Introduction

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Chairman, Board of Editors

This month we have an unusual mixture of articles dealing with a wide range of interests—exactly the type of offering we like to put before our readers. We are pleased to publish Justice Ginsburg's lecture, which she delivered at the Society's Annual Meeting in June, in which she looks at the "stories" of the wives of the Justices. Maeva Marcus, who heads up the Society's Documentary History Project, spoke about the appointments made by the first President at a ceremony at Mount Vernon, part of the bicentennial of the death of George Washington; her insightful remarks are published herein.

The other three articles are advance looks at important books that will be published in the next few years. Jonathan Lurie writes about one of the important cases of the late nineteenth century, *Slaughterhouse,* in which the Court for the first time examined the meaning of the recently approved Fourteenth Amendment. Given the current debate over how society should deal with "hate speech," Shawn Francis Peter's revisitation of the case that enshrined "fighting words" in First Amendment jurisprudence seems all the more relevent. Finally, David W. Levy, who is currently writing a multi-volume history of the University of Oklahoma, examines one of the pre-*Brown* integration cases.

The practices of judicial biography and constitutional history continue in full vigor, as evidenced in our regular feature by D. Grier Stephenson, Jr., "The Judicial Bookshelf." But as is our practice, when we run across a book that stands out in its field, we ask an eminent scholar to write a separate essay review. Barry Cushman has challenged the traditional interpretation of the constitutional crisis of the 1930s, and Richard Friedman, who is writing the Holmes Devise volume on the Supreme Court of that era, evaluates the Cushman thesis. And although there has been a fair amount of writing on the first Justice John Marshall Harlan, Linda Przybyszewski offers a new full-length biography examining many facets of this man's life. Tony Freyer, who has essayed judicial biography in his study of Justice Hugo L. Black, reviews the Harlan biography for us.

We hope that this varied menu will interest you. In each issue we learn more about how scholars look at the Supreme Court, its Justices, and its famous decisions, and we find their work characterized by an infinite variety.

George Washington's Appointments to the Supreme Court

MAEVA MARCUS

When a Supreme Court vacancy is announced today, we know that the competition for that spot will be keen and that we all have different expectations as to who the next Justice will be and what criteria should be critical in the choice: judicial philosophy; political persuasion; intellectual prowess; previous judicial experience; diversity with regard to race, gender, and religion; or geographical distribution. And every President lucky enough to have the opportunity to nominate a Justice will invest a good deal of time and energy in making his choice in the hope that that person will leave his or her mark on our most respected political institution.

With the ubiquity of the media in the late twentieth century, we seem to be very much involved with the appointment process from start to finish. But put yourself back into the last decade of the eighteenth century when there was no radio or television, when a news story could take two months to travel from one end of the country to the other. Even more problematic, imagine what it would be like to contemplate making appointments to an institution as yet unformed. When President Washington took up the reins of government in 1789, all he knew was that the Constitution mandated the creation of a Supreme Court, and that the judges of that court, however many there might be, would have life tenure and a salary, as yet unspecified, that could not be diminished.[1]

So the first order of business for the new Congress was to create a federal judicial system. Even before President Washington was inaugurated, the Senate took up as its initial task the organization of the judiciary. Within a few months, the basic features of what would become the nation's judicial system emerged. The Supreme Court would consist of a Chief Justice and five Associate Justices, who would hold two sessions of the Court, at the capital, beginning on the first Monday in February and the first Monday in August.[2]

Besides the Supreme Court, there would be two levels of inferior courts. Federal district courts were created for each of the states, and each court would have its own judge who lived in the district and had jurisdiction over admiralty and maritime causes and minor federal crimes.[3] At the next level were the circuit courts, which, unlike our Circuit Courts of Appeal today, were mainly courts of original jurisdiction—trial courts—for major federal crimes and civil cases of higher monetary value. Appeals made up a very small part of their dockets. The judiciary bill established a circuit court in each state and grouped the states into three circuits: the eastern, the middle, and the southern. The bill provided for no judges to be appointed to these courts. Instead, each circuit court would be presided over by two Supreme Court Justices and the district judge for the state in which the court met, and would convene twice a year, once in the spring and once in the fall.

You may be wondering why the Supreme Court was initially composed of six Justices—an even number. (Our Court wouldn't function too well today with an even number.) Congress, being practical, wanted two Justices for each circuit, and, at every Term of the Supreme Court until the law was changed, two Justices were assigned. The decision to have no exclusive circuit court judges flowed from Congress's desire to limit the expense of a federal judiciary. But Congress claimed to have more positive reasons as well: sending Supreme Court Justices throughout the nation would be good for the new government and good for all the citizens. According to Senator William Paterson, circuit courts would benefit the populace by carrying "Law to their Homes, Courts to their Doors."[4]

But the Justices detested their circuit duties and spent much time lobbying Congress to change the system. Attending circuit courts twice a year in several states in addition to two sessions of the Supreme Court at the seat of government kept the Justices away from home for the better part of the year. Traveling to the Supreme Court in the two worst months of the year, February and August, and then great distances in the spring and fall over bumpy, muddy roads or trails did not add to the glamor of the job.

Nor did the accommodations the Justices had to stay in along the way. Occasionally, they would visit with friends, but more often the Justices lodged at taverns where the crowded and uncomfortable sleeping conditions, coupled with the noise from below, did little to provide relief from the tiring journey. Sharing a room with strangers wasn't unusual—William Cushing once slept with twelve others—nor was meeting up with "a bed fellow of the wrong sort," as James Iredell discovered.[5]

What did make the job more attractive, however, was the salary. Congress passed a Compensation Act that was signed on September 23, 1789, a day before the judiciary bill became law. The drafters of the compensation bill apparently thought very highly of the positions of Chief and Associate Justices, because they proposed salaries of $4500 and $4000, respectively—next to the President and Vice-President the highest salaries suggested for the new federal officials.

This decision was not without controversy. Opponents noted that federal judges would receive much higher compensation than state judges, a situation that would arouse jealousy, and the federal judges would probably have less work—a prediction that didn't take long to be proved wrong. On the other side, it was urged that the higher salaries were needed to attract the ablest lawyers. After all, they would have to leave lucrative practices. And the higher salaries would make the judges more independent, less liable to pressure and influence. In the end, the House lowered the Chief Justice's salary to $3500 and the Associates' to $3000. When the bill reached the Senate, however, these were again raised, the Chief's to $4000 and his brethren to $3500. The salaries remained at that level until 1819.[6]

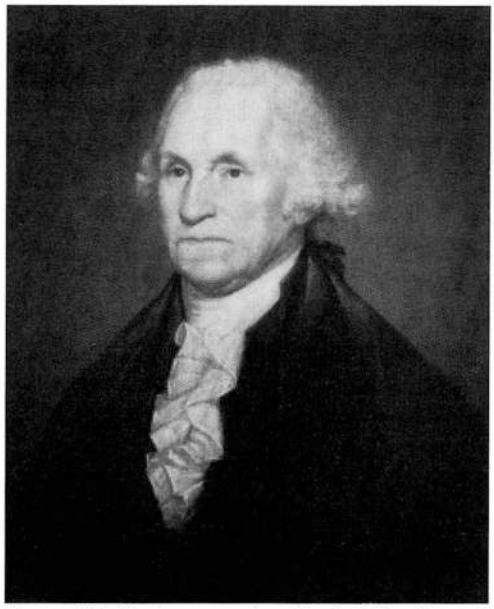
What went unstated in the Compensation Act was that these salaries had to cover the Justices' expenses in traveling to and from the

Supreme Court and while on circuit. So, while these salaries appeared to be very attractive, the Justices soon found that they had very little money left after the year was over.

The President signed the Judiciary Act on September 24, 1789, but the competition to be nominated to the Supreme Court had started well before the outlines of the federal judiciary had been made public. Aspiring candidates and their friends wrote to Washington, Vice-President John Adams, or Senators to urge appointment.[7] James Iredell, before North Carolina had even joined the union, let it be known that he would not be averse to becoming a federal judge, provided that the salary was sufficient.[8] And James Wilson and his friends began an intense campaign to win for Wilson appointment as Chief Justice.[9]

How did President Washington choose his six nominees? With almost six months to think about possible candidates and to be subjected to political pressure, Washington perfected a way to deal with appointments. First, he decided on the qualities he wanted. For Supreme Court Justices, he took into account character, training, experience, health, and public renown. Second, he concluded that geographical distribution was of the utmost importance, not only because of the necessity of circuit-riding, but also because he wished to avoid arousing jealousy among the states. Third, Washington believed a candidate's activities during the war for independence should be weighed: the greater the sacrifice, the better the chance to obtain federal office. Last, he chose only those men who had supported the Constitution.[10]

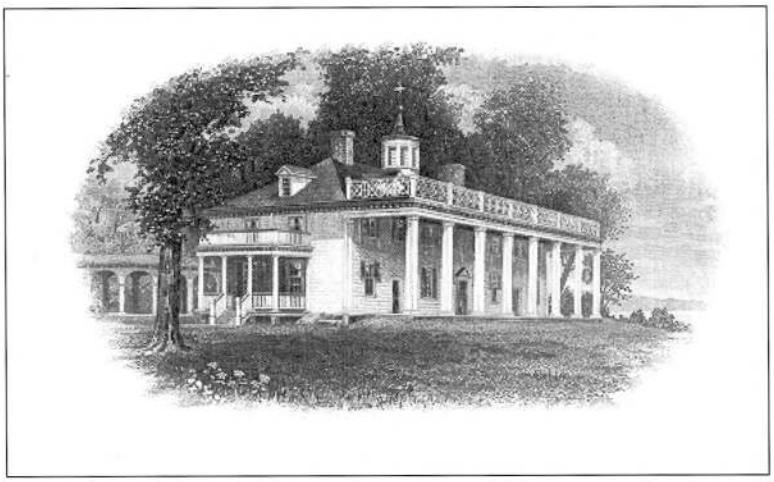
Granted, more than six men in the new nation fulfilled these qualifications. How did Washington hit upon these particular individuals? By encouraging those interested in appointment to write to him—though his answers were always noncommittal—and by consulting with Senators and Congressmen about qualified candidates in their states, Washington determined the pool from which he would choose. One thing he wanted to know was whether a possible nominee would accept the appointment. In



George Washington served as the first President of the United States from 1789 to 1797. He deserves credit for his careful choices for nominees to the Supreme Court because they made significant contributions to the development and success of the new government.

Washington's view, it harmed the perception of the country if too many people refused federal jobs tendered them. The President then discussed specific individuals with his closest friends and advisors, but the final decision was his and his alone.[11]

The criterion that apparently winnowed down the field, however, is one that I haven't mentioned yet: service on a state judiciary. Vice-President Adams stressed the desirability of such experience: "It would have an happy effect," he stated, "if all the judges of the national supreme Court, could be taken from the chief Justices of the several states. The superiority of the national government would in this way be decidedly acknowledged. All the judges of the states would look up to the national bench as their ultimate object.__ As there is great danger of collisions between the national and state judiciaries, if the state judges are men possessed of larger portions of the people's confidence than the national judges, the latter will become unpopular."[12] Adams in-



The author originally delivered this paper as a speech at Mount Vernon (pictured) on September 14, 1999, as part of a joint two-part series between the Mount Vernon Ladies' Association and the Supreme Court Historical Society commemorating the bicentennial of Washington's death.

dicated that he had communicated his views to the President. That Washington valued Adams's advice is obvious: Five of his six nominees to the Court had held high judicial positions in their states.

On the very day he signed the Judiciary Act of 1789, the President sent his Supreme Court nominations to the Senate. And two days later, the Senate confirmed all of them—no questions asked. This should come as no surprise, because Washington had taken great care in choosing his Justices. As he wrote to one of them, "Regarding the due administration of Justice as the strongest cement of good government, I have considered the first organization of the Judicial Department as essential to the happiness of our Citizens, and to the stability of our political system.__Under this impression it has been an invariable object of anxious solicitude with me to select the fittest Characters to expound the laws and dispense Justice.__"[13]

Who were the six highly respected nominees? First and foremost was John Jay, Washington's choice for Chief Justice. Only forty-three years old when he was appointed, Jay, a native New Yorker, had led an amazingly full life. A graduate of King's College (later Columbia) in 1764, he elected to study law and became one of the most successful attorneys in the province. But events soon propelled him in a very different direction. By the end of 1774, Jay found himself deeply involved in the political efforts meant to resolve the colonies' dispute with Great Britain. Elected to the First and Second Continental Congresses, Jay supported moderate measures intended to conciliate England until it became obvious that these would have no effect.

He then turned to more radical means and helped draft New York's resolution of support for the Declaration of Independence. A participant in the writing of the constitution for New York State, Jay was elected the first Chief Justice of the newly formed state Supreme Court of Judicature.

He soon left New York, however, to assist the Continental Congress in mediating a land dispute between Vermont and New York. But upon his arrival in Philadelphia he was unexpectedly elected president of Congress, and from that point on Jay's talents were used in positions of national scope and importance. Congress appointed him minister plenipotentiary to Spain, where he labored for more than two years to forge a Spanish-American alliance, and then selected him as one of the commissioners to negotiate a peace with Great Britain, so in 1782 Jay made his way to Paris.

After the Peace Treaty was successfully concluded (signed Sept. 3, 1783), Jay hoped to retire from public affairs, but the Confederation Congress chose him to be Secretary for For-

eign Affairs, and Jay did not refuse to serve. He began the job in December 1784, and did not give it up, in effect, until Thomas Jefferson succeeded him as Secretary of State on March 22, 1790. In the interim, of course, the Constitution was written and ratified, with Jay helping the process in New York by writing five essays of what has come to be called *The Federalist* papers. Jay dealt with his specialties: foreign affairs and the treaty-making power (#2-5, #64).

President Washington's choice of Jay surprised no one. Perhaps the President said it best when he sent Jay's commission to him:

> In nominating you for the important station which you now fill, I not only acted in conformity to my best judgement; but, I trust, I did a grateful thing to the good citizens of these united States: And I have a full confidence that the love which you bear our Country, and a desire to promote general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the Keystone of our political fabric.[14]

Washington chose a statesman rather than a renowned legal scholar to be his first Chief Justice, and the President knew exactly what he was doing. Jay became a trusted advisor of the President, one who became involved in affairs of state unrelated to the judiciary. The Federalists even nominated Jay, while he was on the Bench, to be governor of New York, but he lost in a close election. In April 1794, the Senate confirmed Chief Justice Jay's appointment as envoy extraordinary to Great Britain, where he was supposed to settle many outstanding controversies. Whether the treaty he came home with was worth his absence from the Supreme Court for more than a year is questionable.

During the Chief Justice's absence in England, the Federalists once again nominated him to be governor of New York, and, on June 5, 1795, a few days after Jay's return from his mission, his election was announced. John Jay's career on the Supreme Court ended when he resigned his commission on June 29, 1795.

President Adams gave Jay another opportunity to serve as Chief Justice in 1800, when Oliver Ellsworth resigned. Although confirmed by the Senate, Jay refused the commission, determined to retire from public life at last. At the end of his second term as governor, in the spring of 1801, Jay returned to his estate and spent the remaining twenty-eight years of his life there. He died in 1829.[15]

I have spent quite a bit of time on John Jay, but I wanted to give you a good idea of the kind of person Washington chose for his first Supreme Court. Obviously, I can't go into that amount of detail for all his appointees, because Washington made thirteen nominations of eleven different men in the course of his two terms as President. But they all came out of a similar mold, for, as Washington wrote to each of his nominees, "Considering the Judicial System as the chief Pillar upon which our national Government must rest, I have thought it my duty to nominate, for the high Offices in that department, such men as I conceived would give dignity and luster to our National Character."[16] So let me give you a brief sketch of the others whom the President chose for the Supreme Court.

For his first nominations, Washington sent to the Senate six names at once. In order to establish seniority, after Senate confirmation, which also happened on one day, Washington dated each commission one day later.[17] First in seniority, John Rutledge of South Carolina had had an illustrious career before being asked to serve on the Supreme Court. Rutledge, a lawyer trained at the Middle Temple in London, participated actively in the First and Second Continental Congresses, was a delegate to the convention that wrote the constitution for the Republic of South Carolina, and was elected first president of the republic. When South Carolina became a state, and shortly thereafter was invaded by the British, Rutledge became gov-

ernor and stayed in that position until the end of the war.

Unable to succeed himself, he was elected as a representative to the Confederation Congress but after two years was called back home to be chief judge of the South Carolina Court of Chancery. Rutledge attended the Constitutional Convention, where he served on the committee that wrote the first draft and then helped to secure ratification in South Carolina. Washington turned to Rutledge as a representative of the South, but he did not remain long on the Court. A combination of ill health and the long distances he had to travel made him eager to accept the position offered him as Chief Justice of the South Carolina Court of Common Pleas. He resigned from the Supreme Court in March, 1791.[18]

William Cushing, second in seniority, came from a well known Massachusetts family and, unlike Washington's other nominees, had had no experience on the national stage before coming to the Supreme Court. A lawyer who practiced mostly in the province of Maine, which was then part of Massachusetts, Cushing returned to Boston to succeed his father on the bench of the Massachusetts Superior Court of Judicature in 1771. When the courts were reorganized after the Revolution began, Cushing stayed on the bench of the new Superior Court of Judicature and later became its Chief Justice.

After Massachusetts adopted a new state constitution in 1780, the court's name was changed to the Supreme Judicial Court, but Cushing remained Chief Justice. His twelve-year tenure on Massachusetts's highest court was supplemented with service in the state's constitutional convention and in the ratifying convention for the federal constitution. Not at all flamboyant, Cushing provided steady service on the Supreme Court of the United States, staying longer than any other Washington appointee. Death, on September 13, 1810, removed him from the Bench.[19]

Next in seniority came Robert H. Harrison—a man who never actually served on the Supreme Court. A native of Maryland, and an enthusiastic patriot, Harrison participated with George Washington in the activities that led to the break with England and became a trusted advisor to Washington during the Revolutionary War. After the War, Harrison returned to Maryland to accept appointment as chief judge of the General Court, in which position his reputation grew.

Washington was very eager to have Harrison as a member of the Supreme Court of the United States, but Harrison declined to accept the commission. Washington got some of Harrison's other wartime friends, like Alexander Hamilton, to urge Harrison to reconsider, and, apparently, he did, for he set out for New York on January 14, 1790, to attend the first session of the Court in February. He never reached his destination, however. Harrison fell ill, and on January 21 wrote to Washington that he could not accept the appointment. He died three months later.[20] Because of the timing of Harrison's illness, the Supreme Court had only five Justices present for its opening session.

Next in line was James Wilson of Pennsylvania, the person many thought had the best claim to be Chief Justice. Born in Scotland, Wilson was educated at the University of St. Andrews, where he studied Latin, Greek, mathematics, logic, moral philosophy, ethics, natural, and political philosophy, and where he became acquainted with the literature of the Scottish and English enlightenment. Wilson was thus well prepared to take an active part in revolutionary activities when he arrived in America in 1765. Wilson believed that studying law would more likely lead to his advancement; shortly after becoming a member of the bar, he established a flourishing practice and became involved in patriot politics.

Wilson's radical view that Parliament had no legislative authority over the colonies contributed effectively to the patriot cause, and publication of his pamphlet, **Considerations on the Nature and Extent of the Legislative Authority of the British Parliament**, enlarged his reputation in America and England. Wilson was elected to the Second Continental Congress,

The Justices found their circuit court duties onerous and spent much time lobbying Congress to change the system. They also found that their high salaries were unexpectedly eaten up by traveling expenses to attend Court sessions and to cover their circuits. Bumpy, muddy roads and noisy, crowded lodgings while riding circuit did not make the job glamorous.

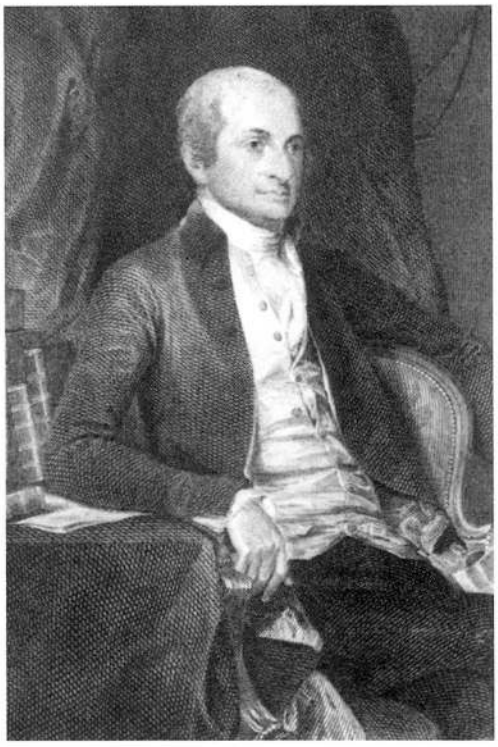
where he was not an early supporter of independence yet became one of three (out of seven) Pennsylvania delegates who signed the Declaration.

During the war years, Wilson's activities contributed to his belief that a more powerful central government was needed. Wilson also found time to pursue his own scholarly studies in political theory, history, and philosophy, and his preeminence in these fields was recognized by the American Philosophical Society, which elected him a member in 1786.

It was hardly surprising, therefore, that the Pennsylvania legislature appointed Wilson a delegate to the federal convention in 1787. Wilson's contributions at the convention were thought to be second only to Madison's, but he has never received the public credit he deserves. In Pennsylvania, he did all in his power as a member of the state convention to aid the successful outcome of the ratification contest. Although disappointed at not being chosen Chief Justice, Wilson threw himself into the work of the Supreme Court with his usual industry.

Wilson's moment of glory as a Supreme Court Justice came, oddly enough, as he sat as a circuit judge in Pennsylvania in April 1792. There the court, by refusing to hear the petition of William Hayburn, a veteran of the Revolutionary War seeking a pension under the Invalid Pensions Act of 1792, exercised judicial review for the first time. Although the court wrote no opinion, it did send a letter to President Washington explaining its actions. The letter contained a ringing defense of the principle of separation of powers established by the Constitution and pointed out how Congress had violated it.[21]

James Wilson's exceptional intellectual promise, so evident throughout his career, should have made him a natural leader of the fledgling Supreme Court. But his preoccupation with his financial problems during the later years of his brief tenure on the Bench—he even spent a short time in debtors' jail in 1797—robbed him of the time and the stature to put his imprimatur on the Court's jurisprudence. Wilson's constant worry about money seriously affected his health, forced him to neglect his Supreme Court duties, and finally, on Au-



John Jay's selection to be the first Chief Justice did not come as a surprise given his stellar credentials as a patriot, a judge, a statesman, an essayist, a diplomat, and a Federalist. He also had considerable personal integrity.

gust 21, 1798, led to his death.[22]

Washington chose John Blair of Virginia as the last of his first six nominees. Born in Williamsburg, Virginia, Blair studied law in London and returned to his native state to practice. An active patriot, he began his long judicial career after the creation of Virginia's judicial department in October 1777. Elected one of the five judges of the newly organized General Court, Blair, by 1779, had become Chief Justice of that court, and in November 1780, became chancellor of the three-member High Court of Chancery. He also sat *ex officio* on Virginia's Court of Appeals.

Elected a delegate to the Constitutional Convention, along with George Washington and James Madison, Blair voted for the adoption of the Constitution there and in the state ratifying convention. When Virginia's judiciary was reorganized, the legislature chose Blair as one of five judges of the new Virginia Supreme Court of Appeals. But that court met for the first time in June 1789 and three months later Washington nominated Blair to the Supreme Court of the United States. Blair served until October 1795, when he resigned because of health problems.[23]

Because Robert Harrison had returned his commission barely two weeks before the Supreme Court was to meet, President Washington had to act quickly to nominate another Associate Justice before the spring circuits got underway. Washington fortunately had someone in mind: James Iredell of North Carolina, who had been a wartime state attorney general and Superior Court judge and a leading proponent of the federal Constitution. At a second convention in November 1789, North Carolina had finally ratified it, and the President thought it would be expedient to appoint someone from that state to an office in the national government. Iredell's name had been made known to Washington and, as revealed in the President's diary, he had consulted every means of information available to ascertain Iredell's character and "found them all concurring in his favor."[24] Washington nominated Iredell on February 8, 1790, and the Senate confirmed the nomination on February 10.

Washington's confidence was not misplaced. James Iredell turned out to be one of the most conscientious of the early Supreme Court Justices. His copious papers have supplied us with much information about the workings of the Supreme Court in its first decade, the politics of the day, the personal relationships among the Justices, and most of all, the state of the law in the 1790s. In preparing to write his opinions, Iredell took notes on all his research, and we have been able to trace the authorities that he relied on. His is a rich collection, indeed, though difficult to read because of his peculiar handwriting. Sadly, Iredell, though the youngest of Washington's appointees—thirty-eight years old—died less than ten years after beginning his service on the Court.[25]

Next to fill a vacancy was Thomas

Johnson, a native of Maryland, who replaced John Rutledge. Johnson's most significant contributions to the development of the new American nation would not necessarily include his service on the Bench of the Supreme Court. He played a major role in the success of the American Revolution and in the establishment of the capital of the United States in the District of Columbia. In 1790 the governor appointed him chief judge of the Maryland General Court, and it was that position from which Johnson resigned to become an Associate Justice of the Supreme Court.

Initially reluctant to serve on the Court because of the duty of riding circuit, Johnson overcame his reservations and accepted the temporary commission sent to him by President Washington on August 5, 1791. The Senate, out of session in August, confirmed him, on November 7, to a permanent position. Johnson, however, missed the February 1792 Term of Court and did not take his seat on the Supreme Court until August 6, 1792. His entire career on the federal bench consisted of holding a circuit court in Virginia in the fall of 1791, attending the Supreme Court in August 1792 (where he did participate in some important cases), and riding the southern circuit in the fall of 1792. After that experience, Johnson decided the burdens of circuit riding were too much for him and resigned his position on January 16, 1793.[26]

To replace Thomas Johnson, President Washington again acted quickly and nominated Governor William Paterson of New Jersey. A native of Ireland, Paterson graduated from the College of New Jersey (now Princeton) and then studied law, which he claimed to find "disagreeable and dry," like "being entangled in the cobwebs of antiquity." He nevertheless applied himself assiduously. Had it not been for the onset of the American Revolution, Paterson might well have achieved the goal he set for himself as he embarked on his legal career, "to live at ease, & pass thro' life without much noise and bustle."

Known as a critic of the British Empire, Paterson held numerous positions in revolutionary New Jersey. In 1787 the New Jersey legislature chose Paterson, a believer in a more powerful national government, as one of its delegates to the federal convention in Philadelphia. Paterson's greatest contribution to the framing of the Constitution was his advocacy of the New Jersey Plan, which contained the germs of several ideas that found their way into the final version of the Constitution.

With the adoption of the Constitution, Paterson's career became entwined with the success of the national government. A member of the first United States Senate, Paterson played an influential role in the creation of the federal judicial system as set out in the Judiciary Act of 1789. Called back by the New Jersey legislature to become governor of the state in November 1790, Paterson, in his few years in that position, codified the state's statutes and revised its rules of practice and procedure in the courts of common law and chancery. But Paterson soon returned to the national scene when George Washington nominated him an Associate Justice of the Supreme Court of the United States in March 1793. Paterson remained on the Bench until his death in 1806.[27]

President Washington had a respite from Supreme Court nominations for two years, but in 1795 two vacancies occurred that caused him more trouble than any other Court appointments. After news of Jay's election as governor became public, John Rutledge wasted no time, writing to Washington that he, Rutledge, would be happy to serve in that office. Jay resigned on June 29. On July 1, the President, not following his usual course of consulting with people before tendering a nomination, answered Rutledge with the news that he had decided to offer him a recess appointment, because he wanted a Chief Justice to preside at the August Term of the Supreme Court. On July 16, Rutledge, in Charleston, gave a very intemperate speech about the treaty negotiated by Jay. Whether Rutledge had already received the letter from the President is not known for a certainty, but it is possible that he had. Meanwhile,

before word of Rutledge's speech had even reached Philadelphia, Washington had been told that there were rumors around that Rutledge was mentally unstable and in some financial difficulty.

We at the Documentary History Project have published a wealth of material concerning Washington's nomination of Rutledge as Chief Justice and the Senate's subsequent rejection of a permanent appointment. We will never know for sure what happened, but certainly a good many Senators were appalled at Rutledge's speech and concerned about the imputations of mental instability. I personally think Washington himself decided that he did not want Rutledge and made no effort to change any Senator's mind. That the President, knowing that the Senate would vote Rutledge down, might have put forth the nomination just to curry favor with the French sympathizers in the United States is a possibility. In any event, the doubts about Rutledge proved true, for after presiding at the August Term of the Supreme Court on a temporary commission, he was unable to hold all the circuit courts in the fall, and on December 26 attempted to take his own life by drowning. Two days later, with no knowledge of the Senate's rejection of him, Rutledge wrote to the President to resign because of illness.

Now facing two vacancies on the Supreme Court Bench—John Blair had resigned in October—Washington had to act quickly because the February 1796 Term was slated to deal with important constitutional questions and more than four Justices, a quorum, were needed to deal with them. At the end of January 1796, the President nominated William Cushing as Chief Justice and Samuel Chase of Maryland as Associate Justice. The Senate confirmed both promptly, but Cushing declined the appointment on the grounds of ill health and remained an Associate Justice.[28]

Chase accepted his appointment with alacrity. He had been seeking it since September

Calling him the man who "wrote the Constitution," Washington enthusiastically accepted John Rutledge's offer to succeed John Jay as Chief Justice. But after Rutledge (above) made an intemperate speech at St. Michael's Church (left) in Charleston, angering Federalists by opposing the Jay Treaty, Washington made no effort to save Rutledge's nomination by using his influence in Congress.

1789. But Washington hadn't favored him earlier, because Chase was a late convert to Federalism. An early and ardent revolutionary, he had opposed the Constitution before ratification but then switched sides. Chase had been chief judge of the Maryland General Court since 1791 and had the support of some important Federalists in Maryland, but he was a very controversial figure who did not have the sterling reputation for character that Washington's other Supreme Court nominees had. As a resident of Maryland, however, Chase could get to Philadelphia by the beginning of the February Term—a major consideration for the President. Chase's friends and the pressing need for a Justice to be appointed must have helped Washington overcome his qualms.[29]

Only a Chief Justice remained to be found. The President chose Senator Oliver Ellsworth of Connecticut, who had none of Chase's problems. Ellsworth was eminently qualified—he had been a member of Connecticut's Supreme Court of Appeals and Superior Court, had played a significant role at the Constitutional Convention and in his state's efforts to ratify it, and had been the author of many sections of the Judiciary Act of 1789—and his nomination was greeted with acclaim. But it had taken the President a long while to decide on Ellsworth—his nomination did not reach the Senate until March 3, 1796—so the February Term of Court proceeded without a Chief Justice until the last day of the Term.[30]

What can we say in conclusion about Washington's appointments? I believe that Washington deserves more credit than he usually gets for his choices. While most Americans think the Supreme Court began with Chief Justice John Marshall and *Marbury v. Madison*,[31] the Court in the 1790s actually made significant contributions to the development and success of the new government. Washington nominated men with wide experience of the world and firm commitments to the principles of the Constitution that they had been active in establishing. Difficult as the job was, the early Justices performed their duties with devotion. Washington's emphasis on the importance of the institution and on the character and integrity of those who would serve it was not misplaced. Alexander Hamilton may have called the judiciary "the weakest branch," but Washington was not fooled. And we should be thankful for that.

ENDNOTES

[1]U. S. Constitution, Article III, section 1.

[2]Judiciary Act of 1789, section 1.

[3]Judiciary Act of 1789, sections 3 and 9, U. S. *Statutes at Large*, vol. 1, pp. 73-74, 76-77.

[4]William Paterson's Notes for Remarks on Judiciary Bill [June 23, 1789], Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789-1800**, (hereafter **DHSC**) vol. 4 (New York, 1992), p. 416.

[5]Marcus, **DHSC**, vol. 2 (New York, 1988), p. 3.

[6]Marcus, **DHSC**, 4:19-21.

[7]*See*, e.g., Thomas McKean to George Washington, April 27, 1789, Arthur Lee to George Washington, May 21, 1789, Francis Dana to John Adams, June 26, 1789, Marcus and Perry, **DHSC**, vol. 1 (New York, 1985), pp. 614-17, 620, 627-29.

[8]Hugh Williamson to James Iredell, August 12, 1789, James Iredell to Hugh Williamson, August 29, 1789, and Hugh Williamson to George Washington, September 19, 1789, *ibid.*, pp. 648, 654, 662.

[9]Benjamin Rush to Tench Coxe, January 31, 1789, Frederick Muhlenberg to Benjamin Rush, March 21, 1789, James Wilson to George Washington, April 21, 1789, and Benjamin Rush to John Adams, April 22, 1789, and June 4, 1789, *ibid.*, pp. 605-606,610-11, 612-13, 613-14,622-23.

[10]James R. Perry, "Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events," *Journal of the Early Republic* (1986), 6:372.

[11]*Ibid.*, p. 373.

[12]John Adams to Stephen Higginson, September 21, 1789, Marcus and Perry, **DHSC**, 1:663.

[13]George Washington to John Rutledge, September 29, 1789, *ibid.*, p. 20.

[14]George Washington to John Jay, October 5, 1789, *ibid.*, p. 11.

[15]Biographical sketch, *ibid.*, pp. 3-8.

[16]For example, George Washington to John Rutledge, September 30, 1789, *ibid.*, p. 21.

[17]*See* Commission, *ibid.*, pp. 19, 28, 34, 50, 57.

[18]Biographical sketch, *ibid.*, pp. 15-18.

[19]Biographical sketch, *ibid.*, pp. 24-27.

[20]Biographical sketch, *ibid.*, pp. 31-33.

[21]2 *Dallas* 411n (1792).
[22]Biographical sketch, Marcus and Perry, **DHSC**, 1:44-49.
[23]Biographical sketch, *ibid.*, pp. 54-56.
[24]George Washington Diary, February 6, 1790, Washington Papers, LC.
[25]Biographical sketch, Marcus and Perry, **DHSC**, 1:60-63.
[26]Biographical sketch, *ibid.*, pp. 69-72.
[27]Biographical sketch, *ibid.*, pp. 82-87.
[28]William Cushing to George Washington, February 2, 1796, *ibid.*, p. 103.
[29]Biographical sketch, *ibid.*, pp. 105-110.
[30]Biographical sketch, *ibid.*, pp. 115-19; Minutes, February 1—March 14, 1796, *ibid.*, pp. 253-73.
[31]1 *Cranch* 137 (1803).

Remembering Great Ladies: Supreme Court Wives' Stories

RUTH BADER GINSBURG
and LAURA W. BRILL*

Introduction: Portraits of Some Ladies

The rooms and halls of this stately building are filled with portraits and busts of great men. Taking a cue from Abigail Adams, I decided, when asked to present this lecture, it was time to remember the ladies—the women associated with the Court in the nineteenth and early twentieth centuries. Not as Justices, of course; no woman ever served in that capacity until President Reagan's historic appointment of Sandra Day O'Connor in 1981. I will speak of the Justices' partners in life, their wives. As a curtain raiser, and with the aid of Franz Jantzen, Court photographer and photograph collection curator, I will present, from our in-house collection, portraits of some ladies. On display from the Court's portrait collection are just four spouses and, best known, not a Court wife at all, but a portrait of Ann Odle Marbury, painted by her cousin, the artist Rembrandt Peale. That 1797 painting of Ann Marbury is companion to the Peale portrait of Ann's husband, William Marbury, of *Marbury v. Madison* fame.

Of the four paintings of wives, a Thomas Sully portrait painted for Justice Peter Vivian Daniel is my favorite. Justice Daniel served on the Court from 1842 until his death in 1860. The painting he commissioned presents a still unresolved question. It is uncertain whether the portrait, painted in 1858, is of the Justice's first wife, née Lucy Nelson Randolph, who died in 1847, or of his second wife, née Elizabeth Harris, who died in 1857, the year before the painting's date. According to the artist's records, the painting is of Lucy, but descendants say it is of Elizabeth.

Let's look next at the appealing portrait of Julia Ann Blackburn Washington, wife of George Washington's nephew, Bushrod Washington, who was appointed Associate Justice in 1798, and served on the Court for nearly three

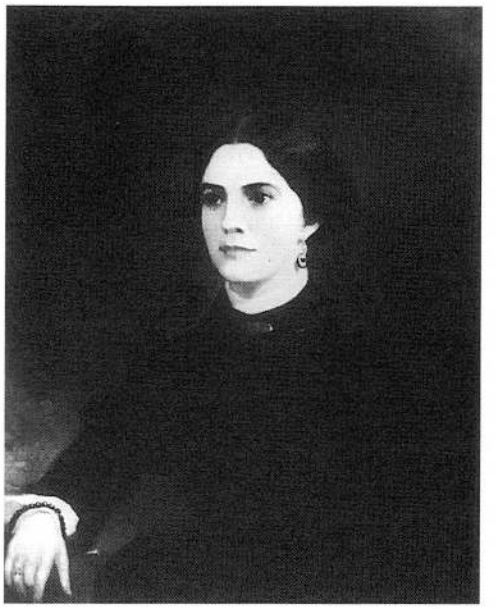
This 1797 portrait of Ann Odle Marbury was painted by her cousin, Rembrandt Peale, and is a companion to the one Peale painted of her husband, William Marbury. A "midnight" appointee of outgoing Federalist President John Adams, Marbury was commissioned as a justice of the peace in 1800. He had trouble claiming his commission when the Republicans took power and his case was eventually taken up by the Supreme Court. *Marbury v. Madison* (1803) established the principle of judicial review.

decades. The portrait, attributed to Chester Harding, was painted circa 1820. Ann Washington was an avid reader and an accomplished musician. In the portrait she holds a music book. She is perhaps thinking about a song she will play that evening on her lyre. The music books and instruments Bushrod and Ann Washington collected are today housed at Mount Vernon. Ann survived Bushrod by only three days. They are buried at Mount Vernon, close to George and Martha Washington.

The collection also includes a painting of Anne Phoebe Key Taney, sister of Francis Scott Key, and wife of Chief Justice Roger Brooke Taney, whose tenure ran from 1836 until 1864. The artist is unknown. On their forty-sixth anniversary, Taney wrote to Anne: "I have done many things that I ought not to have done, and have left undone many things that I ought to have done, yet in constant affection to you I have never wavered—never being insensible how much I owe to you ...." A Taney biographer reported: "No man was more happily married than Mr. Taney." Anne and the youngest of her six daughters (a son died in childhood) died of yellow fever in 1855. She was not alive when her husband wrote the decision in *Dred Scott v. Sandford* (1857), which cast a long, indelible shadow over Taney's name.

The Court's most recent acquisition is a portrait of Scotland-born Jean Blair, painted by Cosmo John Alexander circa 1771, some fifteen years after Jean's marriage. Jean's husband, John Blair, Jr., a Virginia delegate to the 1787 Federal Constitutional Convention, served as a Justice from 1790 until 1795. Like Polly

The painter of this portrait of Anne Phoebe Key Taney is unknown. Because her husband, Chief Justice Roger B. Taney, was so gaunt, their marriage was likened to the "union of a hawk with a skylark."



Thomas Sully painted this portrait of Mrs. Peter Vivian Daniel in 1858. The artist's records indicate that it is Justice Daniel's first wife, Lucy, who died in 1847. Descendants claim, however, that it is a portrait of his second wife, Elizabeth, who died in 1857.

Marshall, wife of Chief Justice John Marshall, and Ann Washington in this regard, Jean's health was precarious. A 1790 visitor to the Blair home observed that Jean was "greatly afflicted with the cholic." Mother of at least five children, she died at age 56 in 1792, a few years before Blair resigned from service on the Court.

The photograph collection of spouses is considerably larger. Currently on display are photographs of Louise ("Lulu") Landon Brewer, first wife of Justice Brewer, taken circa 1890; a splendid one of Helen Herron Taft, wife of Chief Justice William Howard Taft, an Inaugural Ball photograph taken in 1909; and a fine photograph of Natalie ("Nan") Cornell Rehnquist, taken in 1991, just months before her death.

A custom that started in 1972, whenever there is a change in the Court's composition, a group photograph with spouses is taken. And prompted by *Good Housekeeping* Magazine in 1957, a photograph is taken periodically of spouses only. Until 1993, formal attire was the rule for those sittings. But the new tradition, which my spouse finds more compatible with his informal style, is whatever you like, dressed up or comfortably casual. I should mention, too, the Court's World War II exhibition, which included two 1940s photographs of Marion Stearns White, wife of Justice Byron R. White, looking brave and beautiful in her WAVES Lieutenant uniform.

I will proceed now to the text of my lecture, which centers on three nineteenth-century ladies whose names even the most dili-

Julia Ann Blackburn married Bushrod Washington, a nephew of George Washington who was appointed to the Court in 1798. Her love of music is reflected in this portrait, attributed to painter Chester Harding, by the music book she is holding. She and her husband are buried at Mount Vernon near the first President and his wife, Martha.

Jean Blair was the daughter of a Scottish writer named Archibald Blair. She married another Blair, John Blair, Jr., of Williamsburg, Virginia, in Edinburgh, when the future Justice was studying law abroad in 1756. Some fifteen years later, Cosmo John Alexander painted this portrait.

gent students of the Court might not know: Polly Marshall, Sarah Story, and Malvina Harlan—wives of Chief Justice John Marshall, Justice Joseph P. Story, and the first Justice John Marshall Harlan. I will also refer to a turn of the twentieth-century woman, Helen Herron Taft, wife of William Howard Taft, who served as President, then as Chief Justice.

"Behind every great man stands a great woman," so the old saying goes. Yet little attention has been paid to the lives of the women who stood behind the Justices, and one trying to tell the nineteenth century wives' stories runs up against a large hindrance—the dearth of preserved primary source material penned by the women themselves. A volume titled **My Dearest Polly**, for example, reprints letters Chief Justice John Marshall wrote to his wife. Sadly, according to the compiler of that volume, "while Polly saved [John Marshall's] letters to her," John was not a great saver and "left ... not one word written by [Polly] to him."[1]

William Story, son of Joseph and Sarah Story, collected and published a wide range of letters concerning his father's life; none of Sarah's letters to Joseph appear in the collection.[2] The index of an otherwise thorough Joseph Story biography contains under Sarah's name only these entries: "marries Story"; "grief at daughter's death"; "as invalid"; and "finds Cotton Mather dull."[3] Surely there was more to Sarah than that.

Malvina Shanklin Harlan, wife of the first Justice John Harlan, did write a work of her own, titled **Some Memories of a Long Life**.[4] (She lived seventy-eight years, from 1838 until 1916.[5]) The memoirs were probably written for the family and descendants, as many reminiscences were in those days. A typewritten copy was prepared some years ago by a family member. The typed manuscript runs nearly 200 double-spaced pages; here and there, the manuscript is edited by hand, and there are notations in margins, perhaps in anticipation of a hoped-for publisher.[6] Malvina's memoirs are full of anecdotes and insights about contemporary politics and religion, the Supreme Court, and the Harlan family; they provide an

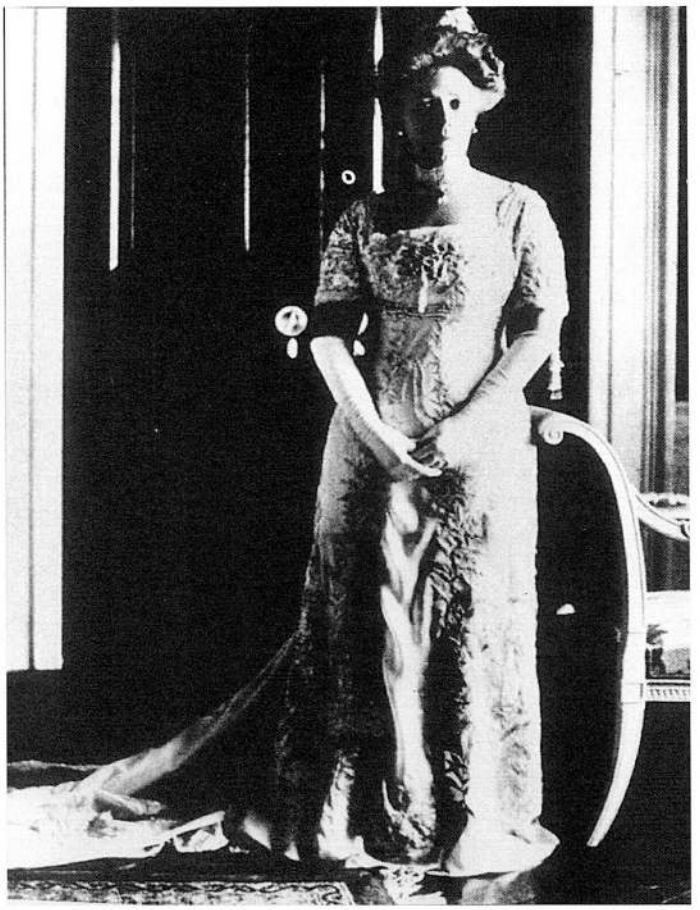
informative first-hand account of the life of a judicial spouse in the closing decades of the 1800s. Sadly, no publishing house to date has considered Malvina's **Memories** fit to print. Helen Herron Taft, born a quarter-century after Malvina Harlan, also wrote memoirs, and hers are in print. Helen Taft's autobiography, **Recollections of Full Years**, was published in 1914,[7] when the women's suffrage movement was vibrant in our land.

In the beginning, Washington, D.C., the Federal City, was a swampy, barely built town, a place slept in by many more men than women. Justices of the Supreme Court, in those early days, resided under the same roof, in one boarding house or another, whenever the Court sat in the Capital. They left their wives behind.

Wives generally remained at home, too, during the rigorous, sometimes dangerous, circuit rides to U.S. courthouses distant from D.C., arduous journeys that plagued judicial life through most of the nineteenth century.[8] There were notable exceptions; I will mention two. Justice William Cushing, who served from 1790 until 1810, had a carriage specially designed so that Mrs. Cushing could ride circuit with him. Her task was to read aloud to her husband as they jogged along, in weather fair and foul, on unpaved roads.[9] (Julia) Ann Washington also rode circuit with her husband, George Washington's nephew Bushrod, whose Court service ran from 1799 until 1829.[10] Ann Washington's health was poor, so Bushrod read aloud to *her*.[11] But these instances of togetherness were uncommon. For most couples, circuit riding and D.C. boarding house living meant long periods of separation. Standing behind one's great man, it seems, could be a lonely station.

If the boarding houses diminished family

Louise "Lulu" Landon Brewer of Burlington, Vermont, the first wife of Justice David J. Brewer, was photographed circa 1890, thirty years after their wedding.



Helen Herron Taft posed for a photographer in 1909 at the ball celebrating her husband William Howard Taft's presidential inauguration. She tried to scuttle her husband's judicial ambitions in favor of a political career, but Taft nonetheless achieved his ambition of becoming Chief Justice in 1921.

life, they served one notable purpose—they helped to secure the institutional authority of the nascent, underfunded Supreme Court. Recent biographies of the great Chief Justice tell how John Marshall used the camaraderie of boarding house tables and common rooms to dispel dissent and achieve the one-voiced Opinion of the Court, which he usually composed and delivered himself—the unanimity that helped the swordless Third Branch fend off attacks from the political branches.[12]

Although Chief Justice Marshall strictly separated his Court and family life, he did not lack affection for his wife. In a letter from Philadelphia in 1797, John Marshall told Polly of his longing. "I like [the big city] very well for a day or two," he wrote Polly,

> but I then begin to require a frugal repast with cool water. I wou[l]d give a great deal to dine with you today on a piece of cold meat with our boys beside us & to see little Mary running backwards & forwards over the floor.[13]

In 1832, a year after Polly's death, Marshall reflected: "Her judgement was so sound & so safe that I have often relied upon it in situations of some perplexity. I do not recall ever to have regretted the adoption of her opinion. I have sometimes regretted its rejection."[14] In truth, however, the marriage, which spanned nearly a half century (forty-nine years),[15] caused John Marshall no little anxiety.

By all accounts, Polly was a frail woman and chronically ill.[16] So acutely noise sensitive was she that John Marshall, to avoid disturb-

ing her, would walk in and around his home without shoes. Richmond, Virginia, officials muffled the town bell so that Polly could sleep.[17]

If John Marshall acted as his fragile wife's benevolent guardian, the Chief Justice's junior colleague, Joseph Story, thrived in a marriage closer to a joint venture.[18] Joseph Story's letters to his wife Sarah suggest a relationship of mutual respect. Joseph gave Sarah detailed accounts of the cultural and political life of the Capital and of the Court's work, including his impressions of the advocates and their arguments.[19] After delivering an opinion disposing of a well-known will contest, for example, Justice Story wrote, intriguingly, that he would have much to tell Sarah about the case when he got home, for "there are some secrets of private history in it."[20]

In his will, signed in 1843, Story declared his "entire confidence in the sound Discretion of [his] Wife" to provide for the welfare of their children.[21] He bequeathed to Sarah "all the Stock[s] standing in her name, or held by [him] for her use [though purchased] out of her own separate funds."[22] Joseph was of the view that this property fully belonged to Sarah[23] although the Massachusetts legislature had not yet provided that a woman, post-marriage, could hold and manage her own property.[24] He left to her as well all of his copyrights, manuscripts, letters, and other writings.[25] The final statement in Story's will is touching, emblematic of a life partnership, responsive to a question Joseph did not want Sarah to worry over. "I recommend," he wrote, "but do not order," that my wife

> sell & dispose of all my wines, & of all my Books ..., which she may not want for her own use, & not ... keep them merely because they belonged to me, as a memorial of our long & affectionate union.[26]

Joseph Story was the first Justice to break with the Court's Brethren-only boarding house tradition. Sarah Story accompanied Joseph to Washington, D.C., for the February 1828 Term. Chief Justice Marshall was ambivalent. He told Story it would be fine if Sarah dined with the Justices, whose circle might benefit from a woman's "humanizing influence."[27] On the other hand, there was work to be done. Marshall expressed the hope that Sarah would not "monopolize" her husband.[28] The experiment was not altogether successful. Sarah Story apparently enjoyed Washington society well enough, but her digestive system did not.[29] And she perhaps grew tired of "waiting in the wings for conferences to cease."[30] She departed town before her husband, and did not return in subsequent years.[31]

Mrs. John Marshall's maiden name was Mary Willis Ambler, but she preferred to be called Polly. She bore ten children and raised six to adulthood in a modest townhouse in Richmond. Sadly, Polly suffered from nervous disorders and was housebound.

But her stay set a precedent. The boarding house culture no longer held fast. Justice John McLean, appointed in 1829, decided he would reside with his wife, at home in Washington, D.C., and would not board with his Brethren, and Justice William Johnson also stayed away from the group quarters. Marshall was not

pleased. The scattering of the Justices, he anticipated, would mean more seriatim opinions, undermining the unified voice Marshall had worked hard to achieve.[32]

By the time of John Marshall Harlan's appointment in 1877, boarding house days were long over and a Supreme Court appointment meant a move to Washington, D.C., for all in the Justice's immediate family. It also meant an unpaid job for the Justice's wife. Malvina Harlan wrote in her memoirs of the "at home" Monday receptions Supreme Court wives were expected to hold. The callers came in numbers. Malvina reported that she might receive as many as 200 to 300 visitors on these occasions.[33] "At home" Mondays were more fancy than plain. Tables would be spread with salads and rich cakes. The young people might dance a waltz or two while the older folk looked on.[34] (We know from Harriet Griswold's 1980s reminiscences, published in a Supreme Court Historical Society newsletter, that "at home" Mondays held by Court wives continued into Charles Evans Hughes Chief Justiceship in the 1930s.[35])

In 1856, when seventeen-year-old Malvina Harlan left her parents' home in Indiana to begin married life in Kentucky, her mother counseled:

> You love this man well enough to marry him. Remember, now, that his home is YOUR home; his people, YOUR people; his interests, YOUR interests — you must have no other.[36]

Malvina valued that advice, but did not follow it in all respects. She continued to pursue her interest in music,[37] eventually sojourned abroad on her own,[38] and even, after forty-seven years of marriage, spoke in public.[39] As her mother instructed, however, she took pride and gained satisfaction in her role as "help-mate."[40]

Malvina wrote in her memoirs: "[A]n ambitious wife felt that no sacrifice on her part was too great that would in the slightest degree make the way to the desired goal for her husband."[41] Before her husband was appointed to the Court, Malvina cheerfully wrote out in long hand briefs John was preparing to send to the printer.[42]

When John became a Supreme Court Justice, Malvina developed a friendship with First Lady Lucy Hayes, nicknamed "Lemonade Lucy" for her avid temperance.[43] This friendship yielded the Harlans more than occasional invitations to the White House.[44]

At White House evenings, Supreme Court wives did not always stand solidly, or at least silently, behind their men. Malvina Harlan tells of a dinner at which Chief Justice Waite endured some teasing by Mrs. Waite and the First Lady for having "squelched" Belva Lockwood's 1870s application to be admitted to practice before the Supreme Court.[45] Lockwood eventually gained admission, in 1879—the first woman to do so—but only after persuading Congress of her cause.[46] (The First Branch, then as now, is sometimes and on some issues a better forum for public pleas than is the Third Branch.)

Malvina Harlan's memoirs tell of an episode showing that Supreme Court wives attended to more than the social side of a Justice's life. Justice Harlan was a collector of objects connected with American history.[47] He had retrieved for his collection, from the Supreme Court Marshal's Office, the inkstand Chief Justice Taney used when he penned the 1857 *Dred Scott*[48] decision,[49] which held that no person descended from a slave could ever be a citizen, and that the majestic Due Process Clause safeguarded one person's right to hold another in bondage. At a reception in town, Justice Harlan mentioned his possession of the historic inkstand to one Mrs. Pendleton, who claimed a family relationship to Chief Justice Taney, so sought the object for herself. Justice Harlan, chivalrous gentleman that he was, promised to send the inkstand to Mrs. Pendleton the next day.

Malvina overheard the conversation and considered the promise rash. Not free from the "that's the way women are" thinking prevalent in her day, she reasoned that her husband truly

appreciated the part the inkstand had played in history, and therefore [—I will use Malvina's words—he] "value[d] it more than it [was] possible for any woman to do."[50] He should not part with it, Malvina decided. The next day, she stepped lightly into her husband's study during his morning nap, found the inkstand buried under a pile of Court papers, carried it away, and hid it among her own special things. Unable to find the coveted item, Justice Harlan wrote to Mrs. Pendleton that the inkstand had been mislaid.

Over the next few months, the Supreme Court heard argument in the Civil Rights Cases,[51] which yielded a judgment striking down the Civil Rights Act of 1875,[52] an Act Congress passed to ensure equal treatment without regard to race in various public accommodations. Justice Harlan, alone, resolved to dissent. He labored over his dissenting opinion for months, but "his thoughts refused to flow easily." He seemed, Malvina wrote in her memoirs, trapped "in a quagmire of logic, precedent and law."[53]

Malvina, who grew up in a free state family strongly opposed to slavery,[54] wanted her husband to finish that dissent. On a Sunday morning when the Justice was attending church services, Malvina retrieved the Taney inkstand from its hiding place, gave the object "a good cleaning and polishing, and filled it with ink. Then, taking all the other ink-wells from [her husband's] study table, [she] put that historic ... inkstand directly before his pad of paper."[55] When Justice Harlan came home, Malvina told him he would find "a bit of inspiration on [his] study table."[56] Malvina's memoirs next relate:

> The memory of the historic part [t]hat Taney's inkstand had played in the *Dred Scott* decision, in temporarily tightening the shackles of slavery ... in the ante-bellum days, seemed, that morning, to act like magic in clarifying my husband's thoughts in regard to the law that had been intended ... to protect the recently emancipated slaves in the enjoyment of equal "civil rights". His pen fairly flew on that day and ... he soon finished his dissent.[57]

Marion Stearns White (center), wife of Justice Byron R. White, was proud to serve as a WAVE during World War II while her husband was an intelligence officer in the Pacific Theater.

Nellie Taft and Chief Justice Taft were well matched intellectually. "She has brains and uses them," approved *The New York Times.* Nellie collaborated with the mayor of Tokyo in arranging for the planting of Washington, D.C.'s now famous cherry trees.

Next time my thoughts on an opinion "refuse to flow easily," I may visit the Marshal's Office in search of a pen in need of absolution, perhaps the one Justice Joseph P. Bradley used to write his now infamous concurring opinion in Myra Bradwell's case, *Bradwell v. Illinois*,[58] an 1873 decision upholding a State's exclusion of women from the practice of law. Justice Bradley wrote in that opinion:

> Man is, or should be, woman's protector and defender. 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....
>
> ... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[59]

(Wouldn't Justice Bradley be amazed to learn that young women today are capable of surviving even the VMI rat line.[60])

The last of my wives' stories takes us into the twentieth century. I will relate some aspects of the life of Helen ("Nellie") Herron Taft, a woman who wanted her husband to become President, and strived to see that dream come true. Nellie Herron, even as a young woman, did not hide her intelligence, as many marriage-bound women of her generation felt it necessary to do. She pursued university studies in chemistry and German,[61] and for several years taught at a private school for girls.[62] In the early 1880s, William Howard Taft attended Saturday night "Salons" Nellie hosted in Cincinnati, at which participants discussed the thoughts of luminaries, including Benjamin Franklin, John Adams, Edmund Burke, Martin Luther, Rousseau, and Voltaire.[63] Taft admired Nellie's "eagerness for knowledge of all kinds," and

"her capacity for work."[64] The two were married in 1886.[65]

Shortly before their marriage, Nellie visited Washington, D.C. Taft wrote to her: "I wonder, Nellie dear, if you and I will ever be there in an official capacity? Oh yes, I forgot; of course we shall when you become secretary of the treasury."[66] Nellie, according to her father-in-law, was economical and an excellent calculator. Taft wisely entrusted to her management of the family's finances.[67] In 1897, after eleven years of marriage, Taft expressed this sentiment in a letter to Nellie: "You are so much of my life.... I am so glad that you don't flatter me and sit at my feet with honey. You are my dearest and best critic and are worth so much to me in stirring me up to best endeavor."[68]

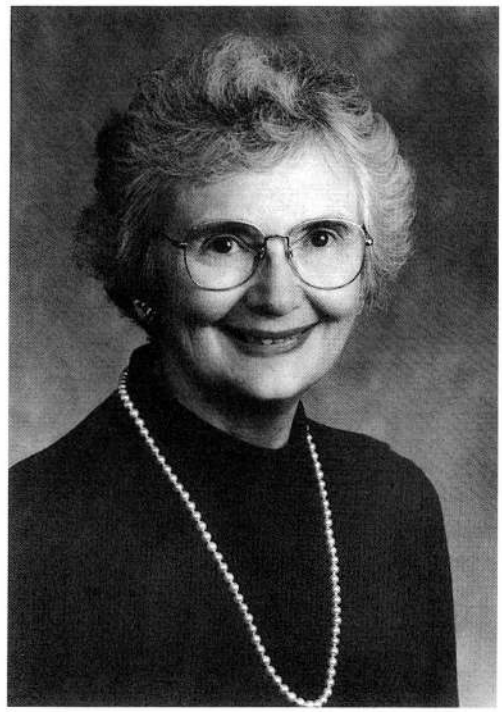
Her eye on the presidency, Nellie had reservations about her husband's appointment to the Court of Appeals for the Sixth Circuit in 1892, following his service as Solicitor General.[69] She later wrote in her autobiography: "[M]y thinking led me to decide that my husband's appointment on the Bench was not a matter for such warm congratulation .... I began even then to fear the narrowing effects of the Bench and to prefer for him ... an all-round professional development."[70]

Taft left the Court of Appeals in 1901 to become Governor of the Philippines.[71] He and Nellie took up residence in Manila. Cholera plagued the island.[72] When President Theodore Roosevelt told Taft that he was in line for a position on the Supreme Court, Nellie entertained second thoughts about a judicial life. "I had always been opposed to a judicial career for him," she wrote, "but at this point I shall have to admit I weakened just a little."[73] Recognizing the grave situation in the Philippines and the importance of his efforts there, Taft declined the appointment.[74]

Taft became a presidential candidate in 1908. The *Washington Post* wrote of Nellie's influence: "There is every reason why she should feel satisfied in her husband's success, for had it not been for her determination to keep him from becoming a Supreme Court Justice he would not have been able to accept the nomination" for the presidency.[75]

As First Lady, Nellie fared well in the press. The *Washington Post* commented: "In the matter of mental attainments, she is probably the best fitted woman who ever graced the position she now holds and enjoys."[76] The *New York Times* put it succinctly: She "has brains and uses them."[77] Among other enterprises, Nellie, with the aid of the mayor of Tokyo, introduced the cherry blossoms that annually adorn the Capital City to celebrate the arrival of spring.[78]

Taft became Chief Justice of the United States in 1921. Nellie did not include in her autobiography a chapter on his tenure at the Court. But we have this information from a letter Taft wrote to his daughter: "She goes without hesitation everywhere, accepts all the invitations that she wishes to accept, goes out at night when there is anything that is attractive to her."[79] Nellie died in 1943, one week shy of her eighty-second birthday.[80] She lived to see all three of



This photo of Natalie "Nan" Cornell Rehnquist was taken a few months before her death in 1991. It now hangs in the former Ladies Dining Room, which has been renamed in honor of Mrs. Rehnquist.

In 1993 the formal dress code for the spouse picture—a tradition dating back to 1959—was relaxed. From left to right standing are Virginia Lamp Thomas, Mary Davis Kennedy, and Martin Ginsburg; seated from left to right are John O'Connor, Dorothy Clark Blackmun, Maryan Simon Stevens, and Maureen McCarthy Scalia.

her children—her sons Robert and Charles and her daughter Helen—gain law degrees.[81]

The life of Supreme Court spouses has changed greatly since the days I have described. Spouses do not receive "at home" callers on Monday, or any day; they pursue careers or interests of their own. Adding "humanizing" variety, two of them are men. Spouses have seats in a special section of the courtroom, and they lunch together three times a year, rotating cooking responsibility. One member favored as a co-caterer is my husband, super chef Martin D. Ginsburg. The lunches are held in ground floor space once designated the Ladies Dining Room, but in the 1997 Term, at Justice O'Connor's suggestion, fittingly renamed the Natalie Cornell Rehnquist Dining Room.

Our Chief Justice commented in a 1996 address at American University: "Change is the law of life, and the judiciary will have to change to meet the challenges which will face it in the future."[82] Change yields new traditions. A most positive one, I think, is the new tradition we are creating by the way the Justices and their partners—at work and in life—relate to, care about, and respect each other.

**The idea for this lecture was proposed to Justice Ginsburg by her 1996 Term law clerk, Laura W. Brill, who co-authored the initial drafts. For large additions and revisions later made, Justice Ginsburg acknowledges with appreciation the assistance of her 1997 Term law clerk, Gillian E. Metzger, and her 1998 Term law clerks, Alexandra T.V. Edsall and Rochelle L. Shoretz.*

******Note:*** *This essay was originally delivered in the Supreme Court as the Society's Annual Lecture on June 7, 1999.*

ENDNOTES

[1] Frances N. Mason, **My Dearest Polly: Letters of Chief Justice Marshall to His Wife, With Their Background, Political and Domestic 1779-1831**, at xiii (1961).

[2] *See* **Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States and Dane Professor of Law at Harvard University** (William W. Story ed.) (1851) [hereinafter, **Life and Letters**].

[3] R. Kent Newmyer, **Supreme Court Justice Joseph Story: Statesman of the Old Republic** 487 (1985).

[4] *See* Malvina S. Harlan, *Some Memories of a Long Life, 1854-1911* (revised 1915) (unpublished manuscript, Library of Congress, Washington, D.C.) [hereinafter, *Some Memories*].

[5] *See* Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** inside cover (1992).

[6] *See Some Memories*, *supra* note 4, at 163, 168.

[7] *See* **Mrs. William H. Taft, Recollections of Full Years** (1914) [hereinafter, **Recollections**].

[8] Circuit riding passed from the scene after enactment of the Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891) (codified as amended in scattered sections of 28 U. S. C.).

[9] *See* Mason, *supra* note 1, at 151.

[10] *See* Clare Cushman, **The Supreme Court Justices: Illustrated Biographies, 1789-1995**, at 51-52 (2d ed.

1995). Ann and Bushrod Washington also shared a deep appreciation of music. *See* Judith S. Britt, **Nothing More Agreeable: Music in George Washington's Family** 82-86 (1984).

[11] *See* Horace Binney, **Bushrod Washington** 24 (1858).

[12] *See* Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801-1835**, at 98-99 (1997); Jean E. Smith, **John Marshall: Definer of a Nation** 282-295 (1996).

[13] Letter from John Marshall to Polly Marshall (July 11, 1797), in Mason, *supra* note 1, at 98.

[14] Mason, *supra* note 1, at 344.

[15] *See id.* at xiii.

[16] *See, e.g.*, Johnson, *supra* note 12, at 41.

[17] *See* Henry Flanders, 2 **The Lives and Times of the Chief Justices of the Supreme Court of the United States** 536 (1881).

[18] Sarah was Joseph Story's second wife, his first wife, Mary, having died after only a few months of marriage. As a young man, Story wrote poetry and published a volume of his work, entitled **The Power of Solitude**, which included two poems written by Mary. The volume was poorly received, and when Mary died, Joseph gathered together all the copies he could find and destroyed them. *See* Gerald T. Dunne, **Justice Joseph Story and the Rise of the Supreme Court** 31 (1970).

[19] *See generally* **Life and Letters**, *supra* note 2.

[20] Letter from Joseph Story to Sarah Story (Mar. 3, 1844), *in* 2 **Life and Letters**, *supra* note 2, at 472, 473 (discussing *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844)).

[21] The Last Will of Joseph Story (Jan. 2, 1843), [hereinafter, Story Will], in **Joseph Story: A Collection of Writings by and About an Eminent American Jurist** 211, (Mortimer D. Schwartz & John C. Hogan, eds., 1959).

[22] *Id.* at 211-212.

[23] *See id.* at 212.

[24] In the years after Justice Story made out his will, Massachusetts reformed its laws on married women's property. *See* Acts and Resolves Passed by the Gen. Ct. of Mass., ch. 208, § 1 (1845), codified as amended at Mass. Gen. Laws. Ann. ch. 209, § 25 (West 1998) (permitting a woman, upon marriage, to contract to hold her own property); Acts and Resolves Passed by the Gen. Ct. of Mass., ch. 304, § 1 (1855), codified as amended at Mass. Gen. Laws. Ann. ch. 209, § 1 (West 1998) (woman's pre-marital property to remain her "sole and separate property, notwithstanding her marriage").

[25] *See* Story Will, *supra* note 21, at 212.

[26] *Id.* at 215.

[27] Johnson, *supra* note 12, at 98 (quoting Letter from John Marshall to Joseph Story (Dec. 30, 1827)).

[28] *Id.*

[29] *See* Dunne, *supra* note 18, at 271.

[30] Johnson, *supra* note 12, at 99.

[31] *See id.* at 98-99; Dunne, *supra* note 18, at 271.

[32] *See* Johnson, *supra* note 12, at 98.

[33] *See Some Memories*, *supra* note 4, at 83.

[34] *See id.*

[35] *See* Harriet F. Griswold, "Justices of the Supreme Court of the United States I Have Known," *Sup. Ct. Hist. Soc'y Q.*, No. 4, 1987 at 1, 3.

[36] *Some Memories*, *supra* note 4, at 8.

[37] *See id.* at 12, 35-36.

[38] *See id.* at 117-118, 120.

[39] *See id.* at 161-162, 181-182.

[40] *See id.* at 30B, 30C, 31.

[41] *Id.* at 30B.

[42] *See id.* at 30B, 30C, 31.

[43] *See id.* at 84; Beth, *supra* note 5, at 133-134.

[44] *See Some Memories*, *supra* note 4, at 86-88.

[45] *See id.* at 89-90.

[46] *See* Belva A. Lockwood, "My Efforts to Become a Lawyer," *Lippincott's Mag.*, Feb. 1888, reprinted in Julia H. Winner, **Belva A. Lockwood** 109, 122-125 (1969).

[47] *See Some Memories*, *supra* note 4, at 96.

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

[49] *See* Some Memories, *supra* note 4, at 97.

[50] *Id.* at 98.

[51] 109 U.S. 3 (1883).

[52] Ch. 114, 18 Stat. 335 (1875).

[53] *Some Memories*, *supra* note 4, at 100.

[54] *See id.* at 8.

[55] *Id.* at 101.

[56] *Id.*

[57] *Id.* at 101-102 (italics added).

[58] 83 U.S. (16 Wall.) 130, 139-142 (1873).

[59] *Id.* at 141.

[60] *See United States* v. *Virginia*, 518 U. S. 515 (1996); Ann O'Hanlon, "Fresh Faces on the Rat Line," *Wash. Post*, Aug. 18, 1998, at B1 (reporting that "[t]he class of 460 freshman [entering the Virginia Military Institute in the fall of 1997] included thirty women, twenty-three of whom survived the Rat Line").

[61] *See* Judith I. Anderson, **William Howard Taft: An Intimate History** 49 (1981).

[62] *See* Henry F. Pringle,1 **The Life and Times of William Howard Taft: A Biography** 79 (Easton Press, 1986) (1939); Ishbel Ross, **An American Family: The Tafts—1678 to 1964**, at 86 (1964).

[63] *See* Ross, *supra* note 62, at 86.

[64] Letter from William H. Taft to Alphonso Taft (July 12, 1885), in 1 Pringle, *supra* note 62, at 79.

[65] *See* 1 Pringle, *supra* note 62, at 81.

[66] Letter from William H. Taft to Helen Herron (March 6, 1886), in 1 Pringle, *supra* note 62, at 81.

[67] *See* Ross, *supra* note 62, at 105.

[68] Letter from William H. Taft to Helen Taft (1897), in Ross, *supra* note 62, at 121.

[69] *See* Anderson, *supra* note 61, at 60-61.

[70] **Recollections**, *supra* note 7, at 22.

[71] *See* Anderson, *supra* note 61, at 67, 72.
[72] *See id.* at 74.
[73] **Recollections**, *supra* note 7, at 263.
[74] *See id.* at 264.
[75] Excerpts from the *Wash. Post*, in Anderson, *supra* note 61, at 120.
[76] *Id.* at 153.
[77] Excerpts from the *N.Y. Times*, in Anderson, *supra* note 61, at 153.
[78] *See* Ross, *supra* note 62, at 220.
[79] Letter from William H. Taft to Helen Taft (June 1929), in Anderson, *supra* note 61, at 260.
[80] *See* Anderson, *supra* note 61, at 265.
[81] *See id.* at 264.
[82] William H. Rehnquist, "Address," 46 *Am. U. L. Rev.* 263, 274 (1996)

One Hundred and Twenty-Five Years after *Slaughterhouse:* Where's the Beef?

JONATHAN LURIE*

You never know. Historical events intended for one purpose sometimes result in the unintended, and American history is far from immune to this tendency. Thus the Civil War—first considered by Lincoln as nothing more than an attempt to prevent Southern secession—ultimately went far beyond an effort to preserve the Union, far beyond ending African-American slavery, far beyond even ensuring continued western expansion. By 1866, the war had wrought changes in the relationship between the federal government and the states, the federal government and its people, as well as the states and their citizenry. Although they may well have been unintended and their extent unclear, these transformations doomed continuance of the Union as it had been—producing instead a new connection between the American people and their legal order that is still evolving.[1] One manifestation of such change was the Fourteenth Amendment adopted by Congress in 1866. Ratified by the states as part of the Constitution in 1868, five years later the Supreme Court first considered its meaning and scope; and thereby hangs a story rich in irony.

I

Intended to facilitate a changed relationship between the former slave and white America, the new amendment was first presented to the Court on behalf of some white butchers arguing with other white butchers over a Louisiana statute enacted in 1869. Moreover, their lawyer—a former Supreme Court Justice who had resigned his seat when his state (Alabama) seceded—now called for a new level of federal supremacy and state subordination diametrically opposed both to his own long-held views and past American history. Finally, the High Court, whose function was, and remains, the reconciliation of law with ongoing change, could not agree on the extent of constitutional alteration mandated by the amendment.

In this they were not alone. Uncertainty as to what the new provision meant, its application and scope, characterized both congressional debates and contemporary commentary. In April 1873, by a 5-4 vote, the Court first interpreted the Fourteenth Amendment, and offered its own assessment—one that remains a "landmark" in American legal history. The majority opinion by Justice Samuel F. Miller sustained the Louisiana statute regulating slaughterhouses, and held that with the exception of the former slave, the new addition to the Constitution had not altered in any significant fashion the traditional pattern of federalism. Although at least two later members of his Court endorsed his analysis (as will be seen), more frequently his opinion has been rebutted, denounced, and condemned, almost (it would seem) from its announcement.

Indeed, a cacophony of criticism has enveloped his decision for more than a century. A recent comment by Yale Law Professor Charles Black is typical. Miller's opinion, he wrote, is "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court."[2] An impressive number of similar sentiments from a wide spectrum of scholars could be cited, and yet Miller's decision has not been overruled. Moreover, it did not prevent his Court, sometimes with his concurrence, from finding awesome breadth and depth in the Amendment—a process that accelerated during the Warren Court era.

Given such criticism for so long, why has the Court retained *Slaughterhouse?* Why this veneration for "stare decisis" in the face of sustained denunciation? We know that when it so desires, the Court can overrule itself, sometimes within a brief span of years. The *Legal Tender Cases, Betts v. Brady,* or *Brown v. Board of Education* come immediately to mind, and more recent examples could readily be cited. Perhaps one answer may simply be that the Justices, for whatever reason, do not wish to overrule the 1873 holding. And here again, we may ask why. A possible answer may be found in a reexamination of exactly what Miller's majority believed it had decided.

In trying to explain what the litigation meant to the Court in 1872-1873, some legal scholars have focused on several alleged flaws in Miller's opinion. Writing in the context of the Fourteenth Amendment that they now know, it is viewed as a virile source of what sometimes seems to be almost unlimited federal authority. Seen in the light of this seemingly filiopietistic veneration of the Fourteenth Amendment, of course Miller's narrow holding would appear misguided, if not malevolent. Further, when one places the cases in the context of a Reconstruction history that emphasizes the negative aspects of that era, it becomes easy to dismiss the statute involved in the litigation as a product of a corrupt, reconstructed Louisiana legislature. Finally, when we add an interpretation that focuses on the intentions of the Amendment's framers, one which emphasizes the clarity and breadth of their vision—besides these other flaws, Miller's opinion appears to defy the clear mandate of the national legislature.

Here in short is a modern Whiggish historical interpretation of *Slaughterhouse*, seen—as with most Whig history—through the eyes of the present rather than of the era subject to the historical analysis being undertaken. Does it represent an adequate and accurate evaluation of the case? Some recent scholarship indicates that it does not, and although in any 5-4 decision debate and disagreement are inevitable, it may be appropriate to reexamine the case and Miller's opinion.[3] Too often it has been cited rather than studied. For reasons that follow, this paper takes issue with what seems to have become the standard negative interpretation, although the purpose of both this paper and the book of which it is a part is more one of reinterpretation rather than refutation. Given the varied ways in which the Fourteenth Amendment has been perceived, the lack of certainty as to its intent, and the existing tradition of federalism and the potency of the police power as a constitutional doctrine—it is far from clear that in 1873 Miller's opin-

ion was "scandalously wrong."[4]

II

Turning first to the question of legislative intent and the Fourteenth Amendment, its adoption MUST be seen in the context of federalism and the police power as understood during the mid-nineteenth century. Moreover, the conservative nature of the new enactment—specifically Section I—should be noted. The terms "equality," "freedom," and "civil rights," do not appear; nor is there any hint of suffrage for the former slave. Scholarly emphasis on its conservative character is not new. More than twenty-five years ago, Les Benedict pointed to the fact that the Amendment's framers intentionally left most Southern rebels with the vote, and Southern blacks without it.[5] He argues, I think correctly, that the amendment "in no way challenged the tradition that states had primary jurisdiction over citizens in matters of police regulation, the regulation of conduct for the protection of the community."[6]

More recently, William Nelson concluded that "confusion and contradiction abound" concerning the Fourteenth Amendment's adoption.[7] He infers, however, that the new enactment had meaning for its proponents.[8] I believe Nelson is correct, but would caution that it had a number of meanings. Various Senators and Congressmen could support the same amendment, but for differing reasons and expectations. Nelson notes further that the Republicans remained committed both to completing the unfinished wartime work of emancipation *and* retaining the "traditional values of federalism." The new provision may well be seen as satisfying both commitments. He writes that its framers sought "to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self rule."[9]

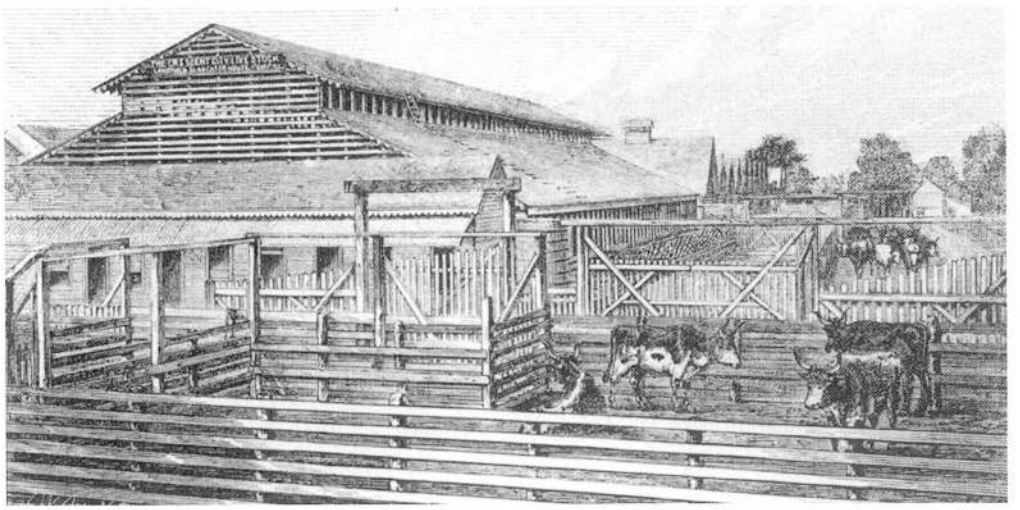
Nelson insisted that the Amendment "simply fails to specify the particular rights to which it applies." Also, any implied distinction between absolute rights and equality of rights remained unclear, as was the difference between an absolute right and its regulation. "Every lawyer," according to the conservative Republican Senator George Edmunds, "knows ... that it is one thing to have a right which is absolute and inalienable, and it is another thing for the body of the community to regulate ... the exercise of that right."[10]

Finally, Nelson emphasizes how quick the Republicans were to reject the claim that their amendment "would give Congress power to legislate about matters previously reserved to the states and thereby result in a consolidation of power and the destruction of the federal system as Americans had known it." John Bingham, the primary author of Section One and a speaker not always distinguished for clearness of thought, had no difficulty making this point. His wording, he insisted, "took from no State any right that ever pertained to it."[11]

After searching the congressional debates for insights concerning the scope of Section One, what we are left with is ambiguity and uncertainty. A variety of views concerning its intended coverage were offered, but the words employed "made so many promises to so many persons."[12] The absence of specifics, to paraphrase Jack Rakove, suggests that, contrary to the views of Michael Curtis and Akhil Reed Amar, a measure of diffidence is in order about drawing too firm a conclusion concerning its scope. For our purposes, the most important point is that when the Court came to interpret the new amendment, Miller could have reasonably concluded that the congressional debates furnished no clear guidance as to intent in general and certainly no specific mandate that federalism was to undergo major transformation. Leonard Levy reminds us that "whatever the [Amendment's] framers ... intended, they did not possess ultimate wisdom as to the precise meaning of their words...."[13]

III

Besides reconsidering anew the intentions of the Fourteenth Amendment's framers, attention must also be focused on the historical and political context in which the 1869 Louisi-



When Louisiana granted the Crescent City Live Stock Landing and Slaughter House Company a twenty-five-year monopoly on livestock-butchering in New Orleans, it forced every butcher to use the facility and to pay for its use. This monopoly situation actually facilitated butchering as a profession because individual butchers, none of whom were denied access, no longer had to maintain their own slaughterhouses. It did, however, inconvenience smaller wholesale packing houses that were primarily owned by old Southern white families.

ana statute was adopted. There can be no doubt that for New Orleans in particular, the slaughtering of cattle and hogs represented a long-standing health problem of impressive dimensions. For more than sixty years, controversy over it had festered, and the search for a solution presented an ongoing challenge to effective public policy.[14]

As early as 1804, New Orleans authorities had "ordered all butchers to move their slaughtering operations out of the city," but to little avail as the butchers' political clout expanded along with the city.[15] By the Civil War era, more than 300,000 animals were butchered within the city each year. New Orleans "had no public sewer system; and, therefore, toilets were emptied into open gutters." Thus the wastes from butchering, either thrown into the Mississippi River or onto city streets, only added to the putrification commonly associated with the city—aptly described by Ross as a metropolis "famous for its filth."[16] In addition, there was the matter of public health.

The humid weather and lack of refrigeration facilities contributed to deadly epidemics of cholera and yellow fever, especially in New Orleans. In 1853 for example, these two diseases caused an estimated forty thousand deaths within the city. Two years before the statute at issue in *Slaughterhouse* was enacted, a legislative committee received a graphic description of the link between the slaughterhouses and public health. "Barrels filled with entrails, liver, blood, urine, dung, and other refuse portions in an advanced stage of decomposition, are constantly being thrown into the river ... poisoning the air with offensive smells and necessarily contaminating the water near the bank for miles."[17]

It is certain, then, that regulation of slaughterhouses had concerned New Orleans long before 1869. But passage of the statute at issue in the cases must be seen in an additional context, besides the matter of public health. In 1866, during a meeting of a state constitutional convention intended in part to enfranchise former slaves, armed white rioters butchered more than thirty-five delegates—a number of them black. Under federal protection, a reconvened convention created a new constitution for Louisiana.[18] It contained a remarkable embodiment of reconstruction goals. The new

charter "desegregated education, prohibited racial discrimination in public places, denied former confederates the right to vote," and included the first Bill of Rights in Louisiana's history. This document in turn outlawed the Black Codes, slavery, "and guaranteed trial by jury, the right to peaceful assembly, and freedom of religion and the press."[19]

The first Louisiana legislature elected under this new constitution was a truly integrated body, with nonwhites numbering "35 out of 101 members of the House, and 7 out of 30 in the Senate."[20] As such, it enacted several very controversial statutes in 1868-1869. They included one that mandated that public schools in the state be open to all races; another that made it a criminal offense to deny African Americans access to certain facilities serving the public, such as hotels, steamboats, and railroad cars; and finally the Slaughterhouse statute.[21] Such enactments from an integrated legislature outraged local white voters, and they were in no mood to distinguish between different statutes with very different motives for passage. One editor was quite candid in his hostility. All laws emanating from this particular legislative body "are of no more binding force than if they bore the stamp and seal of a Haytian Congress of human apes."[22]

In spite of the fact that a well established bloc of white butchers had long had a virtual monopoly on butchering, and that their business produced, according to Ross, filth and stench—the white community joined with them in a callous alliance of expediency.[23] A legal challenge to the Slaughterhouse Act could merge with conservative white opposition to statutes passed by a biracial legislature. The butchers furnished the cause, while the white community helped fund the costs. Thus it became possible for the butchers to hire as their lead attorney former Supreme Court Justice John Campbell.[24]

Another part of the Whig version of *Slaughterhouse* must also be briefly considered: that the statute was the result of a corrupt group of carpet baggers with no legitimate purpose for supporting the new law, other than their own greed. Here once again, reexamination of this claim is warranted. While some in-

Regulation of the slaughterhouses in New Orleans was a matter of public health as well as racial politics. More than 300,000 animals were butchered within the city each year, and their wastes, along with human waste from toilets, were emptied into the gutters and rolled into the Mississippi River (pictured in this 1852 view of the city).

sisted that there was little difference between "lobbying" and "corruption" besides spelling, in actual fact "no hard evidence has ever surfaced that there was bribery involved in the law's enactment."[25] Moreover, accusations of such misconduct emanated largely from the New Orleans press, which represented the Old White South. Their antipathy toward the Louisiana Legislature of 1868-1869 has already been mentioned. Indeed, "for those sympathetic with the cause of the Old South, corruption was easily found."[26]

Similar reexamination should also be given to the claim of legislative collusion in granting the favored butchers a monopoly. There is no doubt that the statute did indeed grant one company the exclusive right to build and operate a slaughterhouse in New Orleans. But *any* butcher who wished to do so could either slaughter his beef at that site, or have it slaughtered for him subject to a fee that was stipulated in the statute. Further, as Miller later emphasized in his opinion, the slaughterhouse faced substantial penalties if it denied any butcher access to its facility. In a real sense, as lawyers for the favored group were quick to point out, far from restricting it the statute actually facilitated butchering as a profession. "There is no longer any necessity of a butcher providing a slaughter- house for himself....This charter, therefore, is not a monopoly in the sense that it prevents anybody from being a butcher; instead of that, it makes it easier to be a butcher than before."[27]

While the claim of bribery cannot be proven and may indeed be erroneous, it surely is reasonable to ask why the Legislature granted one favored company an exclusive right to build and maintain a slaughtering house. There is no doubt that, as was true of other Southern "reconstruction" legislatures at the same time, what Ross calls "ambitious modernization plans" had been proposed. In order to bring them to fruition, however, either tax or bond revenues were essential. But by 1869 tax revenues were very scarce in part because of economic hardship, as well as white tax payer recalcitrance. State bonds also remained unappealing to investors. This resulting shortage of state revenues may well have pointed legislators toward a policy of granting exclusive privileges to companies, who, in return for the "favor," had to meet various public health requirements, conditions of open access, etc.[28]

IV

Speaking for the Court in *Slaughterhouse*, Miller emphasized the limited scope of his decision. "We now propose," he wrote, "to announce the judgments we have formed in the construction of those articles [the Reconstruction Amendments], so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go."[29] This point is important because Miller may well have not intended his opinion to be taken as an "all embracing construction" of the Fourteenth Amendment. Rather, it was a response to the uncomplicated question of whether the Louisiana Legislature's exercise of the police power concerning slaughterhouses had been affected by the new amendment.[30] Echoing Chief Justices Marshall and Shaw, as well as Chancellor Kent, Miller had no doubt of the answer.

In referring to recent incidents, including the Civil War, Reconstruction, and enactment of the Southern Black Codes, events "almost too recent to be called history," Miller noted that "on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would ever have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen...."[31] Yet the Fourteenth Amendment's language was broad, and Miller acknowledged that "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles [the three Reconstruction Amendments], that protection will apply,

even though the party interested may not be of African descent."[32] Possibly with the white plaintiffs in mind Miller emphasized, however, that "what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy...."[33]

There appears to be no evidence of any reluctance on Miller's part to enforce the new amendment on behalf of the former slave, all the more as such is not what the Court was called upon to do in *Slaughterhouse*. Nor is there any evidence that somehow Miller and his Brethren conspired in advance to use the Louisiana statute as a basis for limiting its scope. He was compelled to confront the claims raised in this controversy as they had reached the Court in briefs and argument. Far from seeking to impose a narrow interpretation on the new enactment, Miller may well have had a very different purpose in mind.

It can be argued that Miller's goal, as well as the language he used, was based on a desire to prevent the Fourteenth Amendment from being diluted and diminished by applications to questions concerning localized infighting among white butchers over which group would control the lucrative meat trade in New Orleans. Even if one accepted the contention of broad language, as Miller had from the outset, his majority may well have considered this dispute so far beyond the Amendment's purview as to warrant rejection.[34]

A similar point can be raised concerning Miller's treatment of the Privileges and Immunities Clause, which apparently remains a viable and—as the Supreme Court noted very recently—a visible part of our living Constitution.[35] Again, there is no evidence of any prior intent on Miller's part [as Amar so eloquently puts it] "to strangle the privileges and immunities clause in its crib." Rather, it can be argued that since Miller based his decision on police power precedents, there was no need to specify in any great detail exactly what privileges and immunities might be embraced by the Fourteenth Amendment in future litigation. Whatever they might include, however, they did not extend to the rights claimed by the bickering butchers. It may not be unreasonable to view Miller's comments on privileges and immunities more as dicta rather than doctrinal holding.[36]

The major criticism levied against Miller is that through his opinion, he sought to hinder—if not to derail entirely—the course of congressional reconstruction. Not only, again, is there no evidence for such a claim; its best rebuttal is the opinion itself. Miller did more than accept the well established presumption of constitutionality doctrine. He upheld as legitimate the action of a biracial reconstructed legislature, committed to a program of change, reform, and modernization that—had the legislature persevered—augured well, he believed, for the future. Far from gutting Reconstruction legislation, his opinion endorsed it.

The Whiggish view of *Slaughterhouse* ignores these facts, somehow assuming that what happened after 1877 was inevitable in 1873—and this is not so. Miller's Court had no inkling when *Slaughterhouse* came down that Reconstruction would wither in the climate of the 1877 compromise, that Congress would lose its sense of commitment, or that an older racial and economic order fundamentally unsympathetic to Louisiana's postwar legislation would regain power. Moreover, Miller never denied the inherent potential in the Due Process/Equal Protection Clauses. But their very legitimate purpose "was not to prevent states from passing health regulations that had nothing to do with race."[37]

Further, unlike his colleague Stephen J. Field, Miller simply did not believe that after 1868, his Court possessed authority to strike down a police power statute such as that passed in Louisiana in 1869. He would not presume that Congress had intended his Brethren to become "a perpetual censor upon all legislation of the States...."[38] Such may not have been the

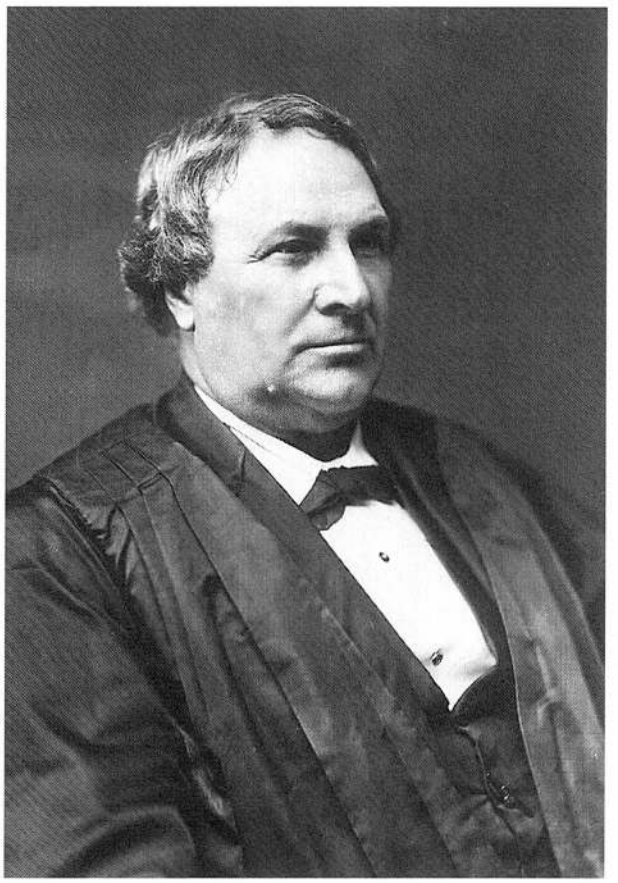
Female attorney Myra Bradwell sought to use the Fourteenth Amendment as a basis to compel Illinois to license her to practice law. When her case came before the Supreme Court, Justice Miller reiterated its conception of the Fourteenth Amendment within a narrow context as it had in *Slaughterhouse*.

intent of the Fourteenth Amendment's framers, when considered as a whole.[39] Although there are very debatable issues in this closely divided decision, replete with legitimate disagreements—the old Whiggish view of Miller's opinion is no longer tenable.

V

Finally, mention should be made of subsequent judicial commentary on *Slaughterhouse,* beginning most appropriately with Miller himself. Although he served on the Supreme Court until his death seventeen years after this decision, Miller remained proud of it. Very soon after the case was decided, in April 1873 Miller wrote to his brother-in-law that his two Fourteenth Amendment decisions [*Slaughterhouse* and *Bradwell*] were "undoubtedly the most important opinions delivered in this Court in many years. I believe they were decided rightly, though no questions have ever given me more trouble in making up my own mind than those [herein? therein?] discussed."[40]

A few months later, Miller wrote to his friend, colleague, and member of the *Slaughterhouse* majority, David Davis. Miller noted that he had been mentioned as a possible replacement for the late Chief Justice Salmon P. Chase, but added that "it is said that my, or rather our opinion in the *Slaughterhouse Cases* is to be used with effect against me. If so it will not be the first time that the best and most beneficial public act of a man's life has stood in the way of his political advancement."[41] Eleven years after his decision, Miller spoke for a unanimous Court upholding the right of a new (and all white) Louisiana legislature to repeal the 1869 statute dealing with slaughterhouses. State authority to enact such a law "was the exercise of the police power which remained with the States in the formation of the original Constitution ... and had not been taken away by the amendments adopted since." A law resulting from such authority "so long as it re-



In his majority opinion, Samuel F. Miller upheld the right of the Louisiana legislature to repeal the Slaughterhouse Act. He was proud of his opinion and wrote his brother-in-law in 1873 that his two Fourteenth Amendment decisions [*Slaughterhouse and Bradwell*] were "undoubtedly the most important opinions delivered in this Court in many years. I believe they were decided rightly, though no questions have ever given me more trouble in making up my own mind than those [herein? therein?] discussed."

mains on the statute book as the latest expression of the legislative will, is a valid law, and must be obeyed, *which is all that was decided by this Court in the Slaughterhouse Cases."*[42]

Ten years after Miller's death, Justice Rufus Peckham cited *Slaughterhouse* and mentioned the "great ability displayed by the author of the opinion...." The views "upon the matters actually involved and maintained by the judgment in the case have never been doubted or overruled by any judgment of this Court."[43] Finally, in 1908, Justice William H. Moody acknowledged that if Miller's views had not prevailed, "it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction [and] ... review by the judicial branch of the National Government." But Moody declined to reinterpret *Slaughterhouse*. "The distinction between National and state citizenship and their respective privileges there drawn has come to be firmly established."[44]

Later legal history appears to have rejected Miller's perception of the Fourteenth Amendment. Both congressional and public support for Reconstruction waned, and with it any prospects of multiracial legislatures working to bring reform and economic modernization to the South also faded. Miller's legal positivism had given great deference to legislative discretion. But with enshrinement of the notion of liberty of contract came the accompanying view that the Fourteenth Amendment protected, but did not in itself create, such liberty. Any legislation that limited it was suspect, on its face. Thus judicial deference to state legislation now became unwarranted and unnecessary.

The great distance the Court had traveled since *Slaughterhouse* can be seen through brief comparison with *Lochner v. New York,* and

United States v. Carolene Products Co.[45] The ghost of the earlier decision hangs over these cases, and it is most prevalent in the *Lochner* dissents. In noting, for example, that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," Justice Oliver Wendell Holmes, Jr., echoed Miller. So did Justice John Marshall Harlan when he insisted that "neither the [Fourteenth] Amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power...."[46]

Between 1873 and 1938, when the *Carolene Products* case was decided, liberty of contract reached its apogee. The concept of strict judicial scrutiny concerning legislation had come a long way since 1873. But in *Carolene Products*, once again Miller's descendants (so to speak) argued successfully that it was now acceptable and reasonable to defer to the legislature. Justice Harlan Fiske Stone held that

> the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis....[47]

Miller had made the same point in *Slaughterhouse*. Even Stone's famous footnote four has a symmetry with the earlier holding. Just as Miller implied that the Fourteenth Amendment was too important "to waste on political and commercial infighting" among butchers, so Stone also implied that it had a more important function, in that "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[48]

"For all sad words of tongue or pen," according to John Greenleaf Whittier, "the saddest are these: 'It might have been.'"[49] Do these words represent a fair and accurate summary of *Slaughterhouse*? There is no doubt that things did not turn out as Miller assumed they would in 1873, and it may indeed be that somehow he and his majority looked back to what had been, while the dissenters anticipated what was yet to come. On the other hand, Miller endorsed legislative deference and a healthy respect for federalism; values that for better or for worse have continued to influence contemporary constitutional interpretation.

One source of significance for *Slaughterhouse* may lie in what it offered for the future, even though public policy as it evolved after 1877 declined to follow its direction. Certainly such a course led to tragic results. But that they followed inexorably from *Slaughterhouse* is neither an accurate nor, I believe, acceptable conclusion. What Loren P. Beth wrote of this "landmark" decision more than thirty-five years ago remains perceptive and persuasive. "Such a case," he observed, "never dies; there is always interest and importance in its reevaluation, and the final word about it is never said."[50]

***Note:** Joined by Professor Ronald Labbé, the author is preparing a reexamination of the Slaughterhouse Case's history, context, and significance—to be published by the University Press of Kansas. Much of this paper will appear as the first chapter, and some points briefly mentioned here, as well as some that were omitted due to space restrictions, will be explored in much greater detail within the completed manuscript.*

ENDNOTES

[1] "I claim not to have controlled events," wrote Lincoln in 1864, "but confess plainly that events have controlled me." In 1864, "the nation's condition is not what either party, or any man, devised or expected." 7 **Collected Works**, 282.

[2] Quoted By Laurence H.Tribe in *New York Review of Books*, September 24, 1998, 34. Tribe added that "there is considerable consensus among constitutional thinkers that the Supreme Court made a scandalously wrong decision" in this case. *Ibid.*, 30. My identity as a "constitutional thinker" to one side, for reasons summarized herein this writer is not part of such a consensus.

[3] *See* in particular the work of Patrick Ballard, whose unpublished seminar paper in Professor William Ross's History of Constitutional Law Seminar (Samford University Law School, 1995) "Strangled in the Crib? Or Proper Limitations? Another Look at the Slaughterhouse Cases" was made available to me by Professor Ross; Herbert Hovenkamp, **Enterprise and American Law 1836-1937** (1991); Ronald M. Labbe, "New Light on the Slaughterhouse Monopoly Act of 1869," in *Louisiana's Legal Heritage*, 1983; William J. Novak, **The People's Welfare: Law and Regulation in Nineteenth Century America** (1996); Wendy E. Parmet, "From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health," 40 *American Journal of Legal History* (1996), 476-505; Michael A. Ross, "Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873," 64 *Journal of Southern History* (1998), 649-676.

[4] This paper focuses on Miller's opinion. The several dissents as well as contemporary press commentary will be thoroughly explored in our book.

[5] Michael Les Benedict, **A Compromise of Principle** (1974), 170, 185-186. The Republican Party in 1886 has been accurately described as "radical in sentiments but ... exceedingly conservative in actions." *Ibid.*, 48.

[6] *Ibid.*, 170. Facing important elections in 1866, the Republicans "had eschewed ideology in favor of practicality." *Ibid.*, 182. But what was practical also had to be practicable.

[7] Quoted in William Nelson, **The Fourteenth Amendment** (1988), 4. Nelson sees its enactment as an effort to resolve the tension between equality and individualism, as well as between federalism and majoritarianism. The method was to employ vague language, leaving the precise accommodation between these principles to be resolved at a later time and by different participants. The framers, Nelson implies, dealt with conflict not by resolving it, but by bequeathing it to the future.

[8] *Ibid.*, 7.

[9] *Ibid.*, 7-8. One can argue that such is exactly what Miller attempted to do in *Slaughterhouse*. His decision emphasized not only that all who wished to butcher could do so, but also that legislative authority (home rule and the police power) remained inviolate.

[10] Quoted in *Ibid.*, 120. Edmunds' point has relevance for Miller's opinion in *Slaughterhouse*.

[11] *Ibid.*, 114-115.

[12] *See* Mark DeWolfe Howe's lecture, "Federalism and Civil Rights," Massachusetts Historical Society (1965), 26.

[13] 103 *American Historical Review*, 1327 (1998).

[14] *See supra* n. 3, articles by Labbe and Ross.

[15] Ross, 654-655.

[16] *Ibid.*, 653. James Audubon described the market in the Crescent City district as "the dirtiest place in all the cities of the United States." *Ibid.*, Ronald Labbe writes that the death rate in New Orleans "was compared unfavorably to London and Paris, the condition of its streets to Cairo and Constantinople." Labbe, 150.

[17] Quoted in *Ibid.*, 654. Much of the debris drifted downstream toward the large intake pipes which provided water for New Orleans, and another witness added that "it is not uncommon to see intestines and portions of putrified animal matter lodged immediately around the pipes. The liquid portion of this putrified matter is sucked into the reservoir." *Ibid.*

[18] Ross notes that General Sheridan enforced Reconstruction laws that eventually enabled more than eighty thousand black males to register to vote in Louisiana. The convention was the "first major elective body in Southern history dominated by a black majority." Quoted in *Ibid.*, 661-662.

[19] *Ibid.*

[20] *Ibid.*, 662.

[21] *Ibid.*, 662-663.

[22] Quoted in *Ibid.* Just before passage of the Slaughterhouse Act, a local racist paper, the New Orleans *Bee* described one of the nonwhite senators as "a coal black negro with kinky hair, thick lips, and feet the size of a sauce pan."

[23] The issue of whether butchering in New Orleans had been a quasi monopoly even before Louisiana reverted to American control has been explored by Ballard in his seminar paper, and will be discussed in some detail in our study. *See supra*, n.3.

[24] Limitations of space here make it impossible to discuss Campbell's background and the exhaustive briefs he filed in the cases. Suffice it here to note that he had a variety of motives for the course he followed. They will be detailed in our book.

[25] Ross, 657. Professor Hovenkamp observes that one of the trial judges involved in the preliminary *Slaughterhouse* litigation refused to accept claims of corruption because such allegations were "general, loose, and of a railing character, without certainty of detail or specification." Hovenkamp, 122.

[26] Hovenkamp, 124.

[27] *Ibid.*, 123. Hovenkamp adds that "among the statute's beneficiaries were countless freedmen," a point that we hope to explore in some detail in our study. On the other hand, it is clear that the smaller, well established wholesale packing houses were unfavorably affected by the new law. These, he notes, were "owned primarily by old Southern families." *Ibid.*, 122.

[28] Ross, 660. It is not unreasonable, as Ross concludes, to view the legislation setting up the slaughterhouse as "a rational response to the city's sanitation needs and the state's shortage of capital." *Ibid.*

[29] *Slaughterhouse Cases*, 16 Wall. 36 (1873), 67.

[30] This point is well discussed in Patrick Ballard's seminar paper, pp. 12-14.

[31] 16 Wall 38, 71.

[32] *Ibid.*, 72.

[33] *Ibid.* Nine years after his decision, during oral argument in another case involving the Fourteenth Amendment, Miller emphasized that "I do not know that anybody in this Court—I never heard it said in this Court or by any judge of it—that these articles were supposed to be limited to the Negro race." To which the lawyer replied that "there is a notion out among the people ... that it was the intention of this Court to give this provision ... as restricted and limited application as possible." Miller responded that "the purpose of the general discussion in the *Slaughterhouse Cases* on the subject was nothing more than the common declaration that when you come to construe any act of Congress, any statute, any Constitution, any legislative decree you must consider the thing, the evil which was to be remedied in order to understand fully what the purpose of the remedial act was." Julius J. Marke, *Vignettes of Legal History*, 183 (1965).

[34] Ballard, 14. This, of course, was the crux of the disagreement between the majority and dissent in the case.

[35] *See Saenz v. Roe*, 119 S. Ct. 1518, 1526-27 (1999).

[36] *See* Ballard, 38-39.

[37] Ross, 675. Limitations of space prevent extended discussion of Miller's previous training and career as a physician, his first-hand observations and experiences concerning the spread of cholera, as well as the terrible results arising from improper sanitation and inadequate safeguards dealing with the location and operation of slaughterhouses. But see the very convincing summary in Ross, 668-670, as well as the extended treatment given police power regulations in this area by Professor Novak in **The People's Welfare**.

[38] 16 Wall. 36, 78.

[39] Mark DeWolfe Howe concluded "that a cautious judiciary was not entirely wrongheaded ... in seeking restrictive elements in the American tradition which could be used to confine the reach of national power. Had the Court read the Fourteenth Amendment to authorize congressional protection of the lives, liberties, properties, and equalities of all persons" against the type of injuries complained of in *Slaughterhouse*, it would have "given its blessing to a revolution much more radical than even abolitionists had intended." *Supra*, n. 11, 26-27. More than thirty years later, Paul Carrington suggested that "had the Fourteenth Amendment been presented to the generation who so reviled *Dred Scott* as a new commission to the Court to impose on suspect legislatures its doubtful wisdom on a wide range of social and economic issues, it would not merely have failed of ratification, but would have been repudiated on almost every side. The Amendment was presented...in the only way it could have won approval, as an instrument declaratory of existing rights." Paul D. Carrington, "The Constitutional Scholarship of Thomas McIntyre Cooley," 41 *American Journal of Legal History* (1997), 396-397.

[40] Ballinger Papers, Box 2A201, Folder April, 1873. Apparently this letter has never been cited before, as it was not part of the Miller-Ballinger correspondence that Charles Fairman was permitted to examine, and which he later turned over to the Library of Congress. It was discovered in a folder of Ballinger's correspondence, located in the Barker Texas History Center, University of Texas, Division of Archives and Manuscripts. The *Bradwell* case reiterated Miller's conception of the Fourteenth Amendment within a narrow context, although this time both Bradley and Field concurred. A female attorney, Bradwell had sought to use the amendment as a basis to compel Illinois to admit her to the practice of law.

[41] Miller to David Davis, September 7, 1873, Illinois State Historical Library, Davis Papers. Actually, Grant did not make his first offer of the Chief Justice post until November 8, 1873—when he nominated Roscoe Conkling. He did not notify his ultimate choice (it was his fourth) until January 19, 1874. That nominee, Morrison R. Waite, recalled one who had already been rejected by the Senate for a Court seat was "that luckiest of all individuals known to the law, an innocent third party without notice."

[42] *Butcher's Union Co., v. Crescent City*, 111 U.S. 746, 747, 750 (1884). Emphasis added by this author to illustrate, once again, Miller's belief in the very limited scope of his earlier decision.

[43] *Maxwell v. Dow*, 176 U.S. 581, 591 (1900). It is ironic, and this in a case replete with irony, that within five years Peckham would speak for the Court in another 5-4 decision; a landmark holding that turned Miller's reasoning on its head. *See* below.

[44] *Twining v. New Jersey*, 211 U.S. 78, 96 (1908).

[45] 198 U.S. 45 (1905), 303 U.S. 144 (1938).

[46] *Ibid.*, 76, 65. Actually, Harlan was quoting Justice Field in *Barbier v. Connolly*, 113 U.S. 27 (1885). Writing

for a unanimous Court that still included Miller, and without any citation whatsoever Field had sustained a San Francisco municipal ordinance regulating the hours in which public laundries could operate. Moreover, "legislation which, in carrying out a public purpose [and] is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [Fourteenth] Amendment. *Ibid.*, 32. Miller had said much the same thing about the statute at issue in *Slaughterhouse*, whereas Field probably had it in mind when he added that "class legislation, discriminating against some and favoring others, is prohibited." *Ibid.*

[47] *United States v. Carolene Products Co.,* 304 U.S. 144, 152-153 (1938).

[48] Ballard, 47-48.

[49] The line comes from Whittier's 1865 poem, *Maud Miller*, stanza 53.

[50] Loren P. Beth, "The Slaughterhouse Cases Revisited," 23 *Louisiana Law Review* (1963), 487-488.

Re-hearing "Fighting Words": *Chaplinsky v. New Hampshire* in Retrospect

SHAWN FRANCIS PETERS

Introduction

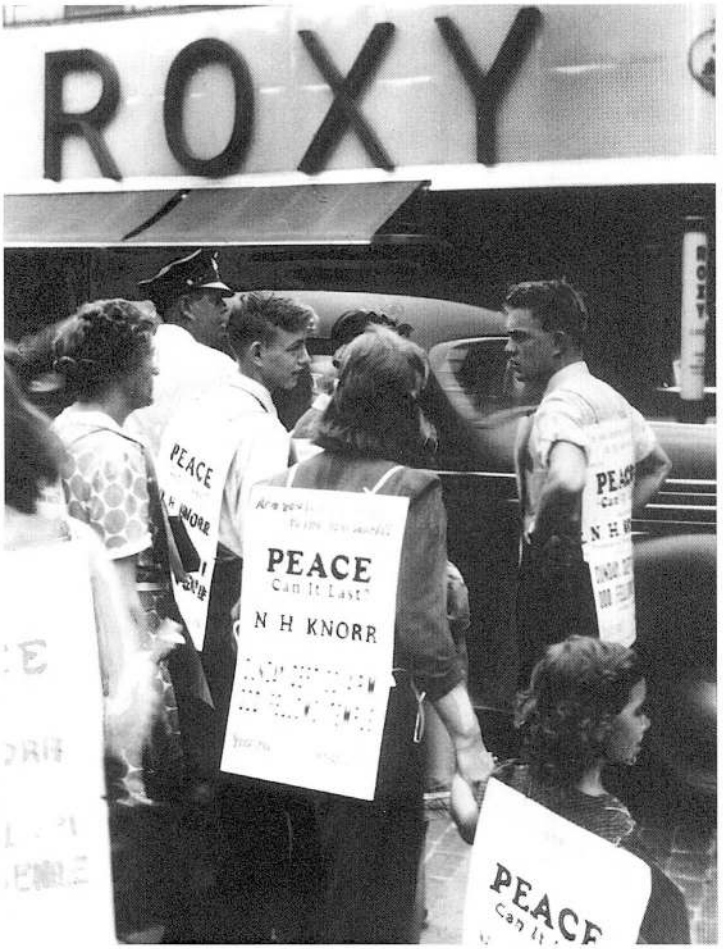
For several grim years in the early and mid-1940s, vigilantes in nearly every state of the union brutalized Jehovah's Witnesses. Targeted largely because they refused to salute the American flag (such ceremonies were idolatrous, they felt), Witnesses throughout the United States were pummeled in everything from riots involving hundreds of people to scuffles among a handful of men. Amazed at both the scope and the savageness of this persecution, the faith's most prominent attorney remarked in dismay that hundreds of his co-religionists were "beaten, kidnapped, tarred and feathered, throttled on castor oil, tied together and chased through the streets, castrated, maimed, hanged, shot, and otherwise consigned to mayhem."[1] Witnesses were so widely and viciously abused during the war years that some observers outside the faith—most of whom were careful to distance themselves from the victims' controversial beliefs—compared their plight to the persecution of religious minorities in Nazi Germany. "Nothing parallel to this extensive mob violence has taken place in the United States since the days of the Ku Klux Klan in the 1920's," the American Civil Liberties Union reported in 1941. "No religious organization has suffered such persecution since the days of the Mormons."[2]

The Supreme Court of the United States' notorious ruling in *Minersville School District v. Gobitis*, handed down in June of 1940, helped to ignite some of the worst anti-Witness violence of the period. In an opinion written by Justice Felix Frankfurter, the Supreme Court dismissed a claim that the enforcement of a public school district's compulsory flag-salute regulation violated the Witnesses' right to free exercise of religion.[3] Frankfurter's majority opinion in *Gobitis* dealt the Witnesses a heavy blow, in part because its timing was so

unfortunate. A number of European countries, including France, were in the process of being overrun by Germany in the spring of 1940, and many Americans believed that a secret network of Nazi spies and saboteurs—a "Fifth Column," it was called—was at work in the United States. In many small communities, the Witnesses, who not only spurned the flag salute but also denigrated "patriotic" groups like the American Legion, were accused of distributing un-American propaganda and thus attempting to lay the groundwork for a German invasion. Frankfurter's opinion in the *Gobitis* case did not directly impugn the Witnesses' loyalty, but in many small towns it was misinterpreted as official confirmation of their disloyalty.

Thanks to the incendiary combination of the Fifth Column scare and the *Gobitis* opinion, the spring and summer of 1940 proved to be especially grueling for the Jehovah's Witnesses. Civil liberties groups in all but four states reported anti-Witness rioting in that period. "What stands out as indisputable fact," *The Christian Century* asserted, "is that in many widely separated parts of the country mob action has been stirred up against these people and scenes of disgraceful violence have occurred."[4] In June of 1940, the Justice Department's Civil Rights Section was swamped with reports of hundreds of anti-Witness disturbances, many of them led or encouraged by police officers. Just days after the release of the Supreme Court's opinion in the *Gobitis* flag-salute case, vigilantes ransacked and then burned a Witness Kingdom Hall in Kennebunk, Maine, sparking several days of rioting in the area. In subsequent weeks, large and violent anti-Witness demonstrations also erupted in Litchfield, Illinois; Rockville, Maryland; Jackson, Mississippi; and Richwood, West Virginia. With accounts of mobbings of Witnesses crossing his desk almost daily, a bewildered Solicitor General Francis Biddle reported that "self-constituted bands of mob patrioteers are roaming about the country, setting upon these people, beating them, driving them out of their homes."[5] Mobbings and other forms of vigilantism became less frequent as World War II progressed (in part because fears of the Nazi Fifth Column ebbed), but the American Civil Liberties Union and the Justice Department continued to field reports of anti-Witness incidents long after V-J Day. The best estimates suggest that a total of between 800 and 2,000 attacks on Jehovah's Witnesses were reported in the United States during the early and mid-1940s. As the ACLU pointed out on numerous occasions, no religious minority in the United States had suffered so intensely from raw bigotry since the Mormons had been driven out to Utah a century earlier.[6]

To make matters even worse for Jehovah's Witnesses, their persecution in the early and mid-1940s was not limited to physical punishment meted out in vigilante attacks. Authorities in dozens of states and communities, for instance, enacted new laws or applied existing ones to suppress their First Amendment freedoms of religion, speech, and assembly. As one member of the Supreme Court of the United States noted in an opinion handed down in 1944, the Witnesses were "harassed at every turn by the resurrection and enforcement of little used ordinances and statutes[,]" including long-dormant anti-sedition laws.[7] What's more, employers and co-workers often discriminated against Witnesses in their workplaces. Throughout the war years, the American Civil Liberties Union and the Justice Department received hundreds of complaints from highly qualified women and men who had been fired from or forced to quit their longtime jobs because they wouldn't salute the American flag. Expulsions of Witness pupils from public schools—which were sometimes accompanied by assaults from livid teachers and school administrators—became so widespread in the late 1930s and early 1940s that Witnesses in dozens of communities were forced to operate their own makeshift educational institutions, called "Kingdom Schools." Witness parents in several states were charged with neglect or disorderly conduct following the flag-salute expulsions of their children, and a few



The persecution of Witnesses in the 1940s was not limited to physical violence. Many states and communities passed laws or resurrected dormant ones to harass Witnesses and suppress their First Amendment rights. These Witnesses are being arrested for proselytizing in Albany, New York.

faced the prospect of sizable prison terms for their alleged crimes. Young Witnesses who registered for the military draft faced rampant discrimination as well. Even when Witnesses were able to present abundant evidence that they, like other recognized clergy, deserved minister's exemptions from military service, local draft boards and the federal Selective Service bureaucracy tended to dismiss their claims. As a result, thousands of Witnesses were parceled off to prison for violating the federal draft law enacted by Congress in 1940.[8]

Buffeted by a gale of intolerance in the United States in the early and mid-1940s, the Jehovah's Witnesses proved to be amazingly resilient. When they responded to religious persecution, the Witnesses didn't resort to vigilantism and coercion, as their critics so often did. Instead of meeting violence and bigotry with lawlessness of their own, the Witnesses pursued judicial recognition of their rights with the same righteous determination that marked their efforts to disseminate the teachings of the Bible. Realizing that, as Nebraska's governor once told the beleaguered Witnesses in his state, their "only recourse [was] the courts," they sought redress by mounting an intense legal counterattack against all forms of religious discrimination.[9] When they were arrested under bogus charges, Witnesses asserted stout defenses in court and repeatedly appealed their convictions. They also sought injunctions that would bar the enforcement of laws that were being used for no other purpose but to suppress their freedoms of religion, speech, assembly, and press. In the process, the Witnesses compelled courts at all levels, including the Supreme Court of the United States, to reinforce

judicial protections for civil liberties—no small accomplishment for a group of largely unlettered and politically powerless zealots who were widely believed to be in league with Hitler.

The Witnesses' legal efforts resulted in hundreds of favorable rulings in municipal, state, and lower federal courts. Led by the resourceful Hayden Covington, a band of Witness attorneys worked tirelessly in courtrooms throughout the country to combat the manifestations of religious bigotry that were devastating so many members of their faith. Their brave efforts in cities like Connersville, Indiana, and Harlan, Kentucky, helped to safeguard the Witnesses' civil liberties from a flood tide of persecution. While their many lower-court victories were significant both practically and symbolically, the Witnesses' most noteworthy legal accomplishments came before the final arbiter of American constitutional rights, the Supreme Court of the United States. From 1938 to 1946, when the persecution of Jehovah's Witnesses was reaching almost epidemic proportions in some parts of the United States, the Court handed down twenty-three opinions covering a total of thirty-nine Witness-related cases. It was a testament to the Witnesses' far-reaching unpopularity in this era (and perhaps their own contentiousness) that they became embroiled in a wide range of disputes—flag-salute cases, free speech cases, leafleting ordinance cases, sedition cases, draft law cases, tax cases, and even child labor-law cases. The women, men, and children whose rights lay at the heart of these cases did not always prevail when they appeared before the Supreme Court; sometimes they lost, and with devastating consequences. But as one scholar has noted, Witness cases like *Cantwell v. Connecticut*[10] and *West Virginia v. Barnette*[11] nonetheless had a "profound impact on the evolution of constitutional law" by helping to bring minority and individual rights—areas long overlooked by the Supreme Court—out of the shadows and into the forefront of constitutional jurisprudence.[12] At least one member of the Supreme Court acknowledged that the Witnesses' frequent appeals had compelled the Brethren to address matters they had long ignored. Writing to Chief Justice Charles Evans Hughes in 1941, a year after his seminal dissent in the *Gobitis* flag-salute case, Justice Harlan Fiske Stone quipped, "I think the Jehovah's Witnesses ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties."[13]

Chaplinsky v. New Hampshire is among the most tragic Jehovah's Witness cases of the early and mid-1940s. For the most part, Witnesses were served well during the war years by state and federal courts, which issued dozens of rulings shielding their First Amendment freedoms. In *Chaplinsky*, though, the courts failed miserably, in large part because they disregarded many of the essential facts of the case, including the savage context of the Witness' alleged offense. After being ignored by the courts, the disturbing story of Chaplinsky's arrest, conviction, and imprisonment has remained obscure for more than half a century. A full examination of those troubling facts reveals just how badly the Supreme Court stumbled when it ruled against Chaplinsky and introduced the "fighting words" doctrine into constitutional jurisprudence. Dissenting in another Witness case, Justice Frank Murphy argued that "[t]he law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution."[14] Judged by that lofty standard, *Chaplinsky* was a singularly dark moment for the First Amendment.

I

Walter Chaplinsky was living in Dover, New Hampshire, in the spring of 1940, but he frequently preached the lessons of the Bible in nearby cities like Rochester, a mill town not far from the Maine border. On a Saturday morning late in March, Chaplinsky evangelized in Rochester's Central Square. His fiery preaching—about the approach of Armageddon, about

the idolatry of saluting the flag, about the perfidy of the Catholic Church—offended several passersby, and they complained to James Bowering, the city's marshal. Like several other members of Rochester's police force, Bowering was a strapping former athlete (he had played football at Springfield College in Massachusetts and then for Rochester's semi-pro team, the Mountaineers), and he towered over Chaplinsky as he investigated the complaints. Bowering did not charge Chaplinsky, but he took the Witness into custody and warned him in no uncertain terms not to cause a disturbance with his provocative witnessing.[15]

His encounter with Bowering did nothing to dampen Chaplinsky's ardor for evangelizing. Accompanied by four boys, he returned to the town square on the following Saturday, April 6 (the eve of his twenty-sixth birthday), and once again preached "the true facts of the situation of the Bible to the people," as he later put it. Chaplinsky stationed himself at the corner of East Wakefield and Main—in the middle of Rochester, near the popular Scenic Theater—and offered Witness tracts. These "Christian publications," as he called them, boldly trumpeted the details of his faith. Some of the pamphlets distributed by the Witness that day promised to expose "the real truth about President Roosevelt's envoy to Europe." The tracts condemned the appointment of Myron C. Taylor as the American envoy to the Vatican, decrying it as "the most astounding piece of business thus far perpetrated by an elected servant of the American people." While Chaplinsky hawked Witness literature, the boys who had accompanied him toted placards. One of their signs advised, "Read the uncensored news."[16]

For the second Saturday in a row, complaints about Chaplinsky's obstreperous preaching at the town square flooded Jim Bowering's office. "I had possibly fifty or more of either telephone calls or personal complaints from people," the marshal later said, "that there was a man on the street decrying the Catholic religion, calling ... the priests racketeers, saying that all religion was a racket, and they wanted to know if I could do something about it." Bowering received so many complaints about Chaplinsky that he approached Leonard Hardwick, the city solicitor, and asked, "Is there anything I can do to prevent this?" Hardwick explained that the marshal was powerless to stop Chaplinsky simply because he felt that the content of the Witnesses' preaching seemed offensive. "He said on religious grounds," Bowering recalled of his conversation with the Harvard-educated attorney, "there is absolutely nothing you can do." Meanwhile, men began to cluster around Chaplinsky at the town square, and they passed threatening notes to the boys who had accompanied him. (One somewhat cryptic message read, "Don't pass out any more. The spider.") A menacing group of war veterans and local mill workers, they taunted the Witness about his purported disloyalty and challenged him to salute an American flag. True to his faith, Chaplinsky refused, telling the approximately fifty men who surrounded him that the teachings of the Bible expressly prohibited the worship of graven images—an answer that did little to mollify his increasingly hostile audience. Bowering had stationed police officer Gerald Lapierre at a nearby intersection, but the rookie cop, hired as a patrolman only a few days earlier, ignored the mounting disturbance and instead concentrated on his assigned task—directing traffic.[17]

Bowering responded to the complaints by lumbering from his office to the square. Although he "absolutely" knew that trouble was brewing, the marshal made no attempt to disperse the crowd of men who surrounded and jeered at the Witness. Instead, he again warned Chaplinsky to temper his caustic remarks. According to his later testimony, Bowering informed the Witness that the crowd was in "an ugly mood" and then asked him "why it wasn't possible for him to preach his religion without riling the people up so, taking religion and jamming it down their throats, calling ... priests racketeers." As he had done a week earlier, Chaplinsky chose to ignore Bowering's warning. More convinced than ever that he had to

Police Officer Gerald Lapierre arrested Walter Chaplinsky, not his assailants, after the dazed Jehovah's Witness was beaten by an angry mob. Lapierre had stuck to his traffic post during the assault, effectively giving Chaplinsky's assailants the go ahead to use violence to quiet his proselytizing. This photo shows a police officer confronting an unnamed Witness as he attempts to proselytize in a New England town.

fulfill his sacred obligation to serve as a minister of the Gospel, he explained that he would not allow a mob or an antagonistic cop to disrupt his freedom of worship. "He said," Bowering recalled, "we preach our religion the way we want." As he attempted to persuade Chaplinsky to tone down his preaching, the marshal saw first-hand how incensed some of Chaplinsky's spectators had become over his refusal to salute the American flag. While Bowering spoke with Chaplinsky, William Bowman, a former commander of the local Veterans of Foreign Wars post, throttled the Witness with one hand and attempted to punch him with the other. According to the marshal's description of the altercation, the irate Bowman "reached over and got hold of [Chaplinsky's] coat collar ... and he said, 'Do you believe in saluting the flag?' Then I pushed him back and told him go on and mind his own business, I didn't want any riot." Despite his purported concern about rioting, Bowering took no further action to restrain the veteran; he apparently did not even order Bowman to leave the scene. Chaplinsky, believing that he had been assaulted, "wrenched ... free" and asked the marshal to make an arrest, but Bowering declined. He gruffly told Chaplinsky that it "wasn't necessary."[18]

After he separated Bowman from Chaplinsky, the marshal left the square and headed back to his office in City Hall. Bowman momentarily retreated as well, but he returned to the square in a few minutes with an American flag that had been affixed to a long pole. When Chaplinsky resumed preaching his "message of the kingdom of the Bible," elaborating on many of the controversial tenets of his faith, the veteran assaulted him a second time. Testifying later in court, the Witness described how Bowman had attempted to impale him with the flagpole:

> This Mr. Bowman ... carried this flag in a spear-like position, and he came forward and gave a terrific lunge to plunge me through. I avoided this

> blow, and as he came by he pushed me into the gutter against an automobile standing there. And he walked by to the corner and offered the flag to a man standing there.... And he came back toward me and caught me by the collar and said, "You son of a bitch."

Bowman's charge ignited the crowd, and men swarmed over the prostrate Witness. Chaplinsky "received about seven to ten punches and ... was cast down between the gutter and the wheels of an automobile," he recalled. Robert Downing, another member of the local Veterans of Foreign Wars post, joined Bowman and other assailants in the fracas, removing Chaplinsky's glasses and striking him repeatedly. The Witness momentarily regained his footing, then collapsed into the gutter after receiving sharp blows from several assailants.[19] As the drubbing progressed, Chaplinsky's attackers flung his tracts and pamphlets around the square, ruining most of them. A few days later, a headline in the local newspaper, the Rochester *Courier*, neatly summarized the brawl and its principal cause: "Chaplinsky Beaten By Irate Mob; Set Upon In Square Here Saturday For Alleged Insult to Flag."[20]

Its rage spent, the mob dispersed. While Chaplinsky attempted to regain his bearings and salvage some of his materials, police officer Gerald Lapierre finally left his traffic post and approached the scene of the attack. After failing to break up the mobbing, Lapierre made no effort to pursue any of Chaplinsky's assailants. Instead, he grabbed the dazed victim of the mobbing by the arm and began leading him toward the police station. Walking up Wakefield Street, the two men were met by Jim Bowering, who was on his way to the square after receiving a "riot call." Several other law enforcement officials—including sheriff's deputies Ralph Dunlap and Lyman Plummer, police officers Vane Nickerson and Burt Powers, and a "special officer" named Stetson—arrived at the scene within the next few minutes to help lead the dazed Witness away from the square. Ultimately, at least a half-dozen policemen escorted Chaplinsky as he was, in Bowering's words, "taken to the station for his own protection." Although it must have been clear to everyone present that William Bowman and Robert Downing had participated in the assault, none of the policemen who converged on the riot scene attempted to detain them or question any witnesses.[21] "Assailants Unknown, Officers Say," the *Courier* reported in a headline.

The newspaper harbored little sympathy for Chaplinsky or his faith— few people in Rochester did—but it was quick to censure Bowering and his subordinates for their lax policing both before and after the assault. A few days after the mobbing of Chaplinsky, in an editorial entitled "Why Was It Permitted?," the paper noted: "The incident which occurred in Central Square here Saturday afternoon, in which a group of overzealous citizens defied the law in order to right what they believed to be a wrong, leaves several questions to be answered, among them: Why did the police permit the thing to occur?"[22]

Chaplinsky recalled that "there was about four or five police officers on top of me" as he was "shoved along roughly" toward the police station after the attack. Although they ostensibly were taking him into custody in order to protect him, the policemen berated and physically abused the Witness as they walked him down Wakefield Street. In his later testimony, Chaplinsky complained about the "rough manner" in which he had been treated, claiming that members of his police escort had "caught hold of me ... as if I had started a fight, and they swung me over the street staggering." Rochester resident Gregory Gessis saw the policemen mistreating Chaplinsky as they led him to the station. "They was roughly handling him," Gessis explained. "Pulling him and pushing [him]." As he stumbled toward the police station, Chaplinsky realized that one of the men who was leading him along, sheriff's deputy Ralph Dunlap, had clouted him during the mobbing. (When asked in court if he was certain that Dunlap, who had not been in uniform

that day, had struck him, Chaplinsky said that he was "absolutely positive.")

At that point, Chaplinsky's frustrations were beginning to bubble over, and he pleaded with Bowering to pursue and arrest his assailants. "Will you please arrest the ones who started this fight?" he asked. According to Chaplinsky's recollection, the marshal responded to his request by barking, "Shut up you dumb bastard and come along." Exasperated, the Witness shot back, "You are a damn fascist and a racketeer"—not a farfetched claim, given Bowering's conduct that afternoon.[23] When Ralph Dunlap announced that he was a deputy sheriff, Chaplinsky made similar statement, announcing, "If you are a deputy sheriff, [all of the] city officials of Rochester are fascists." Following these heated exchanges, the policemen hauled Chaplinsky into the marshal's office, where an enraged Bowering called the Witness "an unpatriotic dog." Dunlap added, "You son of a bitch, we ought to have left you to that crowd there and [let] them kill you."[24]

Bowering told Chaplinsky that he was being placed under arrest for having called the marshal a "racketeer and a fascist." At least one piece of evidence suggests, however, that Bowering might not have immediately known exactly which law Chaplinsky had broken in using that epithet. A hand-written docket for Rochester's municipal court listed Bowering as "complainant," Chaplinsky as "respondent," his plea as "not guilty," and the "disposition" of the case as "continued to Apr 10 Bail 25.00." Only the space on the docket reserved for "offense" remained blank—the only such omission on a page listing eight other arrests, and a rarity in the volume as a whole, which covered several hundred arrests. Chaplinsky was eventually cited for violating Chapter 376, Section 2, of the Public Laws of the State of New Hampshire. The law prohibited the use of "offensive, derisive or annoying" language directed at individuals in public places, and it also banned speech meant to "deride, offend, or annoy" any person "pursuing his lawful business or occupation."[25] Like so many of the accusations leveled at Jehovah's Witnesses in the early and mid-1940s, it was an exceptional charge under a rarely-used law. In 1940, police in Rochester—a city of 12,000 residents—made 314 arrests. During the entire year, they charged only two people under the state's abusive language statute—Walter Chaplinsky and another Jehovah's Witness, John Douglas.[26]

Four days after his arrest, Walter Chaplinsky appeared before Gardner S. Hall, a judge in Rochester's municipal court. Unable to find an attorney, he asked for a continuance. Leonard Hardwick, the city solicitor, requested a continuance as well, so Hall slated the Witness' trial for the following week. Testifying before a courtroom tightly packed with fellow Witnesses, Chaplinsky described how he had been drubbed by the mob and how William Bowman had tried to skewer him with the flag pole. "Bowman," he asserted, "attempted to kill me." (For his part, Bowman admitted to having been at the square, but he denied making any attempt to impale Chaplinsky.) Describing his arduous journey from the scene of the mobbing to the police station, the defendant readily admitted to having exchanged angry words with Jim Bowering. "I called the marshal a damned fascist [and] racketeer," Chaplinsky recalled. "He took me into the police station, where he called me a 'damned unpatriotic dog.'" That was enough for Hall: he found the Witness guilty, sentenced him to twelve days in jail, and ordered him to pay $24.78 in court costs.[27] Chaplinsky was so infuriated by the verdict the he warned the judge that "this court will be responsible to Almighty God," and the Witnesses in attendance staged a brief protest. Hall was unfazed by the reaction to his decision. "I call 'em as I see 'em," he said from the bench. "If I'm wrong, there's a chance for appeal. Thank God." Although he hardly had the resources to pay for a protracted legal battle, Chaplinsky decided to appeal Hall's verdict to the Strafford County Superior Court.[28]

Alfred Albert, Chaplinsky's attorney, be-

lieved that he could present a strong case during the Superior Court trial, in part because the circumstances of the Rochester attack and Chaplinsky's subsequent arrest had been so repulsive. Although they had known that Chaplinsky was in danger, police had failed to prevent the assault, and then they had arrested the victim under a seldom-used law—one that apparently was enforced in Rochester only against Jehovah's Witnesses. Furthermore, of the many people who had been involved in the fracas, only Chaplinsky had been prosecuted; all of the Witness's assailants had been allowed to walk away. Albert decided to make those troubling circumstances the centerpiece of his defense. At the superior court trial, he argued that in light of what had happened to Chaplinsky in Rochester that afternoon, the Witness had every reason to rebuke Jim Bowering as a "damn fascist and racketeer." In his opening statement, Albert contended that the "willful neglect" of Rochester police officers had directly contributed to the attack on Chaplinsky, and he explained that his client had lashed out verbally at Bowering only after he had been "insulted, abused and unjustly and unduly provoked." Chaplinsky's alleged crime was a minor one, Albert maintained, "but the circumstances around that offense are serious," and the jury could consider them as mitigating factors. Albert raised a constitutional issue as well, blasting the abusive language law as an "unreasonable restraint on the freedom of speech, the freedom of the press, and the freedom of worship" that were guaranteed to all Americans by the First and Fourteenth amendments.[29]

John Beamis, the Strafford County Solicitor, voiced objections at several points in Albert's opening statement, and Judge Henri Borque sustained them. But while Borque momentarily headed off Albert's attempt to make police misconduct the central issue of the trial ("The issue is whether or not [Chaplinsky] used these words," the judge admonished), the Witness' attorney never really relented. Throughout his cross-examination of two key prosecution witnesses, Gerald Lapierre and Jim Bowering, Albert was able to repeatedly underscore his contention that the "willful neglect" of the Rochester police had led to the attack on Chaplinsky in Central Square. As they fielded sharp questions from Albert, neither police officer could provide a plausible explanation for the inaction of police during the riot, nor could they account for their slipshod work afterward. In testimony that drew a series of incredulous responses from Albert, Lapierre maintained that although he had been directing traffic "perhaps the length of the [court]room" from the scene of the disturbance, he had noticed nothing unusual until after Chaplinsky had been mobbed—at which point he grabbed the victim and started hauling him off to the police station. Bowering's testimony rang hollow as well. Albert forced the marshal to recount his first trip to the square, when William Bowman had throttled Chaplinsky and angrily demanded that he salute the American flag. He had seen Bowman violently grab the Witness by the collar, the marshal acknowledged, but he had chosen not to arrest the veteran for assault, as Chaplinsky requested.

> *Bowering:* I said, "It is not necessary."
>
> *Albert:* Didn't you consider that a violation of the law?
>
> *Bowering:* No.
>
> *Albert:* In other words, people in the town that you are marshal of can go around grabbing people by the coat collars, and you don't consider that an offense, do you?
>
> *Bowering:* I do in some cases if it is necessary to make an arrest.
>
> *Albert:* I am asking whether or not that is an offense.
>
> *Bowering:* No.
>
> *Albert:* It is not an offense?
>
> *Bowering:* Not to me.

The two men engaged in a similarly edgy

Witness attorney Hayden Covington (pictured) joined Chaplinsky's lawyer, Alfred Albert, when the conviction was appealed to the Supreme Court of New Hampshire. He stayed away from the facts of the case and focused instead on the constitutionality of the state's abusive language law.

colloquy when Albert asked Bowering to explain why he had left the square without dispersing the hostile crowd that had gathered around Chaplinsky. Bowering testified that he had merely advised the Witness to tone down his preaching because it was "going to get the public in an ugly mood."

Albert: You said the public was in an ugly mood?

Bowering: I knew they were from the complaints I received.

Albert: You knew the public was in an ugly mood from the complaints you received. Knowing that the public was in an ugly mood, you left the defendant standing on that corner and walked away assuming that everything was serene?

Bowering: It was when I left.

Albert: It was when you left, yet you knew that the public was in an ugly mood?

Bowering: Oh, yes.

Albert: Didn't you fear that any danger might come to this defendant?

Bowering: Possibly, yes.[30]

Throughout Chaplinsky's trial, Bowering and his fellow police officers attempted to refute Albert's repeated suggestions that they had mistreated the Witness during their journey from Central Square to the Rochester police station. None of the policemen, of course, could offer a plausible explanation as to why a half-dozen officers had escorted the battered victim of a mobbing to jail while his assailants were permitted to flee. Yet all of the officers who testified at the trial were adamant in denying that they had abused Chaplinsky in the wake of the attack. Chaplinsky himself testified that the officers had manhandled him, and witness Gregory Gessis recalled that he had seen various members of the police escort "mistreating" and "roughly handling" the witness. The police officers denied it all. Gerald Lapierre—like Bowering, a former member of Rochester's semi-professional football team, the Mountaineers—admitted that he and officer Burt Powers "had hold of the defendant,"

but he maintained that they had not used excessive force. For his part, Bowering asserted that he had done absolutely nothing to provoke Chaplinsky's outburst. Asked by Albert if he had at least addressed the Witness in "a loud tone," the marshal replied, "No, not louder than necessary."[31]

After Albert rested his case, Judge Henri Borque spoke to the jury and offered instructions for its deliberations. If any of the jurors were wrestling with the idea that Walter Chaplinsky's First Amendment freedoms were at stake, or that they might have to seriously weigh the defendant's allegations of police misconduct, Borque quickly put their minds at ease. Their job as jurors was uncomplicated, he said.

> We are not concerned here with freedom of speech or religious freedom or anything of that kind. The sole question is whether there has been a violation of a statutory law. In other words, whether any statute prohibiting use of offensive, derisive or annoying words to anyone in a public place or a public street has been violated by the respondent. I need not comment on the meaning of the words used. You know what they mean as well as I do. It is for you to determine what the meaning is and whether they were in fact offensive, derisive or annoying.

Making this determination should not be especially difficult, Borque noted, in part because Chaplinsky "practically has admitted what the state charges." The judge's narrow instructions—and his damaging summary of Chaplinsky's testimony—made the jurors' task an easy one; they deliberated for fifteen minutes before finding the Witness guilty. Although Chaplinsky's original sentence had been twelve days in jail, Borque increased the penalty to six months and ordered the defendant, who was already strapped for cash, to pay an additional $42.54 in court costs.[32]

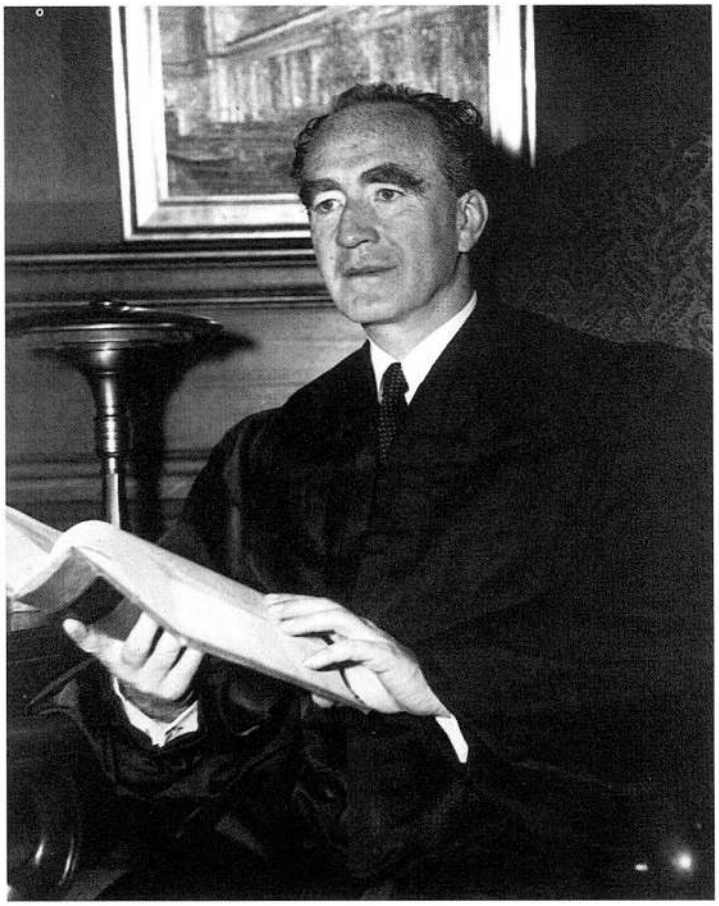
Witness attorney Hayden Covington joined with Alfred Albert to represent Chaplinsky when he appealed his conviction to the Supreme Court of New Hampshire. In his brief, Covington highlighted the issue of police misconduct, remarking that Chaplinsky had testified that he had been "roughly handled" by the officers who had escorted him to the station, and that at least one law enforcement official, deputy sheriff Ralph Dunlap, had "joined in with the mob" during the attack itself. In light of such evidence, it was apparent that the prosecution of Chaplinsky was little more than "an effort on the part of local officials to get vengeance against [him], and constitutes the 'framing of mischief by law' as foretold at Psalm 94:20. They knew that the Supreme Court of the United States had upheld the right of free distribution of literature, and when they saw that the mob could not drive the defendant off the street they seized upon this law in a desperate effort to put the defendant away 'for good.'" Realizing, however, that the state supreme court's review of Chaplinsky's conviction might not necessarily hinge on the troubling facts of the case, Covington devoted a large portion of his ten-point argument to assailing the dubious constitutionality of New Hampshire's abusive language statute. His principal contention: the state measure was "repugnant to the due process clause of the Fourteenth Amendment in that it unreasonably restricts freedom of speech, and as construed and applied [it] unreasonably restricts freedom of press and worship of Almighty God contrary to the Fourteenth Amendment." The law had myriad other flaws as well, including "the fact that it is so vague, indefinite, uncertain, and ambiguous that it fails to set a reasonable standard of guilt."[33]

The brief submitted by the state of New Hampshire—drafted by Strafford County Solicitor John Beamis, Assistant Attorney General Ernest D'Amours, and Attorney General Frank Kenison—was far shorter and more focused than Covington's. Not surprisingly, the

state glossed over the circumstances of the mobbing of Chaplinsky and the subsequent misconduct of the police officers who ushered him to the police station. "The evidence concerning the nature of the riot at Central Square is conflicting," the brief claimed, "but all witnesses for the state testified that they did not participate in the riot or in any way provoke, annoy or abuse the respondent." Although it shied away from the facts of the case, the state was eager to refute Covington's blunt attacks on the constitutionality of New Hampshire's abusive language law. According to the state's brief, the measure was in no way "obnoxious to the constitutional guaranty of free speech, free press, [and] free worship," as Covington asserted. "It is submitted that the statute here in question is simply an exercise of the political authority deemed essential by the legislature to secure and maintain an orderly, tranquil and free society without which religious toleration itself would be a myth."[34]

In its unanimous opinion in *Chaplinsky v. New Hampshire*, handed down in March of 1941, the Supreme Court of New Hampshire acknowledged that if Chaplinsky's account of his drubbing and arrest was accurate, then "nobody concerned ... used proper restraint on this occasion." The court also recognized that in the wake of the mobbing, Chaplinsky "undoubtedly felt resentment because he had been roughly handled by the crowd. His resentment might well enough have extended to the police if they had failed to take any step reasonably within their power to control the crowd, or if they had failed to prosecute anybody who they had reasonable ground to believe had assailed him." But that Chaplinsky might very well have been provoked—or even that his accusations might have been accurate—did not mean that the Constitution protected his speech, the court held. His outburst, after all, did not "rise above the level of name-calling . . . It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government. Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view." Given its role as custodian of public order, the state had every right to limit language that was "plainly likely to cause a breach of the peace by the addressee"—in short, "fighting words"—through measures such as the one under which Chaplinsky was convicted. The law was constitutional, the court held, and the Witness's conviction stood.[35]

Hayden Covington responded to this setback by appealing Chaplinsky's conviction one last time. In the brief he submitted to the Supreme Court of the United States in its October 1941 Term, the untiring Witness attorney again condemned the extraordinary circumstances of the attack on Chaplinsky and his subsequent arrest. Covington noted that Chaplinsky had been peacefully distributing literature in Rochester's Central Square, engaging in "Godly and Christlike work," but "[b]ecause the message contained in the pamphlets and magazines was not suitable to the rabble element of Rochester, including members of the police department, a mob formed and gathered around him, threatening him with violence unless he discontinued his work." A devoted minister of the Gospel, Chaplinsky had kept right on preaching, and he had also refused to commit idolatry by saluting the American flag. As a result, William Bowman, the former commander of the local Veterans of Foreign Wars post, had wielded a flagpole "as a spear or javelin in assault against him," and he had been "assaulted and beaten in the presence of public officers, one of whom actually participated in such mistreatment." Given those circumstances, the harried Witness "was justified in saying what he did say, and such utterances were provoked by the police, one of whom participated in the mob." If the facts of Walter Chaplinsky's mobbing, arrest, and conviction were deeply troubling to Covington, so too was the possibility that the Supreme Court might lose sight of the case's broader constitutional implications and uphold the Witness's conviction. "To permit this con-



Justice Frank Murphy wrote the unanimous opinion upholding Chaplinsky's conviction. "There are certain well-defined and narrowly limited classes of speech," he held, "the prevention and punishment of which never have been thought to raise any Constitutional problem."

viction to stand," he maintained, "means the end of speech and constitutional liberty in this country."[36]

Justice Frank Murphy wrote for a unanimous Supreme Court in affirming the Witness's conviction. In an opinion handed down on March 9, 1942, Murphy spent little time reviewing the disquieting facts of the case. The Court's sole duty, he noted, lay in determining the constitutionality of the New Hampshire abusive language statute under which Chaplinsky had been convicted. And so the appellant's suffering at the hands of the mob in Rochester's Central Square was dealt with perfunctorily, with Murphy briefly mentioning that "a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station." He similarly papered over the physically and verbally abusive behavior of Jim Bowering and his compatriots as they dragged Chaplinsky to the police station. Having displayed his indifference to the facts of the case, Murphy eviscerated Hayden Covington's contention that Chaplinsky's rights under the Fourteenth Amendment had been compromised. For starters, New Hampshire's abusive language statute was neither overbroad nor vague but rather "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." There was little doubt that the state had constitutional power to circumscribe such language, Murphy wrote.

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention

> and punishment of which never have been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of peace.

Whether or not they were justified or truthful, the inflammatory words used by Chaplinsky as he was led away from Central Square clearly fell into those last two categories, Murphy wrote. In the end, such utterances played "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." To help seal his argument, Murphy cited the dictum advanced by the Court in *Cantwell v. Connecticut* that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution"—a passage that the state of New Hampshire had cited in calling for an affirmation of Chaplinsky's conviction.[37]

If any of Murphy's fellow Justices had serious misgivings about his opinion in *Chaplinsky v. New Hampshire*, it appears that they kept their thoughts to themselves. Justice Hugo L. Black told Murphy that he had "shown much wisdom in deciding the case with such restraint," and Justice Robert H. Jackson informed him, "The Constitution does not include a right to brawl and that's about all that seems to be involved."[38]

His appeals exhausted, Chaplinsky suffered through a six-month term at a prison farm in Strafford County, New Hampshire. When he arrived at the facility, the warden, fearing that such discussions might cause unrest, cautioned him not to speak with other inmates about his faith. Shortly after his arrival, he ignored the warning during a conversation with a fellow convict. Asked why he had been jailed, Chaplinsky explained that he was a Jehovah's Witness who was so captivated by the truths of the Bible that he preached them wherever and whenever he could. From the time of Christ and the Apostles, such messengers had been vilified and persecuted because of their beliefs, and he was no exception. "Another prisoner heard me talking and he went and told the warden that I was preaching," Chaplinsky recalled. "For what I did I served six weeks in solitude." Following his release from solitary confinement, Chaplinsky toiled in the prison's squalid pig barn. His job was simple: each day he had to sweep and shovel away the excrement deposited by dozens of animals. The barn was in dreadful condition, and Chaplinsky worked "over two weeks to clean the filth away and make it a decent place," as he later put it. When he wasn't removing the pigs' waste, the Witness tended to sows who had recently given birth. Having lived on a farm as an adolescent, he knew that sows were capable of crushing or even consuming their newborn, so he spirited the helpless piglets out of harm's way.[39] Chaplinsky's spirits remained high throughout his incarceration, and from the prison farm he dispatched a gallant letter to Jehovah's Witness officials in New York. "At all times I shall, by the Lord's grace," he wrote, "stand firm for THE THEOCRACY, and will await the day of my release with joy."[40]

To most contemporary judges and legal scholars, *Chaplinsky v. New Hampshire* is memorable for a single reason—the "fighting words" doctrine employed by the Supreme Court to uphold Chaplinsky's conviction. As articulated in Justice Frank Murphy's opinion for the Court, the doctrine permits the state to impose criminal sanctions on speech if it can show that the words tend to "inflict injury," or that they are likely to "incite an immediate breach of the peace." Over the past half-century, the Supreme Court's two-pronged standard for assessing the constitutionality of "fighting words" has been modified and reformulated in several cases, including *Terminiello v. Chicago* (1949), *Street v. New York* (1969), *Cohen v. California* (1971), *Gooding v. Wilson*

(1972), *Kelly v. Ohio* (1974), and *R.A.V. v. St Paul* (1992).[41] Thanks to those opinions, the broad restrictions on speech articulated by the Court to uphold Walter Chaplinsky's conviction have been narrowed considerably. The "inflict injury" prong of the fighting words doctrine, for instance, has never been used by the Supreme Court to uphold another conviction, prompting some observers to wonder if anything remains of it.[42] The "breach of peace" prong endures, although it too has been substantially limited over the years.[43]

The erosion of the "fighting words" doctrine has been demonstrated in two Supreme Court decisions relating to insulting language directed at police officers. In both *Lewis v. City of New Orleans* (1974)[44] *and City of Houston v. Hill* (1987),[45] the Court threw out convictions of defendants who had been arrested for addressing policemen with vituperative speech. That the addressee in both cases had been a police officer was crucial to the Court's determination that the "fighting words" doctrine was inapplicable. In *Lewis*, Justice Lewis Powell noted that "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"[46] Of course, had the Court followed this line of reasoning a half-century earlier in *Chaplinsky*, it seems unlikely that the Witness's conviction would have been allowed to stand, for Chaplinsky had directed his abusive language at a town marshal and a sheriff's deputy.

Chaplinsky himself fared far better than the shaky doctrine so closely associated with his name. In the mid-1990s, he was living in St. Petersburg, Florida, and remaining steadfast in his faith. Even in his old age, Chaplinsky was an active proselytizer. One correspondent inquiring about his activities received several thoughtful replies—as well as stacks of Witness tracts and journals. "There is no compromise—all witnesses of Jehovah want to be faithful," he wrote. "My purpose in life is to not lose faith in God."[47]

Note: This essay is reprinted from *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution,* by Shawn Francis Peters, copyright 2000 by the University Press of Kansas. Used by permission of the publisher.

ENDNOTES

[1]Marley Cole, **Jehovah's Witnesses: The New World Society**, (1955), 111.

[2]Victor W. Rotnem and F.G. Folsom, Jr., "Recent Restrictions Upon Religious Liberty, *The American Political Science Review,* December 1942, 1053, 1061-1068; American Civil Liberties Union, **Jehovah's Witnesses and the War**, (1943), 1-10; American Civil Liberties Union, **The Persecution of Jehovah's Witnesses**, (1941), 1-3.

[3]*Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The family who brought the *Gobitis* case before the Supreme Court in fact spelled its surname "Gobitas." Throughout this work, I will refer to the case as "*Gobitis*" and to the family as "Gobitas."

[4]"Jehovah's Witnesses—Victims or Front?" 57 *The Christian Century*, 26 June 1940, 813.

[5] John Haynes Holmes, "The Case of Jehovah's Witnesses," 58 *The Christian Century*, 17 July 1940, 896,898.

[6]In the most exhaustive study of the anti-Witness violence of the war years, David Manwaring examined the complaints received by the Justice Department and concluded there had been 843 "incidents of alleged persecution" involving Jehovah's Witnesses between May 1940 and December 1943 **Render Unto Caesar: The Flag Salute Controversy**, (1962), 163, 166-170, 185. In 1978, Barbara Grizzutti Harrison estimated that a total of 2,500 attacks had occurred between 1940 and 1944 **Visions of Glory: A History and a Memory of Jehovah's Witnesses**, (1978), 190. The Witnesses themselves essentially split the difference between Manwaring's and Harrison's estimates, claiming that "at least 1,500 mobbings" occurred during the World War II era ("Modern History of Jehovah's Witnesses, Part 19: Christian Neutrals in America During World War II," *The Watchtower*, 1 October 1955, 588).

[7]*Prince v. Massachusetts*, 321 U.S. 158, 176 (1944) (J. Murphy dissenting).

[8]United States Department of Justice, **Federal Prisons 1946**, (1947) 10, 13.

[9]*Lincoln* (Nebraska) *Journal*, 26 June 1940.

[10]*Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[11]*West Virginia v. Barnette*, 319 U.S. 624 (1943).

[12] William Shepard McAninch, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the

Supreme Court," 55 *Cincinnati Law Review* 997 (1987), 1076.

[13]Harlan Fiske Stone to Charles Evans Hughes, 24 March 1941, Harlan Fiske Stone Papers, Manuscript Division, Library of Congress.

[14]*Falbo v. United States*, 320 U.S. 549, 561 (J. Murphy dissenting) (1944).

[15]*Rochester* (New Hampshire) *Courier*, 4 January and 11 and 18 April 1940; Transcript, The State of New Hampshire Superior Court, Strafford, SS., September Term, 1940, No. 2119, *State vs. Walter Chaplinsky*, at Dover, New Hampshire, September 16, 1940 (hereafter *Chaplinsky* Transcript), 11-16.

[16]*Rochester* (New Hampshire) *Courier*, 8 February, 7 March and 11 and 18 April 1940; *Foster's Daily Democrat* (Dover, New Hampshire), 3 April 1940.

[17]*Chaplinsky* Transcript, 11-16, 28-32.

[18]*Id.*, 11-16.

[19]*Id.*, 28-32.

[20]Rochester (New Hampshire) *Courier*, 11 and 18 April 1940.

[21]*Chaplinsky* Transcript, 5-31.

[22]*Rochester* (New Hampshire) *Courier*, 11 and 18 April 1940.

[23]Bowering and Chaplinsky disagreed on the precise wording of Chaplinsky's accusation, Bowering claiming that the Witness had said "God damn fascist." Given Chaplinsky's candor about the incident—and Bowering's almost complete lack thereof—I am inclined to believe the Witness.

[24]*Chaplinsky* Transcript, 24-32.

[25]*Chaplinsky* Transcript, 1.

[26]*Rochester* (New Hampshire) *Courier*, 12 September 1940. Arrests in Rochester in 1940 are broken down by offense in Jim Bowering's "Report of the City Marshal," which appears in the 1940 *City of Rochester Annual Report*, 66-67.

[27]*Chaplinsky* Transcript, 1-4.

[28]*Rochester* (New Hampshire) *Courier*, 18 April 1940.

[29]*Chaplinsky* Transcript, 2-4, 23-24.

[30]*Ibid.*, 6-9, 11-16, 23-24.

[31]*Ibid.*, 5-33.

[32]*Ibid.*, 1, 33-35; *Foster's Daily Democrat* (Dover, New Hampshire), 18 September 1940.

[33]The State of New Hampshire Supreme Court, February Term, 1941, *State v. Walter Chaplinsky*, Brief for Appellant, 1-32.

[34]The State of New Hampshire Supreme Court, February Term, 1941, *State v. Walter Chaplinsky*, Brief for Respondent, 1-11.

[35]*State v. Walter Chaplinsky*, 18 A.2d 754, 757-763 (N.H. 1941).

[36]Covington's brief is reproduced as "The Chaplinsky Case, in New Hampshire," *Consolation*, 10 June 1942, 20-22.

[37]*Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-573 (1942).

[38]Sidney Fine, **Frank Murphy: The Washington Years**, (1984), 372-373.

[39]Walter Chaplinsky to author, 22 July 1940 (on file with author).

[40]"The Chaplinsky Case," 22.

[41]*Terminiello v. Chicago*, 337 U.S. 1 (1949); *Street v. New York*, 394 U.S. 576 (1969); *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Kelly v. Ohio*, 416 U.S. 923 (1974); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[42]"The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment," 106 *Harvard Law Review* 1129 (1993).

[43] John F. Wirenius, "The Road Not Taken: The Curse of Chaplinsky," 24 *Capital University Law Review* 331 (1995).

[44]*Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

[45]*City of Houston v. Hill*, 482 U.S. 451 (1987).

[46]*Lewis v. City of New Orleans*, 415 U.S. at 135.

[47]Walter Chaplinsky to author, 16 October 1994 (on file with author).

Before *Brown:* The Racial Integration of American Higher Education

DAVID W. LEVY

I.

The landmark case of *Brown v. Board of Education of Topeka*[1] is known, at least in its general outline and result, to millions of American citizens. It may, in fact, be the most universally recognized of all of the decisions ever handed down by the Supreme Court of the United States. No reputable high school or college textbook in American history fails to mention it as one of those monumental determinations of the High Court that changed forever the fabric of American life. And there can be no doubt that the *Brown* case—followed as it was by spirited debate, invigorated efforts on behalf of integration, and bitter resistance by many whites—fully deserves the notice it has received since 1954. How is it possible, after all, to *overestimate* the importance of the decision that declared unconstitutional the long-established practice of racial segregation in elementary and high school public education?[2]

But while the *Brown* case resulted in a flood of commentary and debate and anger and violence, and while the *Brown* case has been retold many times and from numerous perspectives by historians, participants, textbook writers, and others, the prior episode, centering around the legal attack on racial segregation in higher education, has been relatively little studied. Perhaps because the demolition of segregation in the nation's colleges and universities was accepted rather more calmly by the general public, it has tended to be given much less attention. But that story too was an important one. It was a dramatic and profoundly significant episode in the history of race relations in our country. It too was characterized by enormous courage and heavily freighted with implications and lessons about the complicated connections between law and social change. In the battle to rid American colleges and univer-

sities of the injustices of segregation, moreover, the Supreme Court played a decisive role . . . and one which paved the way for the Justices' monumental opinion of 1954.

II.

In the late 1930s, when for practical purposes the effective attack on segregated higher education began in earnest, the availability of post-secondary education for African Americans was largely a matter of region. In the North, no state university prohibited the entrance of black students. Once they were on campus, however, they were subjected to various sorts of discrimination, often connected with the university's social and extra-curricular life. Some of that discrimination was formal, but most of it was unwritten, quietly understood, and traditional. Northern private schools had varying policies, but Gunnar Myrdal, in his classic study of 1944, **An American Dilemma**, offered this generalization: "Private universities in the North restrict Negroes in rough inverse relation to their excellence: the great universities—Harvard, Chicago, Columbia, and so on, restrict Negroes to no significant extent if at all. . . . Most of the minor private universities and colleges prohibit or restrict Negroes. Some of these permit the entrance of a few token Negroes, probably to demonstrate a racial liberalism they do not feel." Probably there were fewer than a dozen or so African-American faculty members in all northern colleges and universities.[3]

In the South, of course, things were very different. At the outbreak of World War II, seventeen states and the District of Columbia maintained, by law, separate school systems at all levels. The post-secondary education of African Americans in Southern states was carried out in 117 all-black colleges. Thirty-six of these were public schools; of the private ones, only seven were not church-related.[4] Attendance in these black Southern colleges had been growing steadily: they had 2,600 students in 1916, 7,600 in 1924, 34,000 in 1938, and 44,000 in the 1945-46 academic year. Although this was an impressive rate of growth, it must be remembered that by 1940, one out of every twelve Southern white youths received some college education, while only one out of a hundred Southern black youths did. Just as important, moreover, is that despite their healthy rate of growth, and despite the myth that black public schools were required by constitutional law to be "equal" if they were going to be "separate," these all-black colleges were, by most standards, inferior operations—starved for funds, poor in staff, buildings, and equipment. In 1943, the **National Survey of Higher Education of Negroes** studied twenty-five representative black colleges, applying the criteria of the North Central Association, and concluded that "colleges for Negroes in general are below par in practically every area of educational service."[5] Two years later, Charles Thompson, the crusading black editor of *The Journal of Negro Education*, wrote that not a single black college "offers work that is even substantially equal to that offered in the corresponding state institutions for whites."[6]

And if the conditions under which most Southern African-American *undergraduates* tried to get an education were inferior and deplorable, the situation in graduate and professional education was a major scandal. The graduate and professional educational opportunities offered to African Americans were so few and so bad, in fact, that it was precisely there that the legal attack on segregation was about to unfold.

Up until 1936, only 139 African Americans had earned the PhD degree in the United States. In 1939, when Fred McCuistion undertook a thoroughgoing study entitled **Graduate Instruction for Negroes in the United States**, only seven black colleges in America offered any graduate work whatsoever; nine Southern states had no provision whatsoever for black graduate education. No all black college in the South offered work beyond the M.A. degree until the 1950s. As far as professional education was concerned, in 1945 the South had fif-

teen medical schools for whites and none for blacks; four dental colleges for whites and none for blacks; sixteen law schools for whites and one for blacks; seventeen engineering schools for whites and none for blacks; fourteen pharmacy schools for whites and none for blacks.[7] This deficiency, of course, made itself felt deeply in the professional assistance available to American blacks. By 1945 each African-American doctor, dentist, or lawyer had to provide services for a vastly greater number of patients or clients than white practicioners of the same profession.[8]

These statistics clearly indicate the enormous disadvantages under which African Americans, particularly in the South, were suffering when it came to gaining higher education, and especially when it came to getting graduate or professional training. It goes without saying that this system of segregated Southern education reflected the racial attitudes of most white Southerners. In many Southern states, therefore, the system of separated higher and professional education (like the separation

When Lloyd Gaines (pictured), a graduate of the all-black Lincoln University in Missouri (below), wanted to go to law school, he applied to the University of Missouri but was turned down because of his race. The state was so anxious to maintain its segregated law school that it gave black applicants scholarships to study out of state and began building a law school at Lincoln University for blacks.

The University of Oklahoma is located in Norman, a town that probably never had a single black resident before the *McLaurin* case. In the 1940s the state nonetheless passed laws making it a misdemeanor to admit blacks into white schools and to teach or be a student in a mixed race classroom.

of public education at the elementary and high school levels) was embedded not only in tradition and in persistent popular attitudes, but heavily fortified in state law, in state constitutions, and in the rules and regulations laid down by the governing bodies of Southern colleges and universities as well.

In view of all of the formidable obstacles raised against quality, integrated higher education, those who undertook to challenge and reform this system had a very serious task awaiting them. In a report done a decade before the end of World War II, *The Journal of Negro Education* asserted that in the seventy years since the end of the Civil War, forty-four lawsuits had challenged segregated education (at all levels) and that all forty-four had been lost in the nation's courts.[9]

III.

Even before the outbreak of World War II, some attempts at breaking down segregated higher education in the South had begun. Not counting a disastrous failure to force the integration of the pharmacy school at the University of North Carolina in 1933,[10] two of these early cases deserve some notice. The first occurred in Maryland in 1935, and was aimed at the University of Maryland Law School, which was located in Baltimore. A young African American named Donald Murray had graduated from Amherst College in Massachusetts and hoped to practice law in Baltimore, his home town. He applied to the Maryland Law School and was turned down by the president of the University on the grounds of race and race alone—and this despite the fact that Maryland had no law requiring segregation at the University. The state had no law school for African Americans. The National Association for the Advancement of Colored People took an interest in this case, and Murray was represented by two of the NAACP's ablest lawyers, Charles H. Houston and young Thurgood Marshall. The latter had a special interest in the case: Marshall was also from Baltimore, and he too had been denied the opportunity to study at the University of Maryland law school.[11]

Murray's attorneys did not attack segregation as such. Instead, on the basis of shrewd calculation, they rested their argument on a much less radical ground. They simply argued that if Maryland was going to provide legal education for its white citizens, it was obligated under the separate-but-equal formula of *Plessy v. Ferguson*[12] to provide it for black citizens

too. The case was heard before the Baltimore City Court, which ordered that Murray be admitted to law school. The state promptly appealed to the Maryland Court of Appeals where the original decision was upheld.[13] At that point Maryland gave up and admitted Murray to its law school. Thus this case, for all of its pioneering importance, never reached the federal court system, much less the Supreme Court of the United States.

One more thing should be noted in connection with the Murray case. The Maryland legislature established out-of-state scholarships to pay the tuition expenses of black Maryland students who wanted to pursue graduate programs that they could not pursue in their own state, but that were available at home to white students. The legislature hoped by this means to satisfy the separate-but-equal formula, by being able to argue that no black student was being deprived of graduate or professional education simply because he or she could not get it in Maryland. These scholarships were not actually funded by the legislature, however, until Murray was rejected; and the court ruled, in addition, that tuition expenses alone were inadequate for students who had to bear the costs of travel and of living away from home. Nevertheless, several other Southern states seized upon this device of out-of-state scholarships for African Americans as a way of forestalling integration. One state that tried it was Missouri, and it was in Missouri that a second significant pre-World War II case occurred.

In June 1935, Lloyd Gaines had graduated from Lincoln University, the all-black state school in Missouri. Like Donald Murray in Maryland, Gaines also wanted to go to law school in his home state and he too was denied admission because of his race alone. The Maryland precedent, of course, was not binding in another state and Missouri argued that there were some real differences anyway. In the first place, in Missouri, the out-of-state scholarships were real and adequate and several black students were already studying with these scholarships in other states. And second, Missouri was so anxious to maintain its segregated law school that it was willing to build a black law school at Lincoln—therefore, if Gaines was suffering a disability, it was merely a temporary one, until the Lincoln law school could get up and functioning.

Both the trial court and the appeals court in Missouri ruled in favor of the state's segregated system and to deny Gaines' request for admission.[14] The NAACP attorney—once again the intrepid Charles Houston—expected this outcome in the state courts and, perhaps, even hoped for it. Gaines went straight to the Supreme Court.[15] In 1938, by a vote of 6-2, the Missouri courts were reversed and the state was directed to admit Gaines to the existing law school—only the High Court's most reactionary Justices, James C. McReynolds and Pierce Butler, dissented from Chief Justice Charles Evans Hughes's majority opinion. As far as the plan to someday build a law school for black Missourians was concerned, the Chief Justice wrote, "we cannot regard the discrimination as excused by what is called its temporary character."[16] Hughes also made short work of the out-of-state tuition option that Missouri offered to provide: "We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color."[17]

The decision in the *Gaines* case set a precedent of enormous importance in the growing effort to break down race separation in Southern higher education. Henceforth *Gaines* would be cited as one of the central arguments in every subsequent suit brought by those attempting to destroy segregation. It is important to reiterate, however, that none of the early cases directly attacked segregation itself. They simply contended that facilities available to black citizens were not equal to those available to white ones and that this was inconsistent with both the Fourteenth Amendment and the

doctrine of separate-but-equal set forth in the old *Plessy* case back in 1896.

World War II intervened in this process of battling segregated higher education, however, and no cases came to the Supreme Court between 1938 (the *Gaines* decision) and 1948. When the struggle resumed, it resumed in Oklahoma and at the state's leading institution, the University of Oklahoma.

IV.

Oklahoma was not a state at the time of the Civil War, of course, but by the time statehood came in 1907, the racial mores and attitudes of the old Confederate states had insinuated themselves firmly into Oklahoma's social life. Fearing the rejection of their work by the Republicans in Washington, D.C., the authors of the constitution of 1907 contented themselves with merely mandating separation of the races at school, content to turn over the real work of legally segregating Oklahoma society, to the first legislatures, and the new lawmakers did not disappoint. Before they were finished, Oklahoma had race laws that emulated many of the harshest practices of the deep South. A law of 1915, to take just one example, mandated the Corporation Commission to require telephone companies to provide separate phone booths for white and black users![18]

As the constitutional provision indicated, there was a special desire to keep school children of the different races apart, and Oklahomans produced at every level a segregated school system that survived for nearly half a century. As far as higher education was concerned, the state relied on Langston University, established in 1897, one year after *Plessy* and ten full years before statehood, to accommodate black youth. But through the years the legislature so starved Langston for funds that it could scarcely be considered an institution of higher learning. It offered no professional or graduate education and was not accredited. In 1935, the legislature—with one eye on the trouble being caused in Maryland by Donald Murray—set aside $5,000 to pay out-of-state tuition for African-American students who wanted to pursue graduate work. By the late 1940s, the sum was $50,000 and nearly two thousand black Oklahomans had studied in other states, in various fields that white students could learn at home.

The Oklahoma legislature passed statutes in 1941 designed to protect absolutely the tradition of racial segregation in state schools.[19] The law now made it a misdemeanor to admit blacks into white schools, a misdemeanor to teach in a classroom that contained both whites and blacks, and a misdemeanor to be a student in such a mixed-race classroom. Administrators, teachers, or students were liable for stiff fines if they violated these laws, and each fresh day that they violated them was to be considered a new crime. On November 7, 1945, the University of Oklahoma's Board of Regents directed President George Lynn Cross "to refuse to admit anyone of Negro blood as a student in the University."[20] If all of this were not sufficiently daunting to potential African-American students, they had to also bear in mind one other fact: the University was located in Norman, a town that had probably never had a single black resident and whose citizens boasted that right up until World War II, no black person had ever spent the night within the town's boundaries.[21]

The first sign of trouble ahead occurred in 1945, less than a month after the end of World War II. Thurgood Marshall arrived from New York to attend the state's NAACP meeting in McAlester, Oklahoma.[22] On September 3 he told reporters that the group had decided to mount a challenge to Oklahoma's segregation laws by attempting to enroll a black student in the state's higher education system. A careful search was begun for the right candidate. On January 14, 1946, just before the start of the second semester, three African Americans appeared in President Cross's office. Two of them were state NAACP officials; sitting between them, across the desk from Cross, was Ada Lois Sipuel Fisher, a twenty-two-year-old Langston University

The NAACP chose Ada Lois Sipuel Fisher, a twenty-two-year-old Langston University honors graduate to mount a challenge to Oklahoma's segregation laws by applying to University of Oklahoma's law school. She posed for the camera with admissions director Dr. J. E. Fellows and NAACP lawyers Amos T. Hall (right) and Thurgood Marshall (middle). In 1992, Fisher, who had become the chair of the history department at her alma mater, Langston University, was named a member of the board of the University of Oklahoma's Board of Regents, the very body that had denied her application for admission.

honors graduate from Chickashaw, Oklahoma. Years later, Cross recalled "The young woman was chic, charming, and well poised as she entered my office, and I remember thinking that the association had made an excellent choice of a student for the test case."[23] Mrs. Fisher—like Murray and Gaines before her—wanted to go to law school.

Cross told his visitors that, whatever his own views about segregation (and there can be no doubt that he privately regarded the system as absurd and unjust), he was prohibited by state law and by the directive of the University's Regents from admitting any African American. They said that they understood this fully. All they wanted from him was a letter stating that it was race—and only race—that prevented Mrs. Fisher's admission. Cross quickly reviewed her credentials and dictated the requested letter in their presence.[24] On the basis of this acknowledgment that the candidate was acceptable on all grounds but one, the legal assault began. An unsuccessful attempt to secure a writ of mandamus from the Cleveland County District Court consumed the spring and early summer of 1946. From there the case was appealed to the Oklahoma Supreme Court, which, on April 29, 1947, rejected Mrs. Fisher's request. The court held that Mrs. Fisher should not insist on entering the all-white school, in opposition to the constitution and the laws of Oklahoma, but should instead apply to the proper authorities (presumably the State Regents for Higher Education[25]) to provide her with a legal education substantially equal to that being given to whites. In short, the Oklahoma Supreme Court ruled that she had asked for the wrong remedy.[26] Marshall and the others went to the Supreme Court of the United States.

The nation's highest court disposed of the state's claims with stunning speed. The arguments were heard on January 7 and 8, 1948, and a scant four days later, on January 12, the Supreme Court ruled unanimously that the Equal Protection Clause of the Fourteenth Amendment required Oklahoma to give black students training in law or to stop immediately giving such training to white students.[27] Thus the Supreme Court was able once again to dodge the underlying question of whether segregation was, itself, unconstitutional. An editorial in *The New York Times* said of the *Sipuel* decision: "So far, so good. But not far enough. The

Court again begged the issue as to whether states' segregation laws are constitutional. . . ."[28]

If the Justices in Washington, D.C., thought that this settled the matter and that Mrs. Fisher would now be admitted to the University of Oklahoma Law School, they had not sufficiently calculated the stubborn determination of the Oklahoma authorities to maintain segregation. Within a week of the High Court's ruling, the state's attorney general asserted that the Supreme Court's ruling did not, in his opinion, invalidate Oklahoma's race laws; the state supreme court declared that the State Regents had to provide a legal education for Mrs. Fisher while still preserving the separation required by Oklahoma's constitution; and the State Regents proclaimed the establishment of the Langston University School of Law—a school for one student that would have to be made ready in a week in order to coincide with the beginning of the second semester at the law school for white students in Norman. The black "law school" was to occupy three rooms on the fourth floor of the State Capitol building, the student body (i.e., Mrs. Fisher) was to have access to the State Library, and the Regents hired, in unseemly haste, a "faculty" consisting of two Oklahoma City lawyers and a former Oklahoma attorney general.[29] On January 24, the State Board of Regents for Higher Education announced—apparently with a straight face—that the Langston Law School was "substantially equal in every way" to the one in Norman![30] Mrs. Fisher and her attorneys, of course, quickly made it clear that she would have nothing whatever to do with this patent fraud.

Instead she and her lawyers returned to the judicial system, arguing that the makeshift arrangement concocted by the State Regents did not, in fact, actually constitute substantially equal educational opportunity. Despite an impressive array of expert witnesses (including the law deans from Harvard and the University of Pennsylvania) testifying that it was impossible to regard the two schools as being even remotely equal, the Cleveland County District Court decided that they were, in fact, equal—a conclusion that President Cross would later call "incredible." Naturally, Mrs. Fisher and her lawyers headed off again to the Supreme Court.

But before the Supreme Court could rule, the question was settled in Mrs. Fisher's favor in another way, by two other closely linked cases. These two are particularly important because they indicate a critical transition in the argument of those seeking to end segregated higher education and, in the process of shifting the argument, these two point the way to the future.

V.

The first of the cases also arose in Oklahoma. Having been encouraged by the Supreme Court's ruling in *Sipuel*, in January 1948, six other African Americans appeared in Norman to apply for admission into various graduate and undergraduate programs that were not available at the black college at Langston. Among them was George W. McLaurin, himself a faculty member at Langston and mature in years.[31] He wanted to work toward a doctorate in education. In October 1948, the Federal District Court handed down another curious opinion in the McLaurin case: admittedly, Oklahoma must provide training leading toward the doctorate in education for McLaurin or else discontinue that program for white students—that much was clear from the *Sipuel* ruling back in January; *but* this did not necessarily mean that Oklahoma's segregation statutes could not be enforced.[32] This language (and the fact that the District Court refused to grant the injunction for which McLaurin's attorneys had asked) opened the way for the state to continue its attempt to escape integration of the races.

The "solution" to the problem of granting admission while maintaining segregation was defined by the legislature (which amended the 1941 statute[33]) and was worked out by the University's Board of Regents and the University's administration. (The University's

administrators had little or no sympathy with the absurdities they were about to enact, but felt that Oklahoma law, with its system of heavy fines, left them little choice.) All of McLaurin's classes were to be held in the same room—a medium sized lecture hall with an anteroom at its north corner. McLaurin would sit in the anteroom where he could see and hear the teacher and see the blackboard, but still be considered "separated" from the whites, i.e., receiving instruction, as the newly amended law required, in a "separate classroom." A table with McLaurin's name on it was set aside for study in the University Library; he was to eat by himself in a specially designated area in the student union; he had his own toilet.[34] A week after these arrangements had been perfected, Thurgood Marshall returned to Oklahoma and was asked what he thought of the measures taken to segregate McLaurin. With typical directness he characterized them as being "stupid."[35] Nevertheless, two months later, when Marshall and McLaurin petitioned the court to end the segregation, the Federal District Court refused, stating that the bizarre arrangements did not violate the provisions of the Fourteenth Amendment.[36] That decision was promptly appealed to the Supreme Court.

Meanwhile, three things were occurring back in Oklahoma that influenced the outcome. First, after McLaurin was admitted, even under these grotesque conditions, African Americans kept coming. They applied for admission to the University of Oklahoma in a steady stream, so that by the summer session of 1949, there were eleven enrolled in graduate work and more indicating their intention to apply for the fall semester. Each time that such a student applied, the University directed the application to the state's attorney general for an opinion.[37]

Second, it was becoming clearer with each passing week that the presence of black students on the campus was not causing trouble. From the outset it was obvious that there was overwhelming support for integration among the University's faculty. The students were more divided, but substantial support for the admission of African Americans was also present in the student body. There were some opinion polls taken at the time, but they were of a rather unscientific nature. It appears that around half of the student body favored the admission of African Americans. The highest percentage of those consisted of returned World War II veterans, graduate students, seniors, and students in the College of Arts and Sciences; the lowest support for integration was to be found among freshmen and business and engineering majors.[38] Those students who favored integration, however, were much more active and vocal in expressing their views. They formed organizations and held large demonstrations. They carried off the ropes and barriers erected to separate the black students. They walked over to shake hands and to offer welcome when new African-American students arrived. They ate at their table with them and studied side-by-side in the Library.

Finally, public opinion in Oklahoma was gradually coming around. In part this was due to the increasing evidence that integration did not lead automatically to catastrophic disorder. In part, everyday Oklahomans, even the most rabid racists among them, came to see both the absurdity of the present system and the terrible expense that would be involved in setting up alternative programs at Langston every time any black student in Oklahoma requested one. What if an African American wanted to be a doctor or an atomic physicist? Could the state afford a medical school or a cyclotron in those eventualities? In part, moreover, Oklahomans were stung by the national ridicule their measures were drawing. As pictures of the roped-off George McLaurin—dignified and grandfatherly, clad always in coat and tie—were published in the national media, the rest of the country expressed their views forcefully.[39] Undoubtedly many Oklahomans remained unconvinced of either the justice or the expediency of integration, but more and more of the Regents, educational leaders, members of the legislature, and other officeholders called publicly for an end to the absurdity.

Encouraged by Sipuel's success, George W. McLaurin (pictured), a professor at Langston University, applied to the University of Oklahoma for a doctorate in education. He was admitted under the condition that he be physically separated from white students in the classroom, which required him to sit at a desk in an anteroom. He was also isolated in a segregated space at the library and the cafeteria, and was assigned his own toilet.

Nevertheless, for a full academic year the University had to endure this business of divided rooms, separate tables, set-aside toilets. It devised policies to cover bringing African-American guests to the student Union for lunch, their attendance at football games, their right to University housing. By the time the Supreme Court spoke in *McLaurin v. Oklahoma State Regents*,[40] the Oklahoma system of higher education was desperate for an end to what Cross called "this ridiculous and extremely embarrassing situation."[41]

But *McLaurin v. Oklahoma State Regents* was only half of a pair of closely related cases. The second case emanated from Texas, but it seemed in many ways (although not in all) the same old story.[42] Heman Sweatt, a mailman, wanted to go to the University of Texas Law School, and he applied for admission in February 1946. The District Court ruled, of course, that to deny him legal education was unconstitutional, but it gave Texas six months to build a law school for African Americans. A dingy little place in Houston was chosen, near the offices of two black attorneys who were to constitute the faculty. When it was obvious that this makeshift arrangement could not possibly be construed as being "substantially equal" to the University of Texas Law School, which was probably the best in the entire region, the legislature appropriated enough money to move the Houston operation to Austin, near the University of Texas. So far, it was the old tale of the petitioner claiming that the "separate" facility was far from being "equal." Despite widespread support from white Texas students and the ap-

pearance of high-powered experts who testified that the new law school was not "substantially equivalent" to the white law school, the District Court ruled against Sweatt, and the Court of Civil Appeals agreed.[43] Naturally, Marshall and his client were off to the Supreme Court. The Court decided to hear arguments in both *McLaurin* and *Sweatt* on the same day—April 4, 1950.

VI.

Richard Kluger writes that "Thurgood Marshall had been in the fight too long not to see that he could spend the rest of his life trying to prove that white school boards in a thousand counties were failing to provide an equal-but-separate education for their resident Negroes."[44] It would be an endless endeavor, arguing that such-and-such a separate arrangement was not "equal" enough to satisfy the *Plessy* formula—that such-and-such a building or library or faculty or length of school-year or expenditures for students or salaries for teachers or amount of available scholarship money was less for blacks than for whites. Moreover, in the McLaurin suit, the case of the Oklahoman who sat in his roped-off classroom, the matter of "equality" was not as clear as in the other cases: McLaurin, after all, had access to the same library, the same classroom, the same faculty at the University of Oklahoma as any white student.

Therefore, the NAACP attorneys, after intense and thorough discussion, adopted a new strategy as they argued *McLaurin* and *Sweatt*.[45] They were careful, of course, to make the same, laboriously documented contention that McLaurin and, particularly, Sweatt were being treated unequally; but they also, this time, made an additional argument: that segregation, in and by itself, was inherently unconstitutional, that the old doctrine in *Plessy v. Ferguson*, permitting separation if the conditions were substantially equal, was wrong and had been perniciously and disastrously wrong for more than half a century. Thus the brief before the Supreme Court began with these words:

> This case is believed to present for the first time in this Court a record in which the issue of the validity of a state constitutional or statutory provision requiring the separation of the races in professional schools is clearly raised. It is the first record which contains expert testimony and other convincing evidence showing the lack of any reasonable basis for racial segregation. . . .[46]

To make this part of their case, the lawyers for McLaurin and Sweatt introduced large quantities of expert testimony from social scientists, sociologists, psychologists, educators—all confirming the harmful effects of a policy of segregated education upon the lives and minds and self-evaluations of those being segregated and excluded. The Supreme Court, in short, was being given the opportunity in 1950 to declare that segregation—even in those instances where the conditions were relatively equal—had no place in education.

The twin decisions in *McLaurin* and *Sweatt* were announced on the same day, June 5, 1950. Both of the opinions were the product of a unanimous Court, and both were read by Chief Justice Fred Vinson. But although the High Court edged hesitantly toward the more radical position that Marshall and the NAACP were hoping for, the Justices were unwilling to go the whole way. They still insisted on settling the cases in terms of the inequalities in Texas and Oklahoma. At the start of his opinion in *Sweatt*, Vinson addressed the matter directly: "Broader issues have been urged for our consideration," he admitted, "but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposi-

Heman Marion Sweatt (above), a Houston mail carrier, ended his four-year fight against the University of Texas Law School in victory. His case and McLaurin's were both announced the same day, were both products of a unanimous court, and were both read by Chief Justice Fred Vinson.

tion of the case at hand, and that such decisions will be drawn as narrowly as possible." As a result of this self-imposed limitation, Vinson decreed, "much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition."[47]

In the Texas case of Heman Sweatt, the Supreme Court ruled that the Austin facility was obviously not equal to the magnificent one at the University of Texas. This was entirely obvious from the hard facts. The white law school at the University of Texas had sixteen full-time and three part-time professors, 850 students, and a library with 65,000 volumes in it. The white school also had a law review, moot court facilities, scholarship funds, opportunities to specialize, many distinguished alumni, and other important advantages. The black law school, by contrast, had five full-time professors, twenty-three students, and a library of 16,500 volumes; it boasted one alumnus in the Texas bar.[48] On the face of it, therefore, the inequalities were glaring and unconstitutional. But Vinson's opinion went on to add some significant words:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these laws schools would consider the question close.[49]

Clearly, when one begins to consider matters such as "prestige," "tradition," and "influence of the alumni," it is hard to see how any makeshift segregated facility would be able to stand the equality test.

In the McLaurin case from Oklahoma, the Court's reasoning was even more strained. The Justices concluded that, despite McLaurin's access to the same facility, the same library, and the same faculty as the white students, at the University of Oklahoma, the segregated conditions under which he was forced to go to school rendered him less than equal to his fellow students. True, there was no physical inequality, Chief Justice Vinson said, but the restrictions imposed upon McLaurin "impair and inhibit his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession. . . . Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his

classmates."[50] Thus the decision in *McLaurin* was that, once a student was admitted into a university, he or she could not be treated differently than other students simply on account of race. But, in the end, the *McLaurin* decision was also framed in terms of inequalities, not in terms of the unconstitutionality of segregation itself.

The Supreme Court of the United States was not to rule against segregation itself, until the *Brown* case, four years later. Then, on May 17, 1954, the Court spoke decisively through Chief Justice Earl Warren:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.[51]

Perhaps we may leave the story of the legal struggle against segregated higher education at this point. We must not minimize, of course, the legal battles that lay ahead—the cases of George McLaurin and Heman Sweatt may have destroyed segregated *graduate* education, but they said little about normal *undergraduate* work. Nor should we minimize the dramatic integration struggles that remained to be won on the actual battle ground of the deep South. After all, the confrontation between Alabama's governor George Wallace and prospective college student James Meredith on the doorstep of the University of Alabama occurred a full dozen years after the Court's rulings in *McLaurin* and *Sweatt*. Nevertheless, by the end of 1950, and certainly by the end of 1954 with *Brown*, the important principles had

Unlike the faculty, which overwhelmingly favored integration of the University of Oklahoma, the student body was evenly divided. The lowest level of support for integration came from freshman and business and engineering majors. Students favoring integration made a show of welcoming the new African-American students by offering handshakes, eating with them in the cafeteria, and studying with them in the library. Two sympathetic students are shown above greeting McLaurin.

all been laid down and enunciated; what remained was a kind of mopping-up operation—against very difficult and stubborn white resistance in many places, but that part of the war against segregation is another and a distinct matter.

VII.

Like every other important transformation of the American legal environment, this one too illustrates the complex, double-sided relationship between social change and the law. The simple rule—so simple that one is almost embarrassed to express it—has two parts: the first is that changes in our law spring from changes in American life. As Oliver Wendell Holmes, Jr., put it in that famous first paragraph of his 1881 book, **The Common Law**,

> . . . the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[52]

In this case, vast social forces were afoot, tending in the direction of the general breakdown of segregation. The massive migration of thousands of Southern blacks to northern states permitted them to assemble enough political power to make judges and presidents and legislators listen to grievances that it had long been possible to ignore. The rise of a group of African-American personalities that captured national admiration and sympathy had the effect of helping to neutralize negative stereotypes, humanizing a race that had been practically invisible to most whites—one thinks of Jesse Owens, Marian Anderson, Joe Louis, Jackie Robinson, Paul Robeson, and others. The crucible of World War II made unmistakable the hypocrisy of fighting against the Nazi racists while at the same time brutally segregating an entire race of American citizens. The constant humiliation that American race policies brought upon the nation at the height of the Cold War, the disadvantage those policies brought in the competition for the political and military allegiance of the non-white peoples of the earth, caused many Americans, including those in high political and diplomatic positions, to wonder if there were not more admirable, less ridiculous ways to conduct a nation's race relations. Above all, perhaps, the rising militancy of the African-American community itself—the attacks all across the nation on everything from housing covenants to separate entrances to federal buildings, from unequal pay for white and black teachers to segregation in the armed forces, from the all-white Democratic primary to the all-white jury to the all-white section of the bus. Everywhere in the late 1930s and through the 1940s and early 1950s, thousands of black men and women and their leaders were determined that enough was enough. The assault on segregated higher education can be seen as a part of this gigantic wave of social change.

But the second part of that embarrassingly simple rule about law and social change also is true and comes into play in this case too. Transformations in the law might indeed be brought about by vast social changes; but once in place, the new law often goes on to have quite spectacular social effects itself. In this case, they are obvious. The new armies of African Americans who graduated from first-class, accredited colleges fueled the civil rights movement of the 1960s at all levels, entered the professions and politics and business, and established a powerful African-American middle class. How this change in the law recast American colleges and universities—their curricula,

their social and athletic life, their hiring and harassment policies, the attitudes and experiences of the white students—is a breathtaking story in itself. Law, in short, makes changes as well as being caused by changes and one would be hard-pressed to think of a clearer example than this one.

This story has some symbolically satisfying footnotes. The new and slick brochures for the law schools at the state universities of Maryland, Missouri, Texas, and Oklahoma now all boast of the schools' commitment to "diversity" and to increasing the representation of minorities in the legal profession. Their catalogues indicate required courses in "Race, Gender and the Law," and elective courses in "Employment Discrimination" or "Affirmative Action" or "Civil Rights Law." Full color photographs show black faculty members of both sexes teaching to relaxedly integrated classrooms.

Another poignant and symbolically satisfying footnote is from the University of Oklahoma. Ada Lois Sipuel Fisher graduated from the Law School in 1951. After a few years of practice she went to work for Langston University. She earned a Master's degree in History from the University of Oklahoma in 1968 and taught at Langston and served as chair of her Department there. On April 27, 1992, Governor David Walters named her to a vacancy on the University of Oklahoma's Board of Regents, the seven-member body that governs all aspects of University life. It was, of course, the very Board that worked so hard to exclude her from attending the University in 1948. The appointment won applause from every corner of the state. If there was any criticism whatever, it never reached the level of public expression.[53]

We must be careful not to minimize the distance that still separates blacks and whites in American society, and we are not yet at the position where we can pretend that the journey to full equality is completed. Indeed, there is a very long way to go in many areas of American life. That having been acknowledged, however, there is still some merit in looking back over the last half-century and, while always remembering how much is left to do, taking some satisfaction in what the partnership of law and social change has made better.

ENDNOTES

[1]347 U.S. 483 (1954).

[2]For the story of the case, *see* Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality** (New York: Alfred A. Knopf, 1976); for the aftermath, *see* Numan V. Bartley, **The Rise of Massive Resistance: Race and Politics in the South during the 1950s** (Baton Rouge: Louisiana State University Press, 1969), Jennifer L. Hochschild, **Thirty Years after *Brown*** (Washington, D.C.: Joint Center for Political Studies, 1985) or Raymond Wolters, **The Burden of *Brown*: Thirty Years of School Desegregation** (Knoxville: University of Tennessee Press, 1984).

[3]Gunnar Myrdal, **An American Dilemma: The Negro Problem and Modern Democracy** (New York: Harper & Brothers, 1944), 633.

[4]*Id.*, 632, 951. In the thirty non-Southern states, there were only four all-black colleges, two of them founded before the Civil War.

[5]Myrdal reports (951n) that in the eleven states under the Southern Association of Colleges and Secondary Schools, 46 percent of the white colleges were accredited in 1939, but only 22 percent of the black colleges were.

[6]The best source for these statistics, problems, and descriptions of higher education for African Americans in this period are the pages of *The Journal of Negro Education*, edited since 1932 by Charles H. Thompson. *See also*, Horace Mann Bond, **The Education of Negroes in the American Social Order** (New York:Prentice Hall, 1934) and "Enrollment in Negro Colleges and Universities," *School and Society*, 50 (July 29, 1939): 141.

[7]Fred McCuistion, **Graduate Instruction for Negroes in the United States** (Nashville: George Peabody College, 1939). For the figures ten years later, in 1948, *see* Kluger, **Simple Justice**, 257.

[8] For example, Myrdal reports (326) that in 1930 there were six black lawyers in Mississippi and four in Alabama, compared to more than 1,200 and 1,600 white lawyers in those states, and (172) in the South in 1937 about thirty-five percent of black babies were delivered by doctors, compared to ninety percent of white babies.

[9]Kluger, **Simple Justice**, 169.

[10] *Id.* at 155-58, 806n. *Hocutt v. Wilson*, North Carolina Superior Court (March 28, 1933).

[11]Mark V. Tushnet, **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961** (New York:

Oxford University Press, 1994), 11.

[12]163 U.S. 537 (1896).

[13]*Pearson v. Murray*, 169 Md. 478 (1936). *See also* Kluger, **Simple Justice**, 186-94, and Tushnet, **Making Civil Rights Law**, 11-15.

[14]342 Mo. 121 (1937).

[15]*Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938). S. W. Canada was the registrar at the University of Missouri. *See also*, Kluger, **Simple Justice**, 202-204, 213.

[16]*Id.* at 352.

[17]*Id.* at 349. The *Gaines* case had a bizarre footnote: Lloyd Gaines never entered the University of Missouri Law School; he disappeared mysteriously and was never found, causing some to speculate that he had been murdered.

[18] Law of Mar. 30, 1915, ch.262, 1915 Okla. Sess. Laws 513.

[19]Okla. Stat. tit. 70, Sec. 452-64 (1941).

[20]University of Oklahoma Board of Regents, "Minutes," November 7, 1945, 1932-33.

[21]George Lynn Cross, **Blacks in White Colleges: Oklahoma's Landmark Cases** (Norman: University of Oklahoma Press, 1975). 5-10.

[22]This account of the *Sipuel* case relies on Cross, **Blacks in White Colleges**, and Ada Lois Sipuel Fisher, **A Matter of Black and White: The Autobiography of Ada Lois Sipuel Fisher** (Norman: University of Oklahoma Press, 1996). *See also* Kluger, **Simple Justice**, 258-60, and Tushnet, **Making Civil Rights Law**, 129-30.

[23]Cross, **Blacks in White Colleges**, 35.

[24]One of the NAACP officials quoted President Cross as saying that he would write whatever "you feel will get you into court" in the rejection letter (Tushnet, **Making of Civil Rights Law**, 129). Had Cross felt otherwise, he could simply have denied admission to Mrs. Fisher on the grounds that she had graduated from Langston, which was not an accredited college.

[25]A body different from the University of Oklahoma Board of Regents.

[26]199 Oklahoma 36, 1947.

[27]*Sipuel v. Board of Regents of the University of Oklahoma, et al.,* 332 U.S. 631 (1948). Miss Sipuel had married Warren Fisher in March 1944, but her transcripts bore her maiden name and the case proceeded forward as *Sipuel.*

[28]*New York Times*, January 15, 1948.

[29] Fisher, **A Matter of Black and White**, 125-26.

[30] Cross,**Blacks in White Colleges**, 54.

[31] His age is variously reported; Cross (**Blacks in White Colleges**, 85) gives his age as fifty-four; Kluger (**Simple Justice**, 266), quoting Thurgood Marshall, puts him at sixty-eight. The NAACP chose McLaurin purposefully as their test case, hoping to neutralize the racist argument that black men were only applying to white colleges to hunt for white women they could date or marry!

[32]*McLaurin v. Oklahoma State Regents for Higher Education* 87 F. Supp. 526 (1948).

[33]70 Okla. Stat. Ann. (1950) Nos. 455, 456, 457.

[34]Cross, **Blacks in White Colleges,** 89-95.

[35]*Id.,* 96; Tushnet, **Making of Civil Rights Law,** 130. By the time McLaurin's case came to the Supreme Court, there were some modifications in his situation. He was removed from the anteroom and allowed to sit in the regular classroom, but in a row specified for African Americans; his library table was removed from the Library's mezzanine to the main floor, where the other students studied; and he was allowed to eat in the cafeteria at the same time as the other students—but, of course, at a separate table.

[36]*McLaurin v. Oklahoma State Regents for Higher Education* 87 F. Supp. 526 (1948).

[37]Cross, **Blacks in White Colleges**, 107-110.

[38] Earnestine Beatrice Spears, **Social Forces in the Admittance of Negroes to the University of Oklahoma** (University of Oklahoma, MA thesis, 1951), 34-36.

[39]President Cross quotes some of the letters he received in his book, **Blacks in White Colleges**, 118ff.

[40]339 U.S. 637 (1950).

[41]Cross, **Blacks in White Colleges**, 118-28, the quotation is at 126.

[42]*Sweatt v. Painter et al.,* 339 U.S. 629 (1950). The case is discussed in Kluger, **Simple Justice**, 262-84, and in Tushnet, **Making of Civil Rights Law**, 128-38.

[43]*Sweatt v. Painter et al.,*210 S.W. 2d 442 (1948).

[44]Kluger, **Simple Justice**, 275.

[45]In part, the new arguments were put forward by the numerous *amici* briefs that were filed in these two cases.

[46] *Sweatt v. Painter et al.,* petition and Brief in Support of Petition for Writ of Certiorari, 2.

[47] *Sweatt v. Painter et al.,* 339 U.S. 629, 631 (1950).

[48] *Id.* at 632-33.

[49]*Id.* at 634.

[50]*McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 641 (1950).

[51]*Brown v. Board of Edcation*, 347 U.S. at 493, 495.

[52]Oliver Wendell Holmes, Jr., **The Common Law** (Boston: Little, Brown and Co., 1881).

[53] *See* her autobiography, **A Matter of Black and White.**

Taking Decisions Seriously: A Review of *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*

RICHARD D. FRIEDMAN

The New Deal era is one of the great turning points of American constitutional history. The receptivity of the Supreme Court to regulation by state and federal governments increased dramatically during that period. The constitutionalism that prevailed before Charles Evans Hughes became Chief Justice in 1930 was similar in most respects to that of the beginning of the twentieth century. The constitutionalism that prevailed by the time Hughes' successor Harlan Fiske Stone died in 1946 is far more related to that of the end of the century.

How this transformation occurred is a crucial and enduring issue in constitutional history. How we perceive both the Supreme Court and the process by which its members are selected depends significantly on how we view the process by which the Court develops and changes constitutional doctrine. To what extent are the Justices' decisions shaped by the doctrines enunciated in the prior decisions of the Court, to what extent by their own personal ideologies, and to what extent by external events and conditions, including political pressure exerted in one direction or another?

The story often told about the constitutional transformation of the New Deal era is that political pressure on the Court was critical, Franklin D. Roosevelt's landslide re-election victory in 1936 and his campaign for Court-packing the next year having induced a conservative Court to change directions. Advocates of this view—and indeed anyone who is interested in the history of the Court during this era—will now have to contend with the arguments presented with enormous skill by Barry Cushman in his stimulating and meticulous new book, **Rethinking the New Deal Court: The Structure of a Constitutional Revolution.**

Professor Cushman does not deny that

"dramatic changes in constitutional jurisprudence" occurred during the New Deal era; no sensible observer could do so. Rather, he attempts "to recharacterize both the jurisprudence that changed and the mechanics by which it changed, approaching the phenomenon examined as a chapter in the history of ideas rather than as an episode in the history of politics."[1] Cushman's account of constitutional transformation is therefore "internal" in the sense that he emphasizes the interplay of precedent and of the Justices' own ideologies rather than the influence of external political pressures. Broadly, he contends that the doctrinal context in which the Justices operate has a great deal to do with their jurisprudence, as do the political, economic, social, cultural, and intellectual contexts:

> Judges are participants not merely in a political system, but in an intellectual tradition in which they have been trained and immersed, a tradition that has provided them with the conceptual equipment through which they understand legal disputes. To reduce constitutional jurisprudence to a political football, to relegate law to the status of dependent variable, is to deny that judges deciding cases experience legal ideas as constraints on their own political preferences.[2]

Thus, Cushman refuses to treat the Justices' opinions as shams, merely as tools to give a veneer of legitimacy to results reached on other grounds. Treating the opinions seriously, rather than as counters to be placed either on the left side or on the right side of a grand political divide, entails a great deal of hard work. Cushman has not shied away from it, and he has done it very well.

More specifically, Cushman argues that an integrated web of thought that had dominated constitutional jurisprudence since the Civil War collapsed before 1937; Cushman identifies *Nebbia v. New York*,[3] the 1934 decision upholding a New York statute regulating the price of milk, as "occup[ying] center stage" in the Court's abandonment of the old framework.[4] He argues that the reach of *Nebbia* extended far beyond its immediate doctrinal context. This point he illustrates well with an extended discussion of the Court's jurisprudence concerning yellow-dog contracts. The majority's ultimate grant of constitutional approval of laws prohibiting these contracts, and thus removing one of the great obstacles to the organization of labor, reflected *Nebbia*'s expansion of the domain of activities deemed to invoke the public interest. "Thus," he concludes pointedly, though perhaps with some slight overstatement, "the fundamental issues that would divide the Justices in the seminal labor cases of modern American constitutional law were decided not in response to the political pressures of 1937, but in a 1934 dispute over the price of milk in upstate New York."[5] Conservative-seeming decisions of 1935 and 1936 represented no backsliding from *Nebbia*, Cushman contends, and in the climactic liberal decisions of the spring of 1937 the Court's swing members, Hughes and Owen Roberts, did not retreat from positions they had taken earlier or recoil in the face of political pressure. Rather, these Justices built on the advances they had made in *Nebbia*. Change continued at a rapid pace, but continued changes were attributable to the influence of the Justices appointed by Roosevelt, beginning with Hugo L. Black in the fall of 1937.

Though we disagree in some significant details, I agree with much of Cushman's account. Like him, I believe there is no persuasive evidence that the 1936 election or the Court-packing plan produced the celebrated decisions of the spring of 1937, and like him I believe that changes in the personnel of the Court were the principal cause of the constitutional transformation. The latter point is one that Cushman makes with delicious irony. Though Hughes and Roberts did not always join the liberal wing of the Court, they were far more likely to do so than the Justices they replaced in 1930—William Howard Taft and

Edward T. Sanford, respectively—and until the 1937 Term their votes were essential for liberal victories. And so Cushman ends his book with this striking statement: "The presidential author of 'the Constitutional Revolution of 1937,' then, was not the man the people had overwhelmingly returned to office the preceding November. It was, instead, the man the electorate had repudiated in Roosevelt's favor in 1932: Herbert Hoover."[6]

Part I of Cushman's book directly challenges the proposition that the decisions of the spring of 1937 were a response to pressures created by the Court-packing plan or Roosevelt's re-election. His aim here, he says, is to "create sufficient intellectual space" to allow for the plausible development of "an alternative internal account."[7] Cushman argues in some depth that the plan was doomed from the start, and so "[t]he justices had ample reason to be confident that constitutional capitulation was not necessary to avert the Court-packing threat. Certainly they had reason to doubt that immediate, total, and unconditional surrender was required."[8]

The first, stronger part of this conclusion seems somewhat dubious to me. Although Cushman is clearly correct that the plan faced formidable obstacles from the start, a contemporary observer would have had to give due weight to the tremendous strength with which Roosevelt began the battle and the possibility that he could compromise and secure the addition of a smaller number of extra Justices than the six he had sought.[9] But the weaker conclusion, that the Justices had reason to believe that total and immediate surrender was not necessary, seems quite correct to me. For example, upholding the National Labor Relations Act on its face and as applied to large employers would have severely undercut the Administration's argument that the Court was trying to destroy the New Deal; to make this point, the Court did not have to give the Administration the extraordinarily sweeping victory that it did in the companion cases to *United States v. Jones & Laughlin Corp.*[10]

In *Rethinking the New Deal Court*, Barry Cushman argues that the Court's thinking changed before the 1937 Court-packing episode, and that its abandonment of the old framework was evident as early as 1934 in *Nebbia v. New York*. That decision upheld a New York statute regulating the price of milk, which had been challenged by Leo Nebbia (pictured), a grocer from Rochester, New York. Many were surprised that the Court upheld the minimum price law that had been passed to protect the New York milk industry from suffering from damaging price wars.

Cushman also argues powerfully that the 1936 election did not account for the Court's decisions of 1937. The Court had felt no compunction about striking down New Deal legislation after the 1934 Democratic landslide, he points out; why would the 1936 election, in which the Republican opposition took a much more moderate stance, have appeared so clearly to be a constitutional referendum—and why would the devastating Democratic losses of 1938 not have appeared to be a constitutional referendum with the opposite response? Cushman is correct that there is an element of *post hoc, ergo propter hoc* ("after this, therefore because of this") in the arguments of those

who emphasize the 1936 election.[11] The 1934 midterm Democratic landslide, he points out, did not cause a flood of liberal decisions; quite the contrary, it was after that election that the Court issued most of its decisions striking down New Deal legislation. And the rightward-swinging midterm election of 1938 did not cause Hughes and Roberts to take more conservative positions. If one is committed to the idea that *some* external political development *must* have caused the pattern of the Court's decisions, then the 1936 election is the obvious candidate, by process of elimination. Absent that commitment, though, there is no good basis for concluding that the 1936 election must have altered the course of decisions.

Not being so committed, Cushman seeks to explain the Court's decisions in terms of evolving constitutional doctrine. In great detail, he works through the cases of the early twentieth century dealing with price regulation, culminating with *Nebbia*. Earlier cases had adhered to the doctrine that the state and federal governments could constitutionally regulate only those industries that were "affected with a public interest." But Justice Roberts' opinion for a bare majority of the Court in *Nebbia* discarded this limitation. There is, he wrote, "no closed class or category of businesses affected with a public interest." That phrase meant "no more than that an industry, for adequate reason, is subject to control for the public good." There was nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells"; prices, like any other aspect of a business's operations, could be constitutionally regulated by reasonable legislation when the public welfare demanded it.[12]

As Cushman contends, *Nebbia* was a case of enormous importance, because it signaled a greater receptivity to price regulation[13] and, more broadly, an integrated view that due process demanded of economic regulations only that they "have a reasonable relation to a proper legislative purpose, and [be] neither arbitrary nor discriminatory."[14] I am hesitant to apply Cushman's label of "revolutionary" only because I do not believe the case called for results that would have been implausible under prior doctrine. Indeed, Justice Roberts was able to cite a large number of precedents supporting an expansive view of legislative power. Of course, there were cases going the other way, but the doctrine invalidating price regulation unless the industry fit within an amorphous category of "affected with a public interest" was already anomalous and unpredictable. In refusing to accept this standard for measuring constitutionality, Roberts smoothened and advanced constitutional law, but I am not so sure that he fundamentally transformed it. As Cushman readily acknowledges, *Nebbia* did not suggest that the Court was yet willing to abandon any substantive due process constraints at all on economic regulation. Roberts and, to a lesser extent, Hughes continued to support such constraints throughout their tenure, well after the drama of 1937.

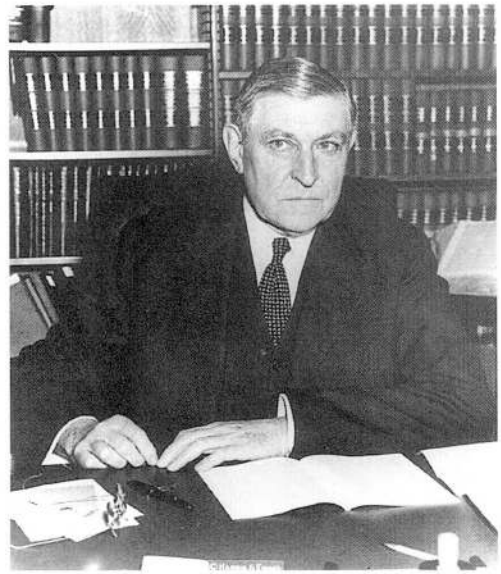
Because *Nebbia* knocked out the theoretical underpinnings for constitutional challenges to price regulations, one would expect the five Justices forming the *Nebbia* majority to support the constitutionality of minimum wage laws, which are, and were conceived of being, a form of price regulation. And so the five did, in *West Coast Hotel v. Parrish*.[15] But the mystery is why the year before, in *Morehead v. New York ex rel. Tipaldo*,[16] Roberts joined the four conservatives to invalidate a minimum wage law. Cushman has an intriguing theory, though one that I ultimately find unpersuasive.

In *Tipaldo*, the state did not squarely ask the Court to overrule *Adkins v. Children's Hospital*,[17] in which the Court had invalidated a federal minimum wage law. Justice Butler's opinion for the Court noted this fact, and focused at first on the question of whether the statute involved in *Tipaldo* was distinguishable from the one involved in *Adkins*. As Cushman says, "The only possible reason for Butler to rest the majority opinion on such a narrow ground is that Roberts insisted on it as the price of his vote."[18] According to Roberts' later recollection,

> I stated to [Butler] that I would concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins* and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case.[19]

After Justice Stone circulated a dissent contending that *Adkins* should be overruled, however, Justice Butler added another section to his own opinion, declaring the continued validity of *Adkins*. To his later regret, Roberts did not remonstrate.

Why did Roberts go along with this addition to Butler's opinion? His reluctance to write separate concurrences, the fact that the additional material was in effect *dicta*, and the press of business at the close of Term might help answer this question. The deeper mystery is why he joined with the conservatives in the first place. Cushman offers, somewhat tentatively, a surprising theory. Roberts, he suggests, would have voted to overrule *Adkins*, but only if there was a majority for doing so. Chief Justice Hughes, who dissented on the grounds that *Adkins* was distinguishable, did not state willingness to overrule *Adkins,* and absent a fifth vote Roberts was not willing to join the three liberals in supporting that result.



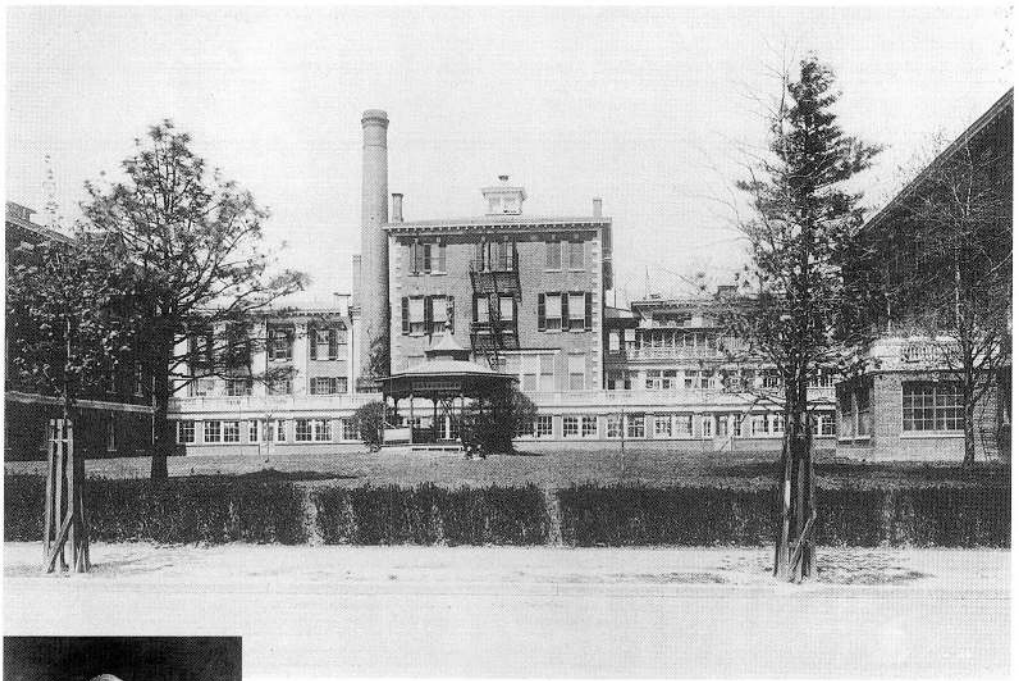
Professor Cushman makes the point that although Chief Justice Hughes (pictured below with his wife) and Justice Roberts did not always join the liberal wing of the Court, they were far more likely to do so than the Justices they replaced in 1930—William Howard Taft and Edward T. Sanford, respectively. He believes that their joining the Court, not the threat of Court-packing, was responsible for the so-called Constitutional Revolution of 1937.

The theory might seem immediately implausible, as Cushman recognizes, because Hughes did, after all, write the opinion overruling *Adkins* just one year later. It seems unlikely, therefore, that his procedural resistance to overruling *Adkins* in *Tipaldo* would be so great that he would refuse to join with Roberts and the three liberals in doing so if he realized that in this way he could achieve the result—upholding the statute—that he strongly favored *in Tipaldo*. Cushman suggests that there was a massive failure to communicate, Roberts never letting Hughes know that a square overrule was the price of getting his vote. And Cushman properly points to two aspects of Hughes' style as Chief Justice—tautly run Conferences, without open-ended conversations, and a refusal

to lobby his Brethren outside the Conference[20]—that make such a failure conceivable.

Intriguing as Cushman's speculation is, I ultimately find it unpersuasive, for several reasons. First, Hughes' antipathy to *Adkins* was clear. His *Tipaldo* dissent did not merely distinguish *Adkins*; it discarded the case. *Adkins*, wrote Hughes,[21] had been a "closely divided" case, following an equal division of the Court in another minimum wage case, *Stettler v. O'Hara*,[22] a few years before. Given the fact that *Adkins* was not "a precise authority" for the statute before the Court in *Tipaldo*, and the "grave importance" of the question posed by *Tipaldo*, he wrote that the Court "should deal with that question upon its merits," without being bound by *Adkins*—and then he presented six pages of analysis citing *Nebbia* and other liberal precedents, but *Adkins* not at all.

Second, Cushman's theory supposes an odd combination of positions on the part of Roberts. Roberts would have had to believe that it was appropriate in the circumstances to overrule *Adkins*—notwithstanding the fact that the grant of *certiorari* did not raise that question and the state did not clearly raise it—but that if there was not a majority for that result then the outcome of the case should be changed and the statute be invalidated. In other words, Roberts' rank ordering of preferences must have been: (1) Uphold the statute by overruling *Adkins* by majority vote. (2) Invalidate the statute by joining the conservatives to hold that *Adkins* was indistinguishable, without reaffirming the continued validity of *Adkins*. (3) Uphold the statute by joining the liberals in forming a four-member plurality to hold that *Adkins* should be overruled, the fifth vote in the majority being that of Hughes, whose opinion would give no basis for believing that



Professor Cushman explains that Justice Pierce Butler (inset) rested the majority opinion in *Morehead v. New York in ex.rel. Tipaldo* (1936) on narrow ground because Justice Roberts insisted on it as price of his vote for overturning the minimum wage law in question. Above is Children's Hospital in Washington, D.C., where women workers were subject to an earlier minimum wage law set by Congress. The Court overturned that law in *Adkins v. Children's Hospital* (1923), before Hughes and Roberts joined the Court. Butler's opinion in *Tipaldo* contained language reaffirming *Adkins*.

Adkins retained any vitality. This ranking, it seems to me, would be bizarre. Option (2) should be either at the top of the heap or at the bottom, not in the middle.

Third Roberts, at the same time, must have been unwilling—either at the Conference or at any subsequent time—to say in effect, "Chief Justice, if you'll go a little further and overrule *Adkins* I'm with you, but failing that I have to vote to hold this statute unconstitutional." Hughes may have been intimidating at Conference, but he did not have a gag. The case was of sufficient importance that, if Roberts believed the proper result was to overrule *Adkins* and failure to do so would be outcome-determinative, it is hard to believe that he would not have articulated that view when the Court was deciding the case.

Fourth, on this account not only must Hughes have failed to pick up on the fact that merely by expressing willingness to overrule *Adkins* he could do it; the three liberals must also have failed to pick up on it, for if they did it seems highly likely, given the stakes at issue, that at least one of them would have raised the matter with Hughes.

Finally, this account is inconsistent with Roberts' own rendition of the affair. Roberts did later recall that at the Conference in which the Court decided to grant the writ of *certiorari* in *Tipaldo* he said that he "saw no reason" to do so "unless the Court were prepared to re-examine and overrule the *Adkins* case."[23] But, as he saw the case, the State did not, in petitioning for certiorari or in briefing or arguing the case, ask that *Adkins* be overruled. The arguments that *Adkins* could be distinguished seemed to him "to be disingenuous and born of timidity," and he did not believe they were sound: "At Conference I so stated, and stated further that *I was for taking the State of New York at its word.* The State had not asked that the *Adkins* case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground."[24] Roberts' memorandum on this matter, I have said elsewhere, is "maddeningly incomplete, inaccurate, and self-serving."[25] But in this case, in part because on this matter his statement works *against* his interest, I am for taking Justice Roberts at his word: Given his perception that New York had not asked the Court to overrule *Adkins*, he did not think that it was appropriate to do so. It was not the absence of a pro-overruling majority that caused him to take this position.

The question remains why New York's failure to ask squarely for overruling would have constrained Roberts, leading him to a result he did not favor. Viewed from a distance of sixty years, Hughes did enunciate some fairly clear distinctions that one might expect to be palatable to a Justice disposed not to follow *Adkins*. But it is not implausible that Roberts was unpersuaded. And perhaps his unwillingness to overrule *Adkins* in the absence of a clear request was also a matter of scruple. But the scruple does not have much self-evident appeal. New York did, after all, ask that the Court *reconsider Adkins* in light of changed circumstances, and while this does not go the full length of asking for an overrule, it goes quite far. If Roberts was confident that *Adkins* should be overruled, one might expect that he would be comfortable in reaching that result notwithstanding the limited nature of New York's argument. And the mystery is compounded by the fact that, when he did vote to overrule *Adkins* in *West Coast Hotel*, he did so despite the fact that the state of Washington, like New York before it, had not asked for that result![26]

I have previously suggested that Roberts' own judicial timidity may have had something to do with his curious behavior. Cushman properly points out that in some notable instances—the *Nebbia* opinion on the left and *Retirement Board v. Alton R.R. Co.*,[27] "in which he bludgeoned the Railroad Retirement Act to death,"[28] on the right—Roberts was anything but timid. And yet at least part of Roberts' behavior in *Tipaldo* seems unmistakably to reflect a sort of timidity: He failed to write separately, despite the fact that the majority opinion clearly adopted a position that he must have found

appalling (and in Cushman's account, he failed even to state his mind clearly in Conference). I continue to regard Roberts' behavior in these cases as mysterious.[29]

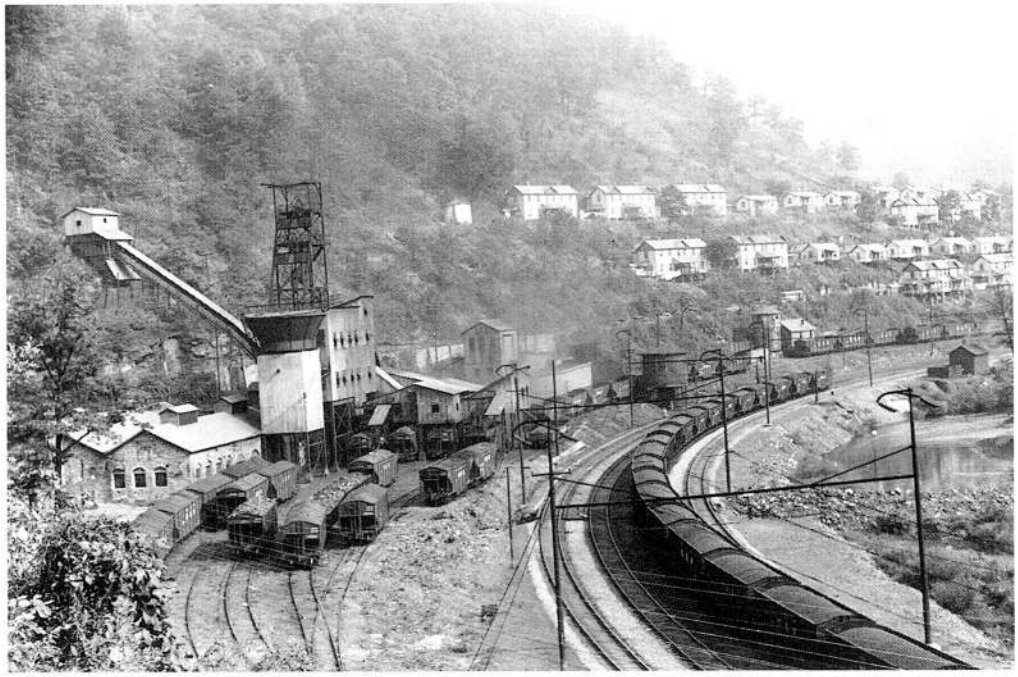
It may be that the firestorm of criticism of *Tipaldo*—from Republicans as well as from Democrats—had some impact on Roberts; I suspect it made him more willing to reach the merits in *West Coast Hotel* than he might have been otherwise. It did not take the election returns of 1936 for Roberts to realize how unpopular *Tipaldo* was; all he had to do was read accounts of how, the week after the decision, the Republican convention and its prospective nominee, Alf Landon, took strong positions in favor of minimum wage legislation and its constitutionality. Moreover, it appears that Roberts signaled his vote in *West Coast Hotel* in October, when he voted to hear the case, rather than summarily reversing the judgment of the Washington Supreme Court upholding the statute or remanding the case for reconsideration in light of *Tipaldo*. And in any event it is now well understood that Roberts cast his vote in *West Coast Hotel* before Roosevelt announced his Court-packing plan.

Like Cushman, therefore, I agree that the supposed "switch" of Roberts on the minimum wage provides no good basis for a political account of the Court's decision-making. Roberts' vote in *West Coast Hotel* is what one would expect from the author of *Nebbia*. His vote in *Tipaldo* is an anomaly that escapes easy explanation. The double-switch explanation that some "political story" advocates favor—that despite *Nebbia* Roberts conscientiously favored the merits of *Adkins* at the time of *Tipaldo* and then switched *back*, like an evasive halfback, in *West Coast Hotel* as a result of political pressure—seems quite implausible.

One of the other key cases on which the "political story" advocates have based their argument is *Jones & Laughlin*, which together with its companion cases not only upheld the Wagner Act—more formally, the National Labor Relations Act—but also seemed to signal a significantly broader view of the commerce power than had previous decisions. To Cushman, however, the Wagner Act cases were nothing but a predictable, though then controversial, application of the prevailing commerce power doctrine of the time, as adjusted in light of *Nebbia*.

The Court had often enunciated the principle that productive industries—principally agriculture, manufacture, and mining—were not part of commerce, and, like intrastate transactions, were subject to state rather than federal control. But, beginning early in the twentieth century, the Court had also held that activities that were in the "stream" or "flow" or "current" of commerce, even if themselves not constituting interstate commerce, could be brought within the federal power. The reach of this latter doctrine, Cushman argues, was confined by the same "affected with a public interest" limitation that shaped substantive due process jurisprudence; Congress could regulate only businesses meeting that description. But when this limitation gave way in the due process context in *Nebbia*, the floodgates were also opened for an expansive application of the "stream of commerce" theory.

Cushman regards this theory as having played a fundamental role in *Jones & Laughlin* and its companion cases.[30] I am not fully persuaded. The Court had rather rigorously adhered to the distinction between commerce and production; as Cushman points out, shortly before the Labor Act decisions, a Senate committee, reporting out the Bituminous Coal Conservation Act of 1937, acknowledged that "[i]n light of the decisions of the Supreme Court, control of production is apparently beyond congressional power." True, some inputs for the businesses involved in the Labor Act decisions had come from out of state, but the manufacturing process had "materially changed" the "character, utility, and value" of those inputs.[31] It would have required a significant expansion of "stream of commerce" theory for the Court to apply it to these cases. The government gave the theory a very subsidiary position in its brief. And Chief Justice Hughes' opinion for the



Justice Roberts voted with the conservatives in *Carter v. Carter Coal Co.*, which invalidated the Bituminous Coal Conservation Act of 1935, but switched his vote the following year in the *Jones & Laughlin* case to support the government. The mining industry was hard hit in the Depression and the ensuing unemployment devastated rural mining communities. Above is a West Virginia coal mine photographed by Marion Post Wolcott in 1938.

majority expressly declined to conclude whether the facts of the *Jones & Laughlin* case fit the "stream of commerce" theory.[32]

Instead, Hughes relied on a broader theory, that Congress has authority to protect interstate commerce against burdens and obstructions from whatever source. The basic theory was well grounded; Hughes' own opinion in the *Shreveport Rate Cases*[33] nearly a quarter-century before, when he was an Associate Justice, was one of its most important bulwarks. It made perfect sense for the theory to be applied to production, and so Hughes' majestic opinion doing just that removed a doctrinal anomaly. Even this application had been foreshadowed by Hughes. "The interests of producers and consumers are interlinked," he had written in *Appalachian Coals, Inc. v. United States*.[34] "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."

Roberts' prior record gave no such indication that he would support the government in *Jones & Laughlin* and its companions. Indeed, his vote with the conservatives the prior year in *Carter v. Carter Coal Co.*,[35] which invalidated the Bituminous Coal Conservation Act of 1935, suggested that he would come out the other way. Cushman attempts to distinguish *Carter*, as did the government, but the distinctions appear rather thin to me. It is notable that Hughes' opinion in *Jones & Laughlin*, which Roberts joined, made no attempt to distinguish *Carter*. Instead, Hughes simply said that "the [*Carter*] Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds";[36] in other words, *Carter*'s commerce power discussion should not be taken seriously because the Court had relied on other grounds as well.

It seems to me that *Jones & Laughlin* does represent some movement on Roberts' part. But that does not provide any strong basis for adopting a political explanation. The opinions of

individual judges, as well as doctrine, evolve. Modern day observers should recognize the phenomenon by considering the career of Justice Harry A. Blackmun—who did not need external political pressure to transform from one of the most conservative to one of the most liberal members of the Court. I do not go quite as far as Cushman does in reading *Nebbia* as forecasting Roberts' vote in *Jones & Laughlin*. But it cannot be altogether surprising that a judge who would reject a categorical doctrine limiting the class of industries of sufficient public interest to be regulated would similarly reject a doctrine refusing to treat production as sufficiently related to commerce to justify national regulation.

What is more, after the political trauma of 1937 was over, neither Hughes nor Roberts retreated from the commerce power ground they took in *Jones & Laughlin*; indeed, they joined the further advances in that power driven by the new members of the Court appointed by Roosevelt. And yet, as Cushman shows in depth, in areas where they had been conservative before, they remained conservative. In short, the evidence does not rebut the premise that these were judges, trying to shape the law and decide cases as they conscientiously thought best.

* * *

To a considerable extent, I have focused in this review on questions on which I disagree with Cushman, or at least where I am not yet persuaded by him. I have done this at least in part because it seems to me that doing so makes a review more interesting and more useful, and perhaps also in part because I am an ornery soul. But I do not want this orientation to cloud my admiration for this book, or for the magnitude of Cushman's achievement. By treating the work product of the Justices seriously, across a very broad sweep of time and substantive areas, he has shown how an integrated body of doctrine exerted an intellectual force of its own. Cushman is not naive; he does not suggest that the way this doctrine evolved was independent of the ideologies and personalities of the Justices who implemented it. On the contrary, he quite properly gives this personal element great prominence. Those who believe that the constitutional transformation of the 1930s must have been the response to political pressure of a political body cannot responsibly ignore his account. And they cannot effectively respond to it unless, like him, they are willing to get their hands very dirty, delving very deeply into the details from which any sound understanding on the grand scale must emerge.

ENDNOTES

[1]Pp. 5-6.

[2]P. 41.

[3]291 U.S. 502 (1934).

[4]P. 7.

[5]Pp. 137-38.

[6]P. 225.

[7]P.5.

[8]P. 25.

[9]At one point, Joseph Robinson, the Senate majority leader, said, "[I]f the President wants to compromise I could get him a couple of extra justices tomorrow." Joseph Alsop & Turner Catledge, **The 168 Days** 152-53 (1938). It was apparently a deal that the leader of the Senate opposition to the plan, Burton K. Wheeler, would have accepted. 2 **The Secret Diary of Harold L. Ickes** 175 (1954).

[10]301 U.S. 1 (1937). This is an argument I have made before, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *U.Pa. L. Rev.* 1891, 1972 (1994), for which Cushman gives me credit.

[11]P. 32.

[12]291 U.S. at 532, 536.

[13]Some observers have contended that *Nebbia* was not so important after all, because some courts gave it a restrictive reading. *See* Laura Kalman, "Law, Politics, and the New Deal(s)," 108 *YALE L.J.* 2165, 2187 (1999); David A. Pepper, "Against Legalism: Rebutting an Anachronistic Account of 1937," 82 *Marq. L. Rev.* 63, 67, 101-02 (1998). Cushman has effectively responded to this argument in "Lost Fidelities," 41 *Wm. & Mary L.Q.* __ (1999) (forthcoming): Most judges, members of Congress, and academics realized the full scope of the *Nebbia* decision.

[14]*Id.* at 537.

[15]300 U.S. 379 (1937).

Prophet or Example: A Review of *The Republic According to John Marshall Harlan*

TONY A. FREYER

In Americans' search for a useable past John Marshall Harlan occupies a unique place. No other member of the Supreme Court authored so many dissents that were precursors of doctrines that decades later became part of the nation's ruling constitutional law. Thus Harlan holds a historic place because he appears to be a true constitutional prophet. This identification began with the *Brown* decision of 1954.

Appointed to the Court by Republican Rutherford B. Hays in 1877, just as the party ended Reconstruction and active support of the freedman's civil rights in the South, Justice Harlan went on to author dissenting opinions that vigorously affirmed a "color-blind" Constitution. His lone dissent in *Plessy v. Ferguson* (1896), rejecting the Court's embrace of the doctrine that separate but equal public facilities did not violate the Fourteenth Amendment's Equal Protection Clause, formally declared the "color-blind" principle. Much of Harlan's opinion tracked closely the logic the Court followed to reverse *Plessy* in *Brown*. From then on, lawyers, judges, and law school students routinely viewed Harlan in prophetic terms. Many scholars have helped to explain Harlan's seemingly prophetic vision, but Linda Przybyszewski offers the most original and persuasive understanding yet.

Harlan maintained the "color-blind" idea in most cases concerning civil rights, but not all. In the *Civil Rights Cases* of 1883, the Court struck down the Civil Rights Act of 1875. On the basis of the Equal Protection Clause, Congress had enacted the law to forbid racial discrimination in "public accommodations" such as hotels, theaters, and restaurants. Only Harlan dissented, asserting vigorously that his colleagues' repudiation of congressional purpose perverted the true meaning of the Equal Protection Clause. Eighty one years later, Title II of

the Civil Rights Act of 1964, which the Court upheld the same year, endorsed the spirit of Harlan's dissent. Here again, Harlan seemed to be ahead of his time.

Yet shortly before his dissent in the *Civil Rights Cases*, Harlan joined a unanimous Court in upholding the conviction of black Alabamian Tony Pace under a law that punished blacks more severely than whites for interracial cohabitation and adultery. Concurring without opinion, Harlan did not attempt to explain why he sanctioned the double standard. Three years after the *Plessy* dissent expressly stated the "color-blind" principle, moreover, Harlan reached his most puzzling result in a race case. The opinion for the Court in *Cumming v. Richmond County School Board* (1899) held that a local Georgia public school board's closing of a black high school, while it kept open the school for whites, did not violate the Fourteenth Amendment's Equal Protection Clause. Harlan noted that the board's policy did not deny blacks educational opportunities because they could attend a private high school that indirectly received some tax support. Even so, the Court's most adamant opponent of "separate but equal" had sanctioned that very doctrine in the field of public education.

During the years that followed, Harlan nonetheless affirmed the spirit of the earlier dissents. When the Court upheld a Kentucky law that declared illegal the policy of racial equality private Berea College had maintained for over forty years, Harlan passionately dissented. Also, not long before his death in 1911, Harlan joined a Court majority that declared illegal the practice of debt peonage in Alabama and other southern states. Initially, when the Court let stand the states' brutal system because it purportedly involved labor contracts, Harlan dissented. As later litigation revealed the evils of the system and the Court changed its position accordingly, Harlan was vindicated.

Outside the field of race, Harlan's opinions engendered similar puzzles. Throughout his judicial career Harlan staunchly defended the principle of equal citizenship for ethnic and racial minorities under the Constitution. In *Elk v. Wilkins* (1884) the Court denied voting rights to a Native American who paid taxes and was otherwise assimilated into white society. Harlan dissented on the grounds that the Constitution established a national citizenship that included all bonafide residents of American states and territories.

Harlan's most publicized affirmation of a more liberal citizenship principle occurred in the *Insular Cases* (1901). The acquisition of the racially diverse Philippines and Puerto Rico as a result of military victory in the Spanish-American War raised a contentious citizenship question: did the Constitution follow the flag? A divided Congress reflected disagreement within both political parties between Imperialists—who denied extending citizenship rights to non-whites—and Anti-Imperialists advocating a more inclusive constitutionalism. A dispute over tariff duties Congress imposed on imported Puerto Rican sugar brought the issue to the Court. American importers argued that they no longer should pay the higher duty imposed on foreign goods because Puerto Rico was now part of the United States. Initially, the Court experienced difficulty in reaching a clear decision; but finally it held that questions concerning the legal status of the acquired territories were best left to Congress. Following this principle, Congress established second-class citizenship for non-white residents of places like the Philippines. Harlan dissented from the Court's final decision in the *Insular Cases*. However, he also dissented in *U.S. v. Wong Kim Ark* (1898), in which the Court held that a child born in America to Chinese nationals could claim United States citizenship.

Harlan's opinions in several other fields of constitutional law suggested further ambiguities. During his years of service as a Justice, the Court applied the Due Process Clauses of the Fifth and Fourteenth Amendments to establish a constitutional boundary between private market conduct and state or federal regulatory authority. The Court's most notorious affirmation of economic liberty guaranteed by

Justice Harlan's dissented in the final decision of the Insular Cases (1901), in which the Court's majority ruled that Congress had authority to decide whether the Constitution applied to newly acquired territories such as Puerto Rico and the Philippines. Congress subsequently established second-class citizenship for non-white residents of its territories. This 1898 cartoon shows Uncle Sam reeling in the Philippines, Hawaii, Cuba, and Puerto Rico.

the Due Process Clause was *Lochner v. New York* (1905), in which a 5-4 majority struck down state imposed sanitary conditions and limits on the number of hours employees might contract to work in bakeries. Contending that the law was a legitimate exercise of the state's police power, Harlan dissented. But three years later, he wrote for a 7-2 majority in *Adair v. U.S.*, holding that a law Congress passed under the Commerce Clause protecting railroad workers from managers who offered employment on the condition that the worker would not join a union—known as "yellow dog" contracts—violated the Fifth Amendment's freedom of contract doctrine.

These contrary outcomes presented a contrast, too, with Harlan's broad construction of power the Commerce Clause granted Congress to prevent anti-competitive business conduct in the Sherman Antitrust Act of 1890. Indeed, Harlan often dissented from the Court's weak antitrust enforcement. He also dissented when the Court overturned the congressional enactment of an income tax intended to sustain a more expansive federal regulatory authority. In addition, Harlan was an isolated proponent of the theory that through the Fourteenth Amendment's Due Process Clause, provisions of the Bill of Rights protected all Americans from the states' arbitrary criminal procedures.

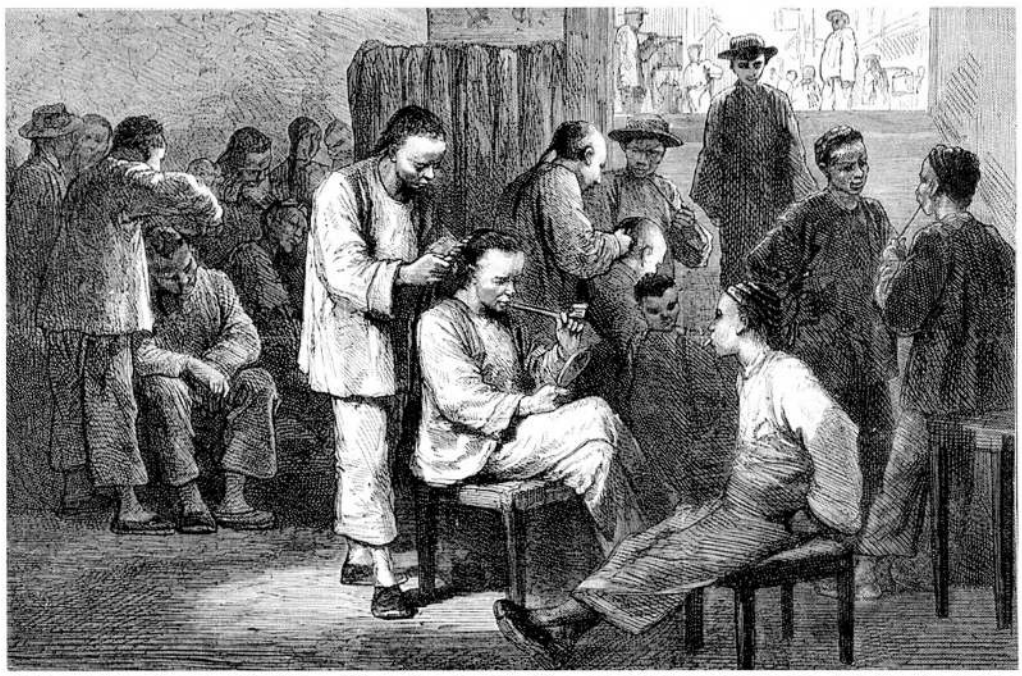
To resolve these puzzles, Przybyszewski explores new sources. Throughout the twentieth century, the primary research materials scholars have used to study Harlan were extensive public records from the time he grew to adulthood in his home state of Kentucky, a fairly large correspondence existing from his later years on the Court, and, of course, approximately 14,000 Court cases he voted in, including 700 opinions he himself delivered, among which were 100 written dissenting opinions and another 100 silent dissents. Despite such a formidable array of material examined by at least eight scholars over many years, Przybyszewski found some surprisingly neglected sources. These include the memoirs of Harlan's wife, the former Malvina Shanklin, written in 1915; the transcripts of student notes taken in constitutional law classes Harlan taught at Columbian Law School during 1897-98; and a list of opinions Harlan prepared late in life to record what he considered to be his most significant contributions to American constitutional jurisprudence.

Przybyszewski employs these materials to place Harlan in a new light. In order to explain

Harlan's singular stand on constitutional issues, other studies begin with the public records describing his rise in mid-nineteenth-century Kentucky to political and professional influence, primarily as a Whig and then, ultimately, a Republican. Przybyszewski retells this story from the point of view presented in Malvina's memoirs. Written four years after Harlan's death and following a happy, fifty-five year marriage, Malvina intended the work to be a tribute to her husband's public life. In Przybyszewski's able hands, however, this personal commentary is used to reconstruct the private motivations shaping Harlan's decisionmaking. A short review cannot do justice to how effectively she blends this indirect evidence with the established narrative of Harlan's career. In this respect hers is a model study. Even so, the public record shows that Harlan grew up in a socially and politically prominent family among house slaves.

A Whig elected to important state and national offices, Harlan's father, James, favored gradual emancipation and actively opposed the slave trade, though there is evidence that he on occasion traded slaves himself. Amid the coincident disintegration of the Whig Party and the Union and the triumph of the Republican Party, the younger Harlan struggled to accommodate his slaveholding birthright with an ardent pro-Union stance. After much political vacillation he finally became a partisan Republican, vigorously defending the freedman's constitutional rights during Reconstruction. Party bosses were sufficiently enamored with Harlan's transition to party loyalist that after he swung Kentucky's delegation to Hayes in the much disputed 1876 election they rewarded him with a seat on the Supreme Court.

The private motivations shaping Harlan's public decisionmaking reflected three traditions: paternalism, religious faith, and nationalism. Around Malvina's memoirs Przybyszewski reconstructs the household Harlan presided over,



Justice Harlan dissented in *U.S. v. Wong Kim Ark* (1898), a rare Supreme Court case resisting Congress's tightening of the Chinese exclusionary laws. He did so on cultural grounds, because he feared that Chinese Americans were so controlled by their traditional culture that they could never conform to the values of the Anglo-Saxon inspired American Constitution. Above are Chinese Americans relaxing at a San Francisco hairdresser's salon in 1879.

describing its patriarch as an enlightened yet traditional male paternalist to whom family members lovingly and with respect subordinated their will. Prior to emancipation, this family included not only Harlan's wife, three sons, and two daughters, but also varying numbers of black slaves. One of these blacks was Robert James Harlan. Robert lived with the Harlan's until 1848, when, with James Harlan's aid, he went to California and made fortune enough to buy his freedom. At the time, it was widely assumed within the local white elite community that James Harlan was Robert's father; it is quite likely that John Marshall knew and accepted this, and the two remained in friendly contact throughout their lives. Once Harlan joined the Court, the Washington household included not only black servants but also a black Court messenger who was also considered part of the family.

Religion reinforced the interdependency between male paternalism, gender, and race. Przybyszewski is especially good at showing how Harlan's liberal Presbyterian faith and his deep experience with church governance and organization motivated public action. Like most white Americans of the time, Harlan and his fellow church members believed that the Anglo-Saxon race was instrumental to achieving a providential destiny God had assigned to the United States. The Civil War was the supreme test of whether the promise of equality embodied in the Declaration of Independence could survive the end of slavery and give the Constitution a new spirit of liberty shaping the future of God's chosen people. Evangelical Presbyterians such as Harlan differed from most American Christians, however, in believing that cultural differences could be a basis for circumscribing citizenship rights somewhat but not much.

Przybyszewski recognizes that throughout the period most Americans shared a consciousness that divided rights into three categories. The term civil rights included a basic personal liberty of movement, minimal guarantees of due process maintained through adversarial judicial proceedings, and fundamental property and contract rights. The right to vote was the most important "political right." Finally, "social rights," though essentially private, acquired a public character linked to state sanction, such as marriage or businesses identified as "public accommodations." Generally, attending the public schools was ranked among these social rights.

Harlan's dissents affirming the "color-blind" Constitution in *Plessy* and the *Civil Rights Cases* altered the tripartite-rights categorization. He rejected the dominant cultural assumption that blacks' access to transportation and public accommodations occupied the social sphere in which government could force racial separation. The blend of household paternalism and religious faith that shaped Harlan's racial consciousness compelled him to elevate blacks' right of access raised in these cases to the level of *civil* rights, bringing them within the Fourteenth Amendment's command of equal treatment. Harlan's lone dissents in both cases were thus emblematic of an American cultural and institutional gulf in which Harlan and his fellow believers were outside the prevailing current.

This new perspective also shows that Harlan's majority opinion in *Cumming* and his dissent in *Berea College* were logically consistent. The latter dissent objected to a state law that ended voluntary interracial association the private, Presbyterian institution had practiced for decades. Harlan could not accept Kentucky's repudiation of Christian-inspired, voluntary affiliation in the private sphere. Nevertheless, Harlan did not seek to protect access to public education as a civil right; he accepted in principle that the state could regulate it as a social right as long as racial separation did not altogether prevent access on a reasonably equal though separate basis. This was pretty much the actual situation in the *Cumming* case: blacks were excluded form the public high school but did receive, at least indirectly, some state support to attend a private high school. Thus black children were treated differently than white chil-

dren but the discrimination did not result in total exclusion. Even so, the paternalistic and religiously defined racial values that Przybyszewski locates in historical context goes far to explain why Harlan could see the respective public-private spheres differently in both cases and arrive at opposite conclusions in each.

The "color-blind" Constitution was contingent, then, on divergent cultural assumptions, which was apparent also in the Court's unanimous decision against the black miscegenist Tony Pace. The Alabama law at issue in that case punished blacks more severely than whites for the same interracial sexual relationships. W.E.B. DuBois, like Harlan's friend and fellow Presbyterian, the black churchman Reverend Francis J. Grimké, viewed this issue of social rights with mixed feelings. Both were all too aware that the proliferation of lynchings that occurred during the turn of the century resulted not, as whites routinely claimed, from blacks raping white women, but rather from consensual interracial cohabitation. The resort to terror, in turn, obscured how often whites suffered no penalty for raping black women.

These grim realities led Grimke, DuBois, and other black leaders to advise against interracial marriage, even as they condemned all illicit sexual relations. At the same time, they opposed in principle laws that either denied altogether interracial marriage or imposed racially discriminatory treatment for the same immoral conduct. In both cases, the underlying assumption was that since white society was not prepared for truly equal social rights—to the point of countenancing violence—it was better to confine the struggle to broadening the constitutional protections afforded civil rights. Thus black leaders would have approved of prosecuting Tony Pace, though not the racial double standard applied to convict him. Harlan's silent concurrence in *Pace* is not inconsistent with this view, especially given that at Berea College the administration allowed interracial dating within the bounds of Christian morality. Przybyszewski leaves the matter open,

Malvina Shanklin Harlan was a considerable influence on her husband, especially when it came to her views opposing slavery. Historian Linda Przybyszewski has made valuable use of the unpublished memoirs Malvina wrote as a tribute to Justice Harlan's public life four years after his death.

content instead with using *Pace* to reveal still more about the contested terrain of American race relations.

Harlan's particular brand of nationalism blended with his religious and paternalistic consciousness to explain the other puzzles. Harlan's dissents in the cases where the Court refused to extend the full guarantees of the Bill of Rights to include Native Americans and residents of the territories acquired from Spain, reflected a belief that fulfilling America's providential destiny required the Anglo-Saxon race to embrace a more inclusive citizenship. Americans possessing an Anglo-Saxon heritage had created the nation and purged from it the stain of slavery. Privileged classes, like the slaveholders who had been willing to destroy the Constitution's promise of liberty, undermined the unity upon which the nation's destiny depended. Americans of Anglo-Saxon descent,

like the Founding Fathers and the victors in the Civil War, were obligated, accordingly, to raise up all true residents of the United States to the same level of participatory republican citizenship. Similarly, diversity in the states' criminal procedures established inequality in what constituted due process of law. The Court perpetuated this unequal condition by refusing to accept the uniformity of rights that would have resulted from Harlan's theory that the Bill of Rights applied to the states through the Fourteenth Amendment's Due Process Clause.

Harlan's dissent in *U.S. v. Wong Kim Ark* (1898) denied full access to republican citizenship, but for cultural reasons. The Court's majority opinion was a rare Chinese victory against the steadily tightening exclusionary laws Congress passed beginning in 1882 to exclude Chinese from American citizenship. In early decisions Harlan voted with the Court majority to resist the congressional policy. Gradually, however, he came to believe that Chinese culture and race so controlled the peoples' consciousness that they could never voluntarily embrace the virtues of the Anglo-Saxon inspired American Constitution. Apparently influencing Harlan's conversion was the fact that under Chinese law the penalty imposed upon those who changed their citizenship to a foreign nationality was decapitation. Ultimately, Harlan and the rest of the Court formed a majority to sustain the exclusionary laws. Przybyszewski thus locates Harlan within a cultural struggle over limiting constitutional guarantees of equal citizenship that did much to define the character of late-nineteenth and early-twentieth century American nationalism.

Cultural imperatives reflected in Harlan's consciousness also shaped his economic nationalism. Przybyszewski uses the list of the cases he hoped to be remembered for to establish that Harlan believed that American values and interests were threatened by corporate capitalism and the rise of big business. Like many middle-class people of the time, including the Populists and such leading Progressives as Louis D. Brandeis, Harlan equated the giant corporation's burgeoning "money getting" (p. 147) ethos and market dominance with slavery. This new slavery, just as much as its predecessor that brought upon the Civil War, sought to destroy the promise of free and equal labor guaranteed in the Declaration of Independence, Constitution, and Bill of Rights. These values provide the context for Przybyszewki's analysis of what Harlan believed was a consistent defense of free labor. Her interpretation explains why he considered so important his dissents in the *Income Tax*, antitrust, and *Lochner* cases. Harlan hoped to alert his fellow citizens that only the federal and state governments possessed the authority and resources necessary to meet the challenge that corporate capitalism posed to the promise of American liberty.

Moreover, these same cultural assumptions motivated Harlan's seemingly prorailroad and antilabor decisions. Accordingly, he refused to allow the federal government to interfere with yellow dog contracts because the law deprived workers of the liberty to sell their labor much like slaveholders had denied that right to slaves. Free labor was not a commodity that Congress might regulate under the Commerce Clause. As Harlan's *Lochner* dissent asserted, however, the states could employ the police power to ensure fair wages and a sanitary workplace. Similarly, state legislatures passed laws that discriminated against interstate competition, which in turn depended upon fair railroad rates; in much the same way, slaveholders had undercut the national expansion of free labor. Thus in order to prevent either state legislatures or the railroads from exploiting free labor's opportunity it was up to the federal courts to uniformly apply the Fourteenth Amendment's Due Process Clause to ensure that railroad rates were sufficient to guarantee a fair return on investment. Only the federal judiciary led by the Supreme Court had the constitutional independence to defend individual liberty from the new slavery that corporate capitalism represented.

Przybyszewski concludes that Harlan deserves better than to be remembered simply as

a prophet. He could not, of course, transcend his times; but, within those very limits, he did better than other men with the same power to battle on behalf of those outside the American dream. In our own time, when culture continues to significantly shape racial and economic conflict, that is an example worthy of emulation.

Judicial Bookshelf

D. GRIER STEPHENSON, JR.

The close of a century makes introspection the order of the day. Pundits reflect on characteristics and events that have distinguished this century from previous ones and that may distinguish it from those that follow. Political institutions are hardly immune to similar analysis. Whether one's interest is the presidency, political parties, or the judiciary, there seems to be no escape from the taxonomy of eons, epochs, and eras.

At least one recent article has reopened discussion of the Supreme Court and the succession of constitutional eras.[1] Building on the work of the late Professor Robert McCloskey,[2] the authors affirm the three major constitutional periods that he had delineated, they define the necessary and enabling conditions that bring one era to a close and bring on another, and they conclude that, despite the political turbulence of the past thirty-five years, the third constitutional era endures.

The first era was dominated by conflicts between national and state power and was terminated by the Civil War and by structural changes wrought by the three constitutional amendments that Northern victory made possible. The second witnessed the evolution of the Court into a defender of property rights against government power. The Justices transformed themselves into arbiters of acceptable public policy as state and national legislators coped for the first time with a truly national economy and huge concentrations of private power. Dating from the Court's reluctant acceptance of the New Deal in 1937, the third (and current) era has been marked both by rapid judicial abandonment and destruction of the property rights fortress and by on-going construction of a new fortress designed for the defense of mainly nonproprietarian rights. Even though there has been disagreement over

the precise shape of, and furnishings for, this new stronghold, the fortress stands.

Moreover, unlike the transition from the first to the second eras, the movement from the second to the third eras occurred with no change in the text of the Constitution. A constitutional revolution transpired without either war or constitutional amendment, soon making it unmistakably clear that the Constitution was not a self-interpreting document, that constitutional interpretation meant constitutional choice, and that interpretation could not be completely isolated from the values of the interpreter. Some scholars have even gone so far to suggest that the hallmark of the third constitutional era is "political jurisprudence."[3]

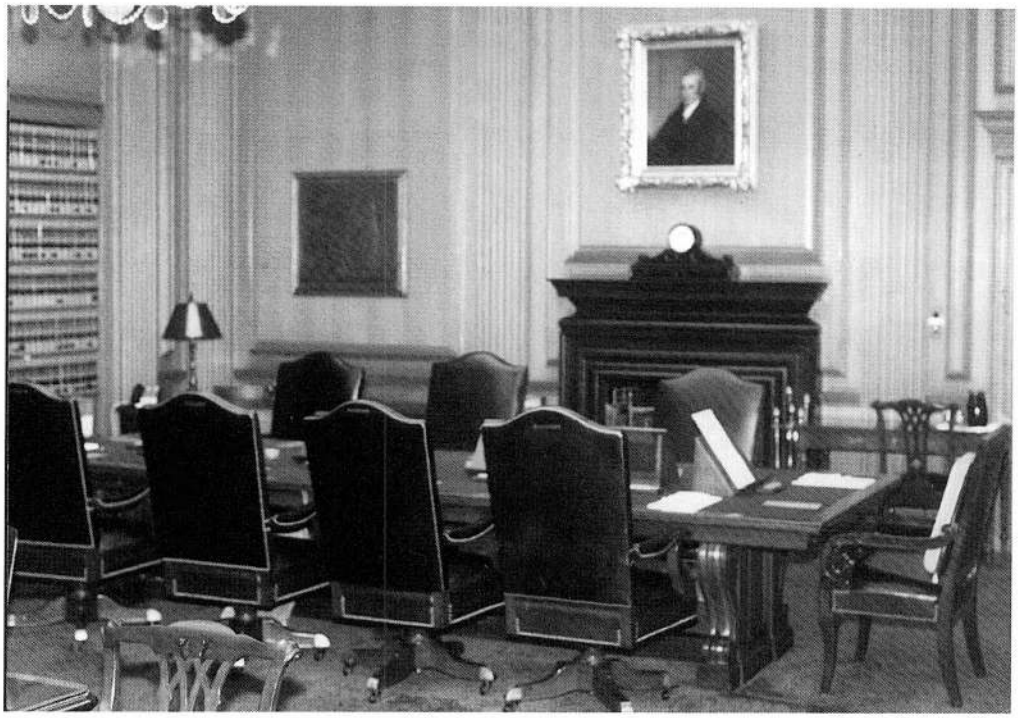
In attempting to explain judicial decisions, the debate has become not whether one's attitudes influence one's votes, but how much they do. The older approach—"institutional"—long assigned a major influence to legal principles, role perception, and political context. A newer school—"attitudinal"—has emphasized the Justices' values, often to the exclusion of practically everything else. The effect of the latter on the way scholars think about judicial decisions has been enormous. Today, no serious scholarship in law, history, or political science discounts attitudes. The constitutional revolution of 1937 made the importance of judicial values unmistakable, convincing any hold-outs in the professorate of what presidents and senators perhaps have known all along. In deciding cases, judges shape public policy "not as a matter of choice, but of function."[4]

It is probably significant that all members of the current Court came of age in the legal profession after the contours of the third era had become apparent. And of the present Court's membership, three once clerked for Justices who were closely identified with one or both themes that define the third era.[5] Certainly the extent of this new constitutional realism was well illustrated by Professor Wechsler's famous attempt in 1959 to hold the current in check or at least to channel its flow.[6] The role of ideology in constitutional change is now not only acknowledged, but apparently legitimate.

Yet, the adequacy of the attitudinal model has been questioned in recent years by what today is called the "new institutionalism." Building on studies of courts and judicial decisions that dominated the literature until the 1950s, when attitudinally oriented scholars redefined the mainstream, new institutionalism arises from an uneasiness. The attitudinal model's emphasis on votes as a function of values,[7] while important, may fail to tell the whole story by leaving out the influence of other considerations. From the perspective of a new institutionalist, attitudinalists start with an unstated premise that votes have no basis other than the Justices' policy preferences. For the former, the fact that a Justice consistently votes to support a certain policy position does not prove that the Justice does so *because of* personal policy preferences. The concern is that correlation is mistaken for causation.

For new institutionalists, asking why a case came down as it did becomes particularly interesting in light of data revealing that Justices frequently switch their votes, alter their written opinions to accommodate colleagues, and join the opinions of others even though they may not embody their own precise preferences.[8] New institutionalism thus searches for causal factors other than a Justice's values or world view. An unintended (and happy) consequence is that the new institutionalists make study of the rich contours of Supreme Court and other courts not only intellectually exciting but academically fashionable again. If judicial decisions are nothing more than the product of personal values, then there is little reason to explore the remaining, but inconsequential, intricacies of the judicial process. If only values matter, anything else is of interest only to courtroom aficionados.

The breadth of interests of those who call themselves new institutionalists is nicely illustrated by **Supreme Court Decision-Making**, a valuable collection of fourteen essays edited by Cornell Clayton and Howard Gillman.[9] The



Lee Epstein and Jack Knight shed light on the decision-making process that takes place in the Conference Room (pictured) in their new book *The Choices Justices Make*. The authors rely primarily on two samples of cases: the 157 cases that were orally argued during the 1983 Term and 125 landmark cases decided during the chief justiceship of Warren Burger. Essential to their investigation were the case files of Justices William J. Brennan and Thurgood Marshall, including Justice Brennan's Conference notes and docket books. They also reviewed the case files, docket books, and Conference notes kept by Justice Lewis J. Powell after his arrival at the Court in January 1972.

editors' own introductory essay explains that the attitudinal model falls short because the institutional setting in which the Court decides cases affects the Justices' "sense of what can be done...." More important, "institutions not only structure one's ability to act on a set of beliefs; they are also a source of distinctive political purposes, goals, and preferences."[10] Perhaps this was behind James Madison's reference in *Federalist* No. 51 to "the interest of the man [being] connected with the constitutional rights of the place." The institution not only sets the context within which decisions are made but inserts a new set of values alongside those with which a newly appointed Justice arrives. "We can only find out whether a set of distinctive norms and traditions affects a judge's behavior if we are more attentive to the habits of thought that constitute the Court as an institution."[11]

Three of the essays are broadly theoretical, as is the introduction. Four examine the relationship between legal norms and the Court's own decision-making process, and four others explore extra-judicial influences on decisionmaking within the Court. Topics range from the "... Rise of Individual Opinions" to "Recruitment and the Motivations of Supreme Court Justices" and "... The Informational Role of *Amici Curiae*." Two focus on state supreme courts exclusively. Together, they reflect the eclectic nature of new institutionalism, affirming the editors' assessment "that there are nearly as many ways to think about institutions as there are practitioners of institutional analyses."[12]

One genre of new institutionalism assumes a rational-choice outlook on the most advantageous ways in which Justices might achieve their goals within the contexts of (1) small-group

decisionmaking, (2) procedures for agenda setting and deciding cases, and (3) the various institutions and constituencies (both public and private) with which the Court deals. This strategic perspective began to compete seriously for attention thirty-five years ago with publication of Walter Murphy's **Elements of Judicial Strategy**.[13] The problem Murphy posed was "how, under the limitations which the American legal and political systems impose, a Justice can legitimately act in order to further his policy objectives."[14] Relying on manuscript collections as well as published sources, Murphy detailed a variety of ways in which some Justices had actually, or could have, done precisely that. Even though no member of the Court had probably "taken complete advantage of the strategies and tactics outlined here, ... the facts remain that these strategic and tactical courses are open, that many if not most Justices could increase their policy influence by conscious efforts along these lines, and that until we know better how a Justice can extend his policy influence it is impossible with any degree of precision to evaluate or criticize the influence he did exert...."[15]

Elements was thus more than an absorbing book about the Court: it was a challenge. Do Justices typically behave in the manner that Murphy suggested they might, or does such behavior occur only occasionally, as in high-profile or landmark cases? The challenge was formidable because of its breadth. Whereas the attitudinal model focuses on outcomes (votes), the strategic perspective embraces the whole decision-making process—from the decision whether to grant certiorari to the fashioning and publication of opinions.

The Choices Justices Make by Lee Epstein and Jack Knight[16] accepts the challenge that **Elements** advanced. Acknowledging the strong influence of a Justice's values in decisionmaking, the authors reject the view that members of the Court are partisan combatants or "unconstrained political advocates" who make "whatever choices they want" because of their life tenure.[17] To determine what considerations other than personal predilections are at work, Epstein and Knight rely largely on two samples of cases: the 157 cases that were orally argued during the 1983 Term and 125 landmark cases decided during the chief justiceship of Warren Burger (that is, through the other sixteen Terms, from 1969 through 1985).

Essential to their investigation were the case files of Justices William J. Brennan and Thurgood Marshall, who served during the entire period; Justice Brennan's Conference notes and docket books; and the case files, docket books, and Conference notes kept by Justice Lewis J. Powell after his arrival at the Court in January 1972. These sources apparently proved valuable in contrast to materials with which Murphy labored because of adjustments made in internal record-keeping procedures at the Court after 1969. Before then, for example, the Justices "did not regularly note where they had made changes on their opinion drafts; now they almost always do."[18] (Nonetheless, even the value of these collections points to inherent limitations. Drawing primarily from the papers of three Justices highlights the risk of incompleteness; furthermore, any written account may miss insights from exchanges that occur face to face outside the Conference Room or on the telephone, or now by email.)

Choices supports the proposition that, at least with respect to the cases that were studied, there is more to judicial decisionmaking than voting one's ideology or world view. Justices "are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."[19] As developed by Epstein and Knight, this strategic account (that is akin to positive political theory, or PPT, as taught in a business school context) has three principal components.

The first is attainment of goals, with the major (but not exclusive) goal being "to see the law reflect their preferred policy positions." Institutional legitimacy would be an additional

spised, the Supreme Court stands out. Nearly every step in the way the Court conducts its business sets the judicial function apart from the legislative and executive functions. The Justices seem not just different but aloof, even mysterious. One journalist has called the Court "at once one of the most open and one of the least accessible of the major institutions of government."[34] It is open because the public has access to nearly all legal documents that are filed and to the oral argument of cases. Yet the decisions themselves emerge from a deliberative process cloaked in secrecy. Leaks prior to official announcements of decisions are so infrequent that they make headlines when they occur. Kiss-and-tell books by Washington insiders almost never spark debates about propriety *unless* they deal with the Court.[35] "The very idea of cooking up opinions in conclave, begets suspicions that something passes which fears the public ear," Thomas Jefferson protested long ago to Justice William Johnson.[36] The Court's penchant for secrecy may even occasionally fuel the "paranoid style in American politics," which "evokes the qualities of heated exaggeration, suspiciousness, and conspiratorial fantasy...."[37] And the Supreme Court's aversion to televised, broadcasted, or photographed proceedings makes even its most public activity seem distant. "The only groups who don't appear on television," observes Court TV's Fred Graham, "are the Supreme Court and the Mafia."[38]

Once decisions come down, the Court speaks almost exclusively through its opinions, and it often speaks in a language that many people do not understand. Moreover, cases frequently involve exceedingly complex issues that lend themselves more to lengthy explanation in a newspaper rather than time frames of-

Should television cameras be allowed to film oral argument in the Courtroom? In their book *Television News and the Supreme Court*, Elliot Slotnick and Jennifer Segal argue that limited coverage might improve the quality and increase the quantity of television's coverage of the Supreme Court.

ten no more than thirty seconds long. In television, "[i]t is not all the news that is fit to print... [It is] all the news that fits, we air."[39] In a capital where eager "sources" far outnumber reporters, Justices never hold press conferences to answer questions about their decisions and only rarely grant interviews. Instances in which individual Justices have personally defended their handiwork in public are just as uncommon. And when they do, they are likely to do so in very general terms. In contrast to nearby offices and agencies, from the White House to Congress and into the bureaucracy, the public relations bureau at the Supreme Court (accurately named the Public Information Office) is little more than a conduit for distribution of decisions, opinions (as they are announced in the courtroom), orders, and other raw information. It offers no interpretation of decisions, attempts no "spin" on events, corrects no "misstatements" a Justice may have made, engages in no defense of the institution or what it does, and points out no errors or distortions in comments politicians and journalists make about the Court. Today, as in Chief Justice John Marshall's time, the Court relies on the intelligence and good faith of others in conveying its work to the people.

But, Slotnick and Segal believe, it does so in a manner that does not fit well with the tools and with the visually and commercially driven priorities of contemporary "infotainment" television. "[N]ews values have been trumped by production values in the business."[40] As a result, stories about law are likely to be substantively thin and to be transformed into human dramas, "thereby allowing journalists to utilize sources, ... obtain dramatic footage, and, more generally, report the cases in a manner that much resemble[s] other politically oriented journalism."[41] Second, "there has been a precipitous decline in newscast attention to and coverage of the Court."[42] Fewer than one in four decisions during the 1989 Term were featured on network newscasts, a ratio that fell to less than one in five in the 1994 Term. Partly because of a smaller docket, "fewer than half as many stories were broadcast about the Court in the 1994 Term when compared to 1989."[43] Third, cases involving disputes over civil liberties and civil rights were more likely than others to win air time, especially if there was broad participation by amici. "[G]roup involvement ... does appear to serve as a cue for reporters suggestive of the policy importance of and public interest in the Court's resolution of the litigation."[44] Fourth, while the authors found examples of professional and sophisticated journalism, accuracy was often a casualty, especially regarding decisions not to hear a case. In twenty-nine stories focusing on denials of certiorari, only seven "were accurately and unambiguously characterized [as] the Court's refusal to hear the case."[45] In nearly half, the actions were presented as rulings on the merits.

Without question these are intriguing findings. They are significant too if they accurately depict ongoing television coverage of the Court. Certainly there is more to television news than the evening network newscasts, and the advent of cable channels (such as CNN, Fox News, and MS-NBC) has multiplied the opportunities for airing Supreme Court news. Indeed, the broadcast networks compete not merely among themselves for viewers but with these other video outlets, as reflected in the declining total network share for the evening news shows. For example, in the spring of 1999, for the first time more people watched the first half-hour of the "Today" program on NBC than the CBS evening news.[46]

Strongly believing that there should be both more and better television news reporting on the Court, the authors direct their suggestions for change mainly to the Supreme Court. "It appears that a majority of the justices" believe that the "'myth' of the Court as an institution outside the realm of politics is best sustained by maintaining the Court's relative invisibility." Accordingly, "there may be a good deal to be gained for the Court and its Justices in eschewing the myth and letting the public in to see the Court and its work for ex-

Chief Justice Burger felt so strongly about barring television cameras from the Courtroom that once when he encountered camera crewmen in an elevator at the Court he "lowered his shoulder, crashing into them with a soccer shot." So recounts Barrett McGurn in his book, *America's Court,* which is filled with colorful vignettes from the Burger Court era when he served as the Supreme Court's Public Information Officer.

actly what it is."[47] Realizing that change must come slowly, they would first have the Justices make "themselves available to the press more routinely to illuminate the processes through which the Court decides cases."[48] Only later would come "opening the Court's doors to coverage by television cameras." Slotnick and Segal's is a "build-it-and-they-will-come" approach. A video-friendly Marble Palace would yield "both greater breadth and depth of coverage as the institution attained added luster as a potential news source."[49]

That may be, but they do not explain why or how that would come about. Of course there might be something like a C-SPAN 3 that would telecast the Supreme Court's public sessions and perhaps those of other federal courts. One can imagine twenty minutes of oral argument on the PBS NewsHour. Yet for the traditional newscasts—the ones that attract a larger and more diverse audience—one wonders what would cause them to abandon snippets and sound-bites, at least once the novelty of cameras at the Court had worn off.

Besides, many major decisions do not lend themselves easily to television's preference for things visual. To pick only one potentially far-reaching decision, *Alden v. Maine*[50] (a federalism case) received lengthy attention in the *New York Times*[51] and on National Public Radio and the NewsHour after it came down on June 23, 1999. Yet transcripts reveal that it rated not so much as a mention on the major network evening newscasts that week. Would a courtroom camera alone have enabled federalism to displace a visually gripping story? One would also want to investigate closely the quantity and quality of television coverage of the executive and legislative branches before and after technology made feeds from the White House lawn so easy and after the House and Senate approved televised coverage of their proceedings. Such considerations merit attention because, once television becomes ensconced at the Supreme Court, there will be no going back, regardless of the effects.

Finally, one wonders how the debate over access and openness will be affected by the Internet and the World Wide Web, terms that do not appear in the index of the book. Access to the Court—decisions, opinions, orders, briefs—is now easier, faster, and more direct than ever; even sound recordings of oral arguments are available over the Internet after the end of a Term. With a computer, modem, and Internet connection, someone even in remote places on the planet may follow the Court's work in nearly real time. That was an advantage enjoyed only a few years ago exclusively by those who could be present in the Supreme Court building on decision days. The Internet is an entirely new medium, one that the Court has hardly shunned.

Television News and the Supreme Court

appeared soon after Barrett McGurn's **America's Court**.[52] The timing is convenient. Each should be read in light of the other. A bureau chief for the *Herald Tribune* (at both its New York and international entities) and later a spokesperson at the Department of State, the author—a "fallen away newsman," as Chief Justice Warren Burger called him[53]—was Public Information Officer at the Supreme Court from 1973 until 1982. **America's Court** is thus a member of a club with a small membership—books about the Supreme Court written by members of the Court's staff. One recalls, for example, the volume by Charles Henry Butler, who was Reporter of Decisions from 1902 until 1916, or the collection of essays co-edited by Mark W. Cannon, who in 1972 became the first Administrative Assistant to the Chief Justice.[54]

America's Court is really three books in one. First is the perspective offered by a person who literally occupied the point at which the interests of the Court and those of the news media intersect: "each acutely aware of the other, and each fated never to find full peace with the other." If the Justices seem to the press to be "locked away behind marble walls, privately generating decisions affecting the course of national life," the media seemed for the Justices to be a "puzzling mixed array, some thoughtful and serious, others superficial and sensational, ... too willing to make headlines where no facts justified them...." In the Justices' view, what the public and the legal community need to know is in the published decisions and opinions. "In a Justice's ideal world, media coverage would be left at that, with news bulletins about decisions delayed until reporters could give them at least a sliver of the study that went into their creation in months of work behind the ... scenes."[55] Nothing in the book suggests that these perceptions are likely to change in the foreseeable future. "There was no question but that television in the Courtroom could have some informational value, and even an entertainment potential but, so far as the latter went, the Justices were content to let TV seek it elsewhere."[56]

Certainly Chief Justice Warren Burger, who hired McGurn, had an unflattering view of television that reflected that of his predecessor Earl Warren. The reader learns that the latter counseled the former at a luncheon in 1969 never to allow cameras in the midst of Court proceedings. Warren "had never admitted the cameras, and he felt strongly that it would be a sad day when they did get in, destroying, in his view, an important aspect of Court practice." But Warren was preaching to the choir. Only a few days before, Burger apparently told Senator James Eastland, chair of the Senate's Judiciary Committee, that he would not appear before the committee if television cameras "covered it." The senator assured him that the problem would not arise because, at that time at least, the committee "never permitted cameras."[57] Some years afterwards, when a television camera crew squeezed into an already crowded elevator car with the camera-shy Chief Justice, "the crew complained later that the nation's heavyset top jurist, a multiletter athlete in his school days, lowered his shoulder, crashing into them with a soccer shot."[58]

America's Court is also an anecdotally rich memoir. McGurn's service at the Court began just as the Watergate Tapes Case was taking shape and ended not long after Sandra Day O'Connor's arrival as the first woman Justice. These were event-filled years. McGurn's account of the progress of the Tapes Case[59] at the Court insists that the opinion was almost entirely Burger's handiwork, "with the exception of manicuring."[60]

There are charming vignettes of incidents and situations likely to be best remembered by the Public Information Officer and probably not widely known even by those who follow the Court closely. For instance, he recounts the careful planning necessary to balance the Court's aversion to cameras and the White House's understandable desire for maximum television coverage of Justice O'Connor's installation. The plan called for the White House staff to arrange for erection of a "mini-grandstand in one of the open-air courtyards on the

building's second floor" where still and television cameras and journalists could gather for a "photo opportunity" with Justice O'Connor, the Chief Justice, and President Reagan. The ground rules forbade questions from reporters, but a rope kept them fifteen feet from the principals in case "someone like the loud and aggressive Sam Donaldson ... ignored the request and bellowed some inquiry.... If the Chief Executive liked the query, he could reply. If he did not, he 'would not hear.'"[61]

Third, the volume is a valuable source of insight into Burger himself. McGurn takes issue with the pillorying of Burger and the pettiness that color **The Brethren**[62]—"the vituperation heaped on the head of the government's third branch, the privacy-minded Chief Justice who may have been from the beginning the designated victim. He appeared as a conceited fool."[63] Instead a picture emerges of a talented and dedicated public servant who earned the author's admiration and respect. Burger took seriously his leadership of the Court, his responsibilities for the federal judicial system, his prodding of the organized bar, and his chancellorship of the Smithsonian Institution. While few would probably say that Burger was the intellectual or doctrinal leader of the Supreme Court, McGurn makes a convincing case that Burger was very much its administrative or managerial leader. If the author is correct, then the institution was indeed Burger's Court. At the least, **America's Court** will be useful reading for anyone assessing his tenure as Chief.[64]

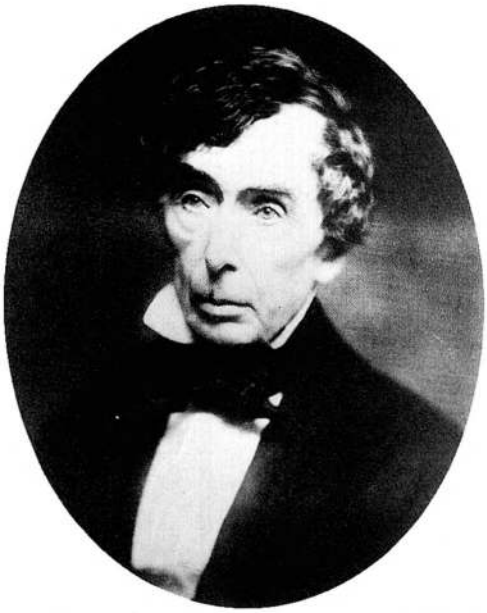
Additional grist for new institutionalists in search of forces and factors at play in the decision-making process can be found in William H. Rehnquist's **All the Laws But One**.[65] A study of the vitality of civil liberties in wartime, the book explores legal conflicts during the War Between the States and during World Wars I and II, although the bulk of the volume (170 of the 225 pages of text) deals specifically with the Civil War and its immediate aftermath. The writing is crisp, direct, and riveting. The sixteenth Chief Justice of the United States knows how to tell a good story—or, more accurately, stories. There are eleven separate adventures in the book's eighteen chapters. If a scholarly volume can qualify as seaside reading, this is it.

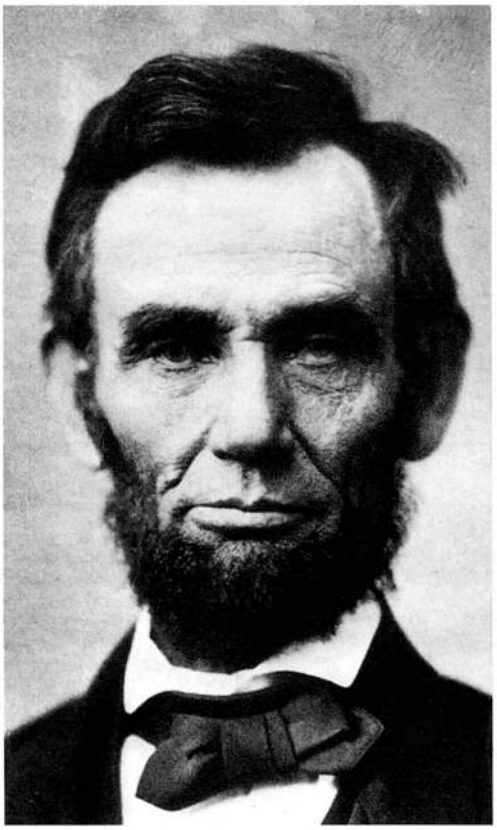
The title comes from President Abraham Lincoln's message to a special session of Congress on July 4, 1861, in which Lincoln indirectly replied to Chief Justice Roger B. Taney's opinion in Ex parte *Merryman*. Declaring invalid the President's suspension of the writ of habeas corpus (after the marshal had been unable to serve the writ at Fort McHenry) and insisting that someone like Merryman be tried in a civil, not military court, Taney, sitting as circuit judge, reminded "that high officer, in the fulfillment of his constitutional obligation, to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[66] "Are all the laws, *but one*," Lincoln asked rhetorically in his message, "to go unexecuted, and the government itself go to pieces, lest that one be violated?"[67] "Here was Lincoln the advocate at his very best," writes Rehnquist. "There was no reference to the difficult constitutional issue but only the posing of a starkly simple question that seemed to admit of but one answer."[68]

The Taney-Lincoln exchange pointed to a recurring dilemma that almost every democracy faces at some time: how and to what extent may civil liberties be curtailed when the nation is at war. If the power to wage war is the power to wage war successfully, the regime of liberty that military action is designed to preserve may be sacrificed in pursuit of victory. That is the danger posed by the title of the last chapter: "*Inter Arma Silent Leges*" (in time of war the laws are silent). The danger will be even more costly if a restoration of liberties after the conflict falls short of what prevailed *ante bellum*.

Rehnquist draws several conclusions from the American experience with this dilemma. First, "government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war,"[69] it being "neither desir-

able nor ... remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime."[70] Second, the record demonstrates "marked differences between the government's conduct during the Civil War, during World War I, and during World War II." Chief among them is that Lincoln "relied on presidential authority or on the orders of military commanders to curtail civil liberties, while in the twentieth-century wars, the executive branch resorted much more to laws passed by Congress."[71] The administration of Woodrow Wilson may have had "the same instinctive desire to suppress harsh criticism of the war effort as had the Lincoln administration," but Wilson relied more "on laws passed by Congress than on executive fiat."[72] From the perspective of the one who has been silenced, there may be little difference. But from the perspective of constitutional government, Rehnquist observes that a President "may do many things in carrying out a congressional directive that he may not be able to do on his own." And, as happened to Wilson's request for wartime censorship authority, Congress may say no. Still, "[q]uite apart from the added authority that the law itself may give the President in time of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond."[73] As Attorney General Francis Biddle chillingly commented about President Franklin D. Roosevelt's support of the internment of Issei and Nisei during World War II, "Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President."[74]





The title of William H. Rehnquist's new work, *All the Laws But One,* refers to Abraham Lincoln's response to the opinion by Chief Justice Roger B. Taney (above), sitting as Circuit Judge in Ex parte *Merryman,* which declared invalid the President's directive to suspend habeas corpus during wartime. "Are all the laws, *but one*," Lincoln (below) asked rhetorically, "to go unexecuted, and the government itself go to pieces, lest that one be violated?" The dilemma of suspending civil liberties in time of war is examined in other contexts as well in this engaging new work.

Finally, courts have a minor, if important, role to play. Indeed, the federal judiciary was more actively engaged in the two world wars than during the Civil War. (One suspects that, at least until after Chief Justice Taney's death

in 1864, the Supreme Court was still laboring under the debilitating cloud of *Dred Scott*.[75]) Judicial decisions "made after hostilities have ceased ... [are] more likely to favor civil liberty than if made while hostilities continue." Even in the latter situation, courts have tended increasingly to pay more careful attention to the government's claims regarding the need to curtail liberty. The result is that the laws "will thus not be silent in time of war, but they will speak with a somewhat different voice."[76]

If the book is important for its subject, it is important as well because of its author. No other person has written books—and this is Rehnquist's third—specifically about the Court or its Justices while holding the nation's highest judicial office. John Marshall's biography of George Washington explained federalist principles of government.[77] William Howard Taft authored a book about the president and published a volume of essays on government before President Harding named him to the Court.[78] As Chief, Taft expounded in at least one book on the nature of American constitutional government.[79] The lectures of Charles Evans Hughes on the Court remain a classic more than seven decades after publication, yet the book appeared twelve years after his resignation as Associate Justice and two years before his appointment as Chief.[80] Chief Justice Harlan Fiske Stone left an abundance of papers to scholars, but no book. Chief Justice Earl Warren's short volume on democratic government appeared after his retirement, as did his memoirs.[81] Chief Justice Burger made a large number of addresses (many of them published as articles), but authored no book on the Court in general. As with Rehnquist's first book, **The Supreme Court; How It Was, How It Is** (1987) and his second, **Grand Inquests** (1992), **All the Laws But One** is of instant interest because of its author. Yet one hopes that its subject remains of historical interest only. **Grand Inquests** chronicled in part Chief Justice Salmon Chase's hand in the Senate's trial of President Andrew Johnson in 1868. Seven years after its publication, the author found his life imitating his scholarship.

The essence of the new institutionalism seems to be that—along with ideology—rules, procedures, conventions, circumstances, and context are part of the mix out of which judicial decisions come. That position seems amply validated by the Rehnquist volume and each of the others surveyed here.

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THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

CLAYTON, CORNELL W., AND HOWARD GILLMAN. **Supreme Court Decision-Making: New Institutionalist Approaches** (Chicago: University of Chicago Press, 1999). Pp. xiv, 344. ISBN: 0-226-10954-2 (cloth); 0-226-10955-0 (paper).

EPSTEIN, LEE, AND JACK KNIGHT. **The Choices Justices Make** (Washington, DC: CQ Press, 1998). Pp. xviii, 200. ISBN: 1-56802-226-3 (paper).

MCGURN, BARRETT. **America's Court** (Golden, CO: Fulcrum Publishing, 1997). Pp. Xi, 194. ISBN: 1-55591-263-X

REHNQUIST, WILLIAM H. **All the Laws But One: Civil Liberties in Wartime** (New York: Alfred A. Knopf, 1998). Pp. xiii, 254. ISBN: 0-679-44661-3 (cloth); 0-679-76732-0 (paper).

SLOTNICK, ELLIOT E., AND JENNIFER A. SEGAL. **Television News and the Supreme Court: All the News That's Fit to Air?** (New York: Cambridge University Press, 1998). Pp. xii, 264. ISBN: 0-521-57264-9 (cloth); 0-521-57616-4 (paper).

ENDNOTES

[1]Stephen C. Halpern and Charles M. Lamb, "The Supreme Court and New Constitutional Eras," 64 *Brooklyn Law Review* 1183 (1998).

[2]Robert G. McCloskey, **The American Supreme Court** (1960). A second edition (1994) was prepared by Sanford Levinson.

[3]Martin Shapiro, **Law and Politics in the Supreme Court** (1964), p. 15.

[4]Jack W. Peltason, **Federal Courts in the Political Process** (1955), p. 3.

[5]Chief Justice Rehnquist clerked for Justice Robert H. Jackson, Justice John Paul Stevens clerked for Justice Wiley Rutledge, and Justice Stephen Breyer clerked for Justice Arthur Goldberg.

[6]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* 1 (1959). This effort was promptly challenged by Arthur S. Miller and Ronald F. Howell in "The Myth of Neutrality in Constitutional Adjudication," 27 *University of Chicago Law Review* 661 (1960), who tried to demonstrate the role of value choice and bias in judicial decisionmaking.

[7]For example, "Rehnquist votes the way he does because he is extremely conservative. Marshall voted the way he did because he [was] extremely liberal." Neither votes nor voted a particular way because of the law. Jeffrey A. Segal and Harold J. Spaeth, **The Supreme Court and the Attitudinal Model** (1993), p. 65.

[8]Forrest Maltzman and Paul J. Wahlbeck, "Strategic Policy Considerations and Vote Fluidity on the Burger Court," 90 *American Political Science Review* 581 (1996).

[9]Cornell W. Clayton and Howard Gillman, eds., **Supreme Court Decision-Making** (1999).

[10]*Id.*, pp. 4-5.

[11]*Id.*, p. 5.

[12]*Id.*, p. 6.

[13]Walter F. Murphy, **Elements of Judicial Strategy** (1964). This is not to suggest that **Elements** was the first such attempt. *See*, for example, Glendon A. Schubert, "The Study of Judicial Decision-Making as An Aspect of Political Behavior," 52 *American Political Science Review* 1007 (1958), which applied game theory to voting by Supreme Court Justices during the 1930s.

[14]Murphy, **Elements of Judicial Strategy**, p. vii.

[15]*Id.*, p. 5.

[16]Lee Epstein and Jack Knight, **The Choices Justices Make** (1998) (hereafter cited as Epstein and Knight).

[17]*Id.*, p. 184.

[18]*Id.*, p. xv.

[19]*Id.*, p. 10.

[20]*Id.*, pp. 11-12 (emphasis in the original).

[21]429 U.S. 190 (1976).

[22]Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), had advocated strict scrutiny as the proper constitutional standard by which to judge gender-based classifications, a view with which Justices Douglas, White, and Marshall concurred. Although there were eight votes against the constitutionality of the federal statute challenged in *Frontiero*, none of the three opinions commanded more than four votes.

[23]Epstein and Knight, p. 183.

[24]*Id.*, p. 184.

[25]Professor Edward Corwin once suggested that for the Constitution's framers, judicial review rested "upon certain general principles [such as government under law, separation of powers, and federalism] which, in their estimation, made specific provision for it unnecessary." Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (12th edition, 1999), p. 44. If one assumes, therefore, that most of the framers of the Constitution believed that the Supreme Court would engage in some sort of constitutional oversight of legislation, it is certainly plausible that they might have imposed more institutional and political checks on the federal judiciary had most of them foreseen the large policy-making role that judicial review would eventually allow the Court to have.

[26]Elliot E. Slotnick and Jennifer A. Segal, **Television News and the Supreme Court** (1998) (hereafter cited as Slotnick and Segal).

[27]*Id.*, p. 13, pp. 89-157. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

[28]Slotnick and Segal, p. 13, pp. 158-188.

[29]*Id.*, pp. 16-88.

[30]*Id.*, xii. For example see *id.*, pp. 98-99, 114-115.

[31]Richard Morin, "Unconventional Wisdom: A Nation of Stooges," *Washington Post*, October 8, 1995, p. C5.

[32]Linda Greenhouse, "Telling the Court's Story: Justice and Journalism at the Supreme Court," 105 *Yale Law Journal* 1537, 1538 (1996).

[33]Slotnick and Segal, p. 8.

[34]Linda Greenhouse, "Press Coverage," in Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States** (1992), pp. 666-667.

[35]Drew Pearson and Robert S. Allen, **The Nine Old Men** (1936); Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (1979); Edward Lazarus, **Closed Chambers** (1998) (reissued in 1999 with a new preface).

[36]Letter of 1823. Paul Leicester Ford ed., **The Writings of Thomas Jefferson (1892-1899)**, vol. 10, p. 249. Jefferson may have been less concerned with the secrecy of deliberations than with Marshall's practice of expressing the collective views of the Court through a single opinion, "the opinion of the Court," in contrast to the older practice of *seriatim*, or individual,

opinions.

[37]Richard Hofstadter, **The Paranoid Style in American Politics and Other Essays** (Vintage ed., 1967), p. 3.

[38]Quoted in Edward J. Cleary, **Beyond the Burning Cross: The First Amendment and the Landmark R.A.V. Case** (1994), p. xiv.

[39]Carl Stern, quoted in Slotnick and Segal, p. 158.

[40]*Id.*, p. 234.

[41]*Id.*, p. 235.

[42]*Id.*, p. 238.

[43]*Id.*, p. 236.

[44]*Id.*, p. 237.

[45]*Id.*, p. 210.

[46] David Bauder, "Morning Is Hot New Time Slot in TV," *Associated Press,* June 24, 1999.

[47]Slotnick and Segal, p. 239.

[48] *Id.*, p. 241.

[49]*Id.*, p. 242.

[50]No. 98-436, 119 S. Ct. 2240 (1999).

[51]Linda Greenhouse, "States Are Given New Legal Shield by Supreme Court," *New York Times*, June 24, 1999, p. A1.

[52]Barrett McGurn, **America's Court** (1997) (hereafter cited as McGurn).

[53]*Id.*, p. ix.

[54]Charles Henry Butler, **A Century at the Bar of the Supreme Court of the United States** (1942); Mark W. Cannon and David M. O'Brien, eds., **Views from the Bench: The Judiciary and Constitutional Politics** (1985).

[55]McGurn, p. ix.

[56]*Id.*, p. 57.

[57]*Id.*, p. 53.

[58]*Id.*, p. 55.

[59]*United States v. Nixon*, 418 U.S. 683 (1974).

[60]McGurn, p. 16. McGurn thus disputes the version of events reported in **The Brethren** (see note 35) that the opinion in the Tapes Case was a group effort party because of Burger's inability or unwillingness to lead. However, there is some confusion in McGurn's account as to timing. He writes, "For forty-two days without a break, often from 8 A.M. to midnight, Burger and his two new, youthful law clerks worked on the President's verdict." *Id.*, p. 15. The Court granted certiorari in the case on June 15, [417 U.S. 960 (1974)], heard arguments on July 8, and announced the decision and released the opinions on July 24, 1974. For a detailed account of the formation of the Court's opinion in the Watergate Tapes Case that draws extensively on papers of the late Justice Thurgood Marshall, *see* Charles M. Lamb and Lisa K. Parshall, "*United States v. Nixon* Revisited: A Case Study in Supreme Court Decision-Making," 58 *University of Pittsburgh Law Review* 71 (1996).

[61]McGurn, p. 51.

[62]*See* note 35.

[63]McGurn, p. 22.

[64]A new printing of **America's Court** should correct several errors: 1978 was not a presidential election year (p. 107), nor is the Chief Justice in the line of presidential succession (pp. 87, 107). The note on page 179, keyed to page 40, suggests that Justice Abe Fortas "left the High Bench" because his "nomination [to be Chief Justice] was withdrawn." Most scholars probably would not read *Roe v. Wade* [410 U.S. 113 (1973)] as resting on the "'privileges or immunities'" clause (p. 110).

[65]William H. Rehnquist, **All the Laws But One** (1998) (hereafter cited as Rehnquist).

[66]Quoted in Carl Brent Swisher, **Roger B. Taney** (1935), p. 553. The Merryman case is reported at 17 Fed. Cas. 144 (D.Md., 1861).

[67]James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents, 1789-1897**, vol. 6, (1896-1899) p. 25.

[68]Rehnquist, p. 38.

[69]Rehnquist., p. 218.

[70]*Id.*, pp. 224-225.

[71]*Id.*, pp. 218-219. Rehnquist notes that in the Prize Cases [67 U.S. (2 Black) 635 (1863)], "the Supreme Court held that an insurrection could be treated by the government as the equivalent of a declared war." Rehnquist, p. 218.

[72]Rehnquist, p. 182.

[73]*Id.*, p. 224.

[74]*Id.*, p. 191. The Issei were first-generation Japanese immigrants who were legally barred from U.S. citizenship. The Nisei were their children born in the United States and were American citizens.

[75]*Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

[76]Rehnquist, p. 225.

[77]**The Life of George Washington**, 5 vols. (1804-1807).

[78]**Our Chief Magistrate and His Powers** (1916); **Popular Government: Its Essence, Its Permanence and its Perils** (1913).

[79]**Liberty Under Law: An Interpretation of the Principles of Our Constitutional Government** (1922).

[80]**The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation** (1928).

[81]**A Republic, If You Can Keep It** (1972); **The Memoirs of Earl Warren** (1977).

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