Introduction

Melvin I. Urofsky
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It has now been seven years since I took over as editor of this *Journal*, and I am constantly surprised at the infinite variety of subjects that fall within the rather broadly defined topic of "Supreme Court history." To quote Shakespeare, it is "an ever-changing delight." I hope the readers share my pleasure at the wide range of topics discussed between our covers.

This issue is a case in point. The first article grows out of a sister enterprise of the Society, the Documentary History of the early Supeme Court, headed by Dr. Maeva Marcus. Although we assume that there have always been clean lines between the different branches of government—indeed, we believe that the Constitution mandates such a separation of powers—the fact of the matter is that early in our history government was very fluid, and the members of each branch realized that there would be times when murkiness rather than clarity would be desirable in relations among the branches. Elliott Ashkenazi, one of the associate editors of the Documentary History project, explores one such instance in an area of law about which we hear little these days, admiralty.

Salmon P. Chase did not become Chief Justice until the Lincoln administration, a time when most things Jacksonian had been repudiated. Yet according to Mark A. Graber, time moves more slowly in the judicial branch than it does in the legislative or executive, whose members must face re-election periodically. Just as Franklin D. Roosevelt's appointees continued to have an impact on the Court through the Warren era, so, Graber claims, the Jacksonian nominees laid the basis for an activism that would have appalled Old Hickory.

When we think of the Supreme Court and criminal justice, we rarely think of the people involved, concentrating instead on the principles enunciated. For example, we know far more about the Miranda warning than we do about Miranda the man. If it had not been for Anthony Lewis's classic *Gideon's Trumpet* —and the movie made from it starring Henry Fonda—we would probably not know too much about the cause of one of the Court's great cases, *Gideon v. Wainwright*. In the late

nineteenth century the Court had to deal with what was surely one of the most unusual cases in its history, a seemingly simple death penalty case from Utah. However, as Sidney Harring and Kathryn Swedlow show, it was far from simple for anyone, much less the Justices.

The article by C. Ellen Connally originally came to us in the form of a student essay submitted for the Hughes-Gossett award. Although the panel did not choose it, we were so impressed with the work that we asked her to rework it and resubmit it as a regular article. In that version, presented here, Judge Connally takes a close look at the reputation the first Justice, John Marshall Harlan, enjoyed as a liberal on racial matters, and questions whether that reputation is fully deserved.

In the two decades surrounding the turn of the twentieth century, the Court dealt with two great matters: race and private property rights. We do not often link the two together, but Professor David E. Bernstein suggests that perhaps we should, since, he argues, both the *Plessy* doctrine and the basis for *Lochner v. New York* were cut from the same bolt of cloth.

And last, but surely not least, we keep up with the great outpouring of works on the Supreme Court through our veteran reviewer, D. Grier Stephenson, Jr., and the "Judicial Bookshelf."

Herein lies a rich repast. Enjoy!

Admiralty Law and Neutrality Policy in the 1790s: An Example of Judicial, Legislative, and Executive Cooperation

ELLIOTT ASHKENAZI

The subject of admiralty law may have lost much of its luster over the years, but during the first decades of the nation's existence this branch of the law provided a vehicle for establishing foreign policy principles that helped protect the new nation. The admiralty cases that reached the U.S. Supreme Court in the mid-1790s were important to administration policy in the realm of foreign affairs and to the Court's own development as an independent arm of the national government.[1]

The outbreak of war among the European nations in 1793 provided the setting for these cases. In the naval battle between France and several European nations led by England, privateering was rife in the West Indies and along the United States coasts.[2] French privateers captured enemy or neutral merchant ships coming out of the islands and brought their prizes to United States ports for sale. They could not return to a French jurisdiction for condemnation proceedings because of the British naval blockades. Benjamin Moodie, the British vice-consul for North and South Carolina and Georgia after February 1794, tried to regain the British prizes for their original owners by beginning suits in admiralty in the United States district court in Charleston. The captured ships were not always British, and some suits began in Savannah rather than Charleston, but the Moodie cases stand out for their sheer number and for the dangers presented to a neutral venue by confrontations between the main belligerents.

Typically, the owner of a French vessel equipped it for war and received a commission from some French authority allowing it to make captures and disrupt British trade with the West Indies. In some cases the privateer was a previously captured merchant vessel converted to privateering. In others American owners sold ships to French nationals for the purpose of conversion. Once captured, a British prize would be accompanied into an American port or sailed in with a French prize master and a few crewmembers, with the in-

tention of selling the prize and its cargo to the highest bidder for the benefit of the privateer's officers and crew.[3] As the British prizes arrived, Moodie attached the more valuable of them in the district court sitting in admiralty, claiming that the ships and cargo still belonged to their original British owners. The attachments and the ensuing libels that served as the complaints in admiralty proceedings presented the court with the threshold question of whether neutral American courts should, or even could, hear cases between belligerents when decisions had clear diplomatic consequences. Even if the cases were justiciable, was the capture itself invalid because the arming of a French privateer took place in American ports and violated some principle of American law or of the law of nations? Moodie asserted that judicial sanction of a capture amounted to an "unneutral" act. French owners and their captains sought protection behind articles of the 1778 Treaty of Amity & Commerce with the United States, which on the surface allowed French privateers to bring prize vessels into American ports without fear of judicial or executive seizure.[4]

Those of Moodie's libels that reached the U.S. Supreme Court covered cases in which the captures had been made between November 1794 and September 1795 outside American territorial waters, but the outfitting or equipping of the privateers often occurred in 1793. At that time the administration had not even established what constituted the nation's territorial waters, let alone what the laws of neutrality encompassed. In *Moxon v. The Fanny,* 19 Fed. Cas. 942 (D. Pa., 1793) (case no. 9895), a French privateer captured a British vessel five miles off the coast of Philadelphia. The Court knew of no government statement on the extent of American waters or treaty on the subject. In circulars to the United States District Attorneys and to the various Foreign Ministers Thomas Jefferson explained that a policy was in the making, but for immediate purposes the President decided to use the measure of one marine league (about three miles). By that standard the capture of the *Fanny* had taken place outside American waters. Jefferson outlined a procedure to determine the location of a capture, beginning with the state governor who would then either call on the district attorney to arrange an arbitrator or pursue a fact-finding process himself.[5]

By the end of its two terms in 1796, the Supreme Court had decided all but one of the fifteen privateer cases on its docket in favor of the French, but not before serious issues of foreign policy and war or peace had been raised and resolved in a very short time with the help of all branches of the national government.[6] The President's cabinet answered a barrage of complaints from both French and English officials while it devised procedures to pacify the two and develop a viable neutral stance. The district courts initially believed that captures and prizes raised questions of great importance, but that they should be settled by the executive branch as part of its exercise of the foreign affairs authority. The Supreme Court soon required lower courts to accept such cases in the form of property restoration claims. The attachments themselves provided the basis for *in rem* jurisdiction in Admiralty over the ship itself and its cargo.

We now know that the Moodie cases and others in the same vein helped define the Court's role in preserving the government's neutrality policy by limiting access to the federal judicial system to those prize cases in which there was serious participation by American nationals. Moreover, these cases were significant to the development of the Court's function as an independent interpreter of treaties.[7] Answering jurisdictional questions, poring through days and days' worth of depositions and answers to interrogatories, and interpreting treaties and the terms of the Neutrality Act of 1794, the Justices of the Supreme Court worked "hand in glove" not only with the national executive but also with the state governors to institute and maintain poli-

cies that bought a few more crucial years of peace during the nation's infancy. The Court managed to perform this feat while solidifying its position as an independent arm of the national government.

The executive branch very sensibly wanted to control decisions that might put the nation at war with England. Military intervention against Britain looked like a real possibility in 1793 and remained one into 1794. American nationals armed their merchantmen or built fully armed privateers meant to defend commerce and fight the British. As the threat of American military involvement subsided with the success of a dual American policy of embargo and neutrality, a number of these vessels found their way into the hands of French nationals for privateering purposes.

If any courts were to deal with these questions, the United States courts in the exercise of their admiralty jurisdiction would be the ones. However, reluctance to give courts power to delve into issues that could affect the nation's peace and independence went back a long way. As early as 1777 James Wilson, future Constitutional Convention member and Supreme Court Justice, had serious concerns about the diplomatic ramifications of the exercise of judicial power through admiralty jurisdiction. At the time he believed that *all* admiralty matters should be handled within the executive branch, preferably by one individual who would manage all international admiralty disputes. This executive officer would also give opinions on issues of maritime and civil law and the law of nations as referred to him by Congress. Wilson wanted to follow what he considered the practice of other countries and establish a "system" for the laws of all admiralty courts. He hoped to achieve uniformity by replacing diverse state procedures with a federal executive who would decide admiralty cases without juries, for, as he wrote, "All conversant in Courts know that they [juries] receive a Tincture from the Practicioners as well as from the Judges."[8]

Wilson's ideas did not gain many adherents in the Continental Congress, but the terms of the Constitution addressed the issues and followed his thinking about removing jury trials from admiralty. The Constitution also extended the judicial power of the United States to all cases "of admiralty and maritime jurisdiction," and in Section 9 of the 1789 Judiciary Act Congress gave federal district courts exclusive original jurisdiction over civil admiralty and maritime cases. However, Wilson's primary concerns about a judicial role in matters of diplomacy and foreign relations remained unresolved until the wars among the European nations that began in 1793.

When questions of captures, prizes, and neutrality then came to the fore, members of Washington's administration received endless complaints from the diplomatic community about United States neutrality and its ramifications. Of particular concern was the outfitting of French vessels in United States ports to act as privateers. The initial response from Washington and his cabinet included executive investigations of complaints about captures or increases in armament, in which both federal and state authorities participated. Executive decisions followed on the restoration of property seized by a belligerent or compensation for property not restored. Washington's cabinet sought to appease the British, who had good cause to complain about the behavior of French diplomatic and consular emissaries. Those sympathetic to France needed to avoid the appearance of partiality and could not ignore the fundamental breaches of the rights of a neutral by French nationals and some of their supporters in the United States. The treaty with France, however, could not be ignored. Based on those provisions, the French complaint averred as a practical matter that even if the attached vessels were ultimately released by the court, the delay occasioned by the process lessened the economic benefits the French could gain by selling prizes and their cargoes immediately on arrival.

Treasury Secretary Alexander Hamilton at first thought, as Wilson had almost twenty

years earlier, that issues of foreign policy such as those involved in maintaining a neutral stance should be "settled by reasons of state, not rules of law" and required the single voice of the executive authority. The flexibility possible through diplomatic negotiation seemed more appropriate than legal rulings dependent on factual evidence and interpretation of laws. Hamilton changed his thinking somewhat within a month's time, when he accepted that the judicial process might be useful as a fact-finder when the nation's neutral status had been compromised.[9]

As Secretary of State, Jefferson hoped that those most affected—the British and the French—would make use of the federal courts before approaching the executive branch.[10] The district judges, however, were not so cooperative. A few days after Jefferson suggested in June of 1793 that the British consular authorities use the federal court system for their nation's grievances, the district judge in Philadelphia, Richard Peters, questioned his court's power to resolve questions arising in capture cases, even those alleging capture within American waters. He placed responsibility solely within the executive department, knowing that the executive branch had not yet asserted any clear authority to act. Judge Peters fully understood the importance of the cases before him, but felt secure in his decision because of the availability of the appeals process.[11]

Executive pronouncements did appear in 1793 before a Supreme Court decision could be made. These pronouncements helped to give substance to the rapidly evolving neutrality posture and to the difficulties posed by it. The President's Neutrality Proclamation appeared on April 22nd, expressing the nation's resolve to stay out of the European wars. With this proclamation, Washington sought to enlist the federal courts in the prosecution of all those who violated the law of nations in their treatment of the belligerents. The proclamation hinted at a forthcoming set of rules to "assert the privileges of the United States," rules

A few days after President Thomas Jefferson suggested in June of 1793 that the British consular authorities use the federal court system for their nation's grievances regarding privateering, the district judge in Philadelphia, Richard Peters (pictured), questioned his court's power to resolve questions arising in capture cases, even those alleging capture within American waters. He placed responsibility solely with the Jefferson administration, knowing that the executive branch had not yet asserted any clear authority to act.

which had been reduced to a "system" that would soon be presented to the nation.[12]

After discussions at the cabinet and presidential levels, the system—such as it was—appeared on August 4, 1793, in the form of instructions and an explanatory letter sent by Hamilton as Secretary of the Treasury to the various collectors of customs.[13] The instructions did not focus on the taking of prizes within American territorial waters; instead, the emphasis shifted to recruitment of Americans for privateers and the outfitting of French vessels in American ports. The French were to retain the favored treatment given them by treaty, but any violations of neutrality principles as enunciated by Hamilton were to be reported to the state's governor and to the United States attorney for the district. The attorney could then attach the offending vessel and keep it in port. The clearest occurrence of

a principle of neutrality stated that any vessel originally equipped for war in a United States port was to leave the United States. The policy regarding increase in force of an existing ship was not as yet so clear, nor was there a stated policy with regard to the sale of French prizes in American ports, but the treaty with France prohibited the sale of prizes by any other nation.

The Supreme Court declined to answer questions put to it directly by the cabinet on foreign policy questions, but the case of *Glass v. Sloop Betsey* was already in the federal court system by the time Hamilton sent out the instructions (the district court libel was dated July 16, 1793) and was to be heard by the Court at its next term, with arguments beginning February 8, 1794. Both Hamilton and Chief Justice John Jay were satisfied with the Court's refusal to answer questions from the executive. They hoped that the executive branch would retain primary control of disputes arising out of the European wars, and that a Federalist judiciary could be more helpful by interpreting the law through litigation and grand jury charges in ways that would support administration policy. As it turned out, the Court ultimately made a judicial remedy for the British extremely difficult to maintain and, in the process, helped avert American military participation against the nation to whom the Federalists looked for an ally.[14]

When the *Glass* case finally reached the Supreme Court the decision established, among other things, that a United States district court, a neutral venue sitting in admiralty, had jurisdiction to decide a dispute over conflicting claims to a vessel and cargo seized on the high seas during wartime. The Justices in *Glass* also permitted a district court to order restoration of a captured ship to its original owner if the privateer had in some way violated the law of nations or local American law in a serious way.[15] The Court reinforced its support of the extension of United States judicial power in disputes between European belligerents in *Talbot v. Jansen,* decided on August 22, 1795.[16] It affirmed lower court decisions that allowed such a restoration when the owners and crew of the privateer, Americans pretending to be French, were found to have violated both American criminal laws and the law of nations.

In little more than a year, the Supreme Court had thus opened neutral United States courts to wartime claims between belligerents when treaty obligations to France alone on their face protected French privateers from such exposure. It had created exceptions to the treaty provisions, based on judicial interpretation of the implications of the Neutrality Act and, more importantly, the law of nations.

Moodie wasted no time in beginning his policy of attachment and libel in view of three favorable rulings, one by the Supreme Court in *Glass* and the others by two lower courts in *Talbot* as it made its way to the Supreme Court for decision. He also regularly contacted the South Carolina governor for assistance and expected Bond in Philadelphia to approach Secretary of State Jefferson for the same purpose, knowing that they would be told to seek a judicial remedy first. The federal judiciary was not the last stop for the two warring nations. Each also pursued diplomatic remedies.[17]

The executive branch, however, did not speak with one voice about responses to violations of the nation's neutral status by the belligerents. In Washington's cabinet the antagonisms between Hamilton and Jefferson had grown, and the two gave the President conflicting advice. In March 1794 Congress responded to the increasing anti-British sentiment in the country in a moderate way with a resolution imposing an embargo for a period of time—ultimately sixty days—on all ships in United States ports bound for any foreign port. Of less magnitude than a complete ban on imports, the embargo helped defuse war scares with the British. The French complained that the embargo had an adverse effect on French supply routes across the Atlantic to France. Ultimately John Jay had to go to Brit-

ain to iron out differences between it and the United States.[18] Of rather short duration, the embargo served a limited function. Moreover, the executive pronouncements of the President and Hamilton's instructions the previous year to the customs collectors proved difficult to enforce in the absence of supporting legislation.

In the Neutrality Act of June 5, 1794, Congress undertook to codify some of the rights and duties of neutrals and belligerents.[19] Most of its provisions attached criminal penalties to specific individual conduct, such as service of an American in a foreign military force or attempts at recruitment into such service. Anyone who tried to outfit or increase the force of a vessel for privateering against ships and sailors of a nation friendly to the United States (i.e., Britain) was also subject to criminal penalties, and—in the case of an original outfitting—the ship would be forfeited. The Act authorized the executive branch to call on federal and state military units to seize vessels that might be in violation of the Act, and their prizes. The military could also return any prizes that "shall have been adjudged" to be restored and could force a foreign ship to depart, if treaties or the law of nations so required.[20] It also gave district courts jurisdiction over captures made within the territorial waters of the nation or within a marine league of the coasts, but said nothing about jurisdiction over captures on the high seas.

Hamilton wrote to John Jay, who was on his way to London to negotiate with Britain, that Jay would be happy to learn of passage of the Neutrality Act. Hamilton considered ". . . the Executive and the Judiciary as armed with adequate means of repressing the fitting out of Privateers, the taking of commissions, or inlisting in foreign service, the unauthorised undertaking of military expeditions, &c."[21] He also sent copies of the Act to the various collectors of customs, explaining that its provisions should bolster enforcement of rules previously laid out by Hamilton in his circular of August 1793 on the same subjects.[22] In the end, the Act did provide federal officials and the federal judiciary with specific expressions of national policy on neutrality violations, which the courts and the executive could enforce, but not necessarily in the way Hamilton envisaged.

Moodie's court proceedings against privateers, already given support by the *Glass* and *Talbot* cases, received further encouragement from the provisions of the Neutrality Act, especially those about equipping a ship for privateering. The British hoped that the conduct embedded in the language of criminal violations would establish broader principles that federal courts could use to declare French privateers illegal.

In *Moodie v. Ship Mermaid,* a leading prize case, the privateer *General Lavaux* had been an American vessel, the *Cygnet*, originally built for privateering during the Revolutionary War, and was being restored to that status in Charleston harbor when another war with Britain seemed imminent. When war scares subsided, and an American embargo forced ships in American ports to remain there, the American owner of the *Cygnet,* Abraham Sasportas, sold it to French interests. He duly registered the change of ownership with the collector of customs in the port. The *Cygnet* underwent material alterations both before and after the transfer of ownership, but Sasportas paid for and supervised all the work, first on his own account and then allegedly as agent for the French buyer. The collector of customs finally allowed the *General Lavaux* to leave port after its captain removed certain guns the collector thought violated the instructions he had received from Hamilton.

Much of the huge amount of evidence presented at the trial, conflicting and often of dubious veracity, would ordinarily have been excluded but for Judge Thomas Bee's understanding that both sides were ready to appeal. Judge Bee determined that the arming of a neutral American vessel for self-defense was legal, done in fear of war between the United States and Britain, and that the testimony did

Judge Thomas Bee originally heard the evidence in the trial of *Moodie v. Ship Mermaid,* a leading prize case. Much of the huge amount of evidence presented at the trial, conflicting and often of dubious veracity, would ordinarily have been excluded but for Judge Bee's understanding that both sides were ready to appeal. Pictured is his home on Church Street in downtown Charleston, which still stands today.

not support Moodie's claim that many of the crew were United States citizens. The privateer did not infringe any neutral right and therefore was protected by the 1778 Treaty with France. Judge Bee referred to Hamilton's instructions that ships of Britain and France could rearm in United States ports during the period of the American embargo but that French vessels alone should be given the benefit of the doubt when it was not clear whether their arming was solely for war or for protection of cargo carried on a commercial basis.[23]

As expected, Moodie appealed to the circuit court, and the court scheduled the case for its May session, at which time Justice Blair was to sit with Judge Bee.[24] At that time Justice Blair was too ill to sit, and so the court adjourned until its next session, to begin in October 1795. Both sides took advantage of the delay to gather new evidence. Moodie's superiors told him to take the case all the way to the Supreme Court, knowing that, even if Moodie prevailed, the costs of the litigation would exceed the amount recovered. Something more important than money was at stake.

In October Justice Blair's poor health forced him to resign and Chief Justice Rutledge, sitting by virtue of a temporary commission, took Blair's place on the southern circuit. The following month, after hearing new oral and written testimony collected since the district court trial, Rutledge affirmed the lower court decree in favor of the French privateer. On the same day as the decree in the *Mermaid*, Rutledge affirmed district court decrees against Moodie in ten other prize cases, and reversed one decree that had gone in Moodie's favor in the district court.[25] A

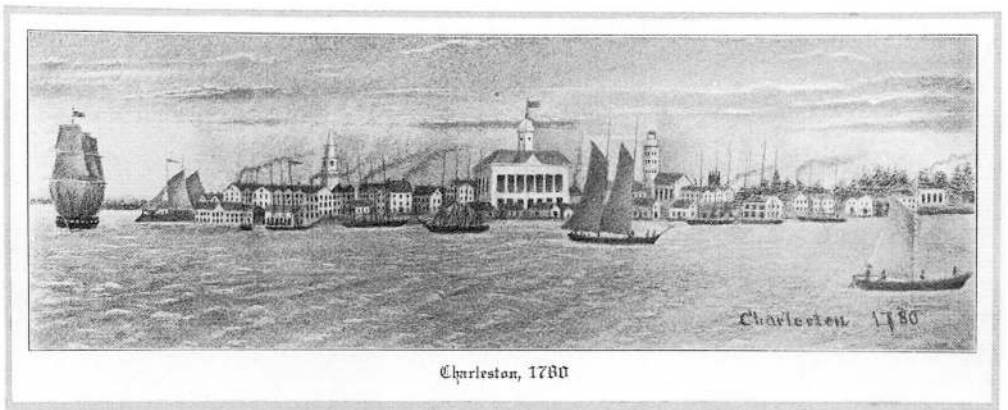
Charleston resident, one of many loyal to France, boasted to a friend in New York that the circuit court's decrees made clear that the federal government would no longer be led

> by the agents of the powers at war with the Republic of France; for of fifteen law suits for prizes in this last Circuit Court, fourteen have been decided in favor of our brethren [the French]. It is to be remarked that the present chief justice of the United States, MR. RUTLEDGE as good a republican, as he is learned and impartial, was the president of the court.[26]

Following instructions, Moodie filed writs of error to the Supreme Court in all the cases he had lost. He did so with the August 1795 Supreme Court decision in *Talbot v. Jansen* in his hand. The Court there had sifted through the evidence to allow a United States court to declare a French privateer illegal and restore its prize to the original owners when the privateer's owners and crew violated both the law of nations and United States criminal laws. This would have given Moodie some reason for optimism.

The notes taken by Justice Iredell during the *Mermaid* case and his opinion delivered on March 1, 1796, give us some insight into the reasons why the judiciary and other branches of the federal government placed so much importance on the prize cases. Most time for argument in *Mermaid* went to reading the testimony of no fewer than thirty-six witnesses and examining a handful of exhibits about the legal status of the privateer as affected by the law of nations and the Neutrality Act, the principles of which were accepted as applicable even though many of the events in question had taken place before the Act's passage.

As Iredell recorded them, the issues presented to the Court included those discussed by the district court judge in his published decision, but the arguments made by the lawyers had changed. Moodie's attorneys sought to bring their case within the principles of the *Talbot* decision. They hoped to show American involvement and some shady procedures by the French privateers, a prime component of which would have been fraud and collusion with regard to sale of the American vessel. The French argued that the case came down to whether the privateer was American or French property at the time of capture. Did a bona fide sale to a French citizen preclude restitution? A buyer who purchased the ship in the West Indies on the basis of the collectors' records



Charleston, 1780

This illustration of the port of Charleston was painted in 1780, thirteen years before the outbreak of the war between England and France that led to massive privateering in the West Indies and along the coasts of the United States. Many French privateers captured enemy or neutral merchant ships coming out of the islands and brought their prizes to Charleston for sale.

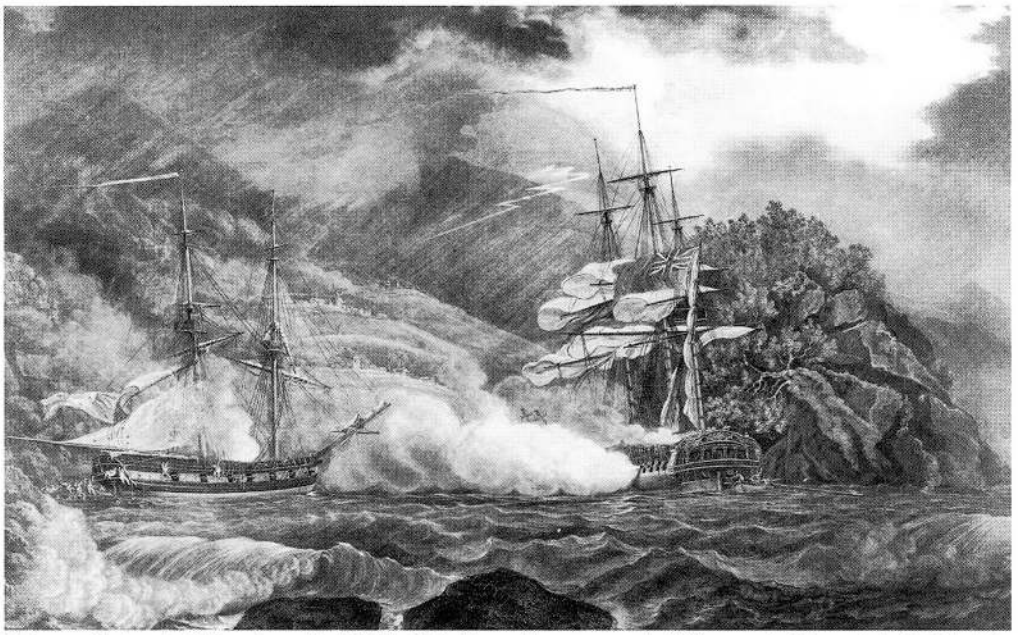
from Charleston would have bought a French vessel in good faith. Lawyers for the British argued that the Neutrality Act called for forfeiture of the ship in certain situations, and that after a forfeiture a bona fide sale could not take place. The sale of the ship to a French national in Charleston was therefore invalid, and the ship remained American property. As an American ship from a neutral country, it could not be a privateer and so its capture of the *Mermaid* was also invalid. The prize should be restored to its British owners. Though penal in design, the terms of the Act nevertheless were declaratory of the law of nations on the subject according to Moodie's attorneys, and should be broadly construed.

Moodie also claimed that any sale of the *Cygnet* by an American was collusive and fraudulent and therefore of no effect. The French buyer in Charleston could have been a straw man. He could have produced documents to support his purchase, but did not. The retort was that whatever occurred between the buyer and seller in Charleston had no effect on a subsequent purchaser without notice on the island of San Domingue. Furthermore, the French buyer in Charleston, perhaps not knowing the language well, could have thought he had a right to buy the vessel.

The issues of which side bore the burden of proving its case and which might have produced even more evidence recurred as themes throughout the arguments. The emphasis continued to be on Supreme Court review of the testimony, some of which was hard to believe. Eyewitnesses not only contradicted each other, but also testified to seeing guns and other evidence that must have been invisible to them from their own testimony as to their locations when they allegedly saw what they claimed to have seen. In addition, although only one concrete case of perjury surfaced, it was probably more prevalent. There were also discussions of the applicable law, such as interpretation of the clause in the Neutrality Act that gave district courts jurisdiction over captures within American waters. The French argued that this express grant precluded jurisdiction over captures on the high seas and that, in any event, the Act was penal in nature —meant to punish individuals, not nations— and should be read narrowly. In a belligerent's prize court, the usual venue for determining the validity of a capture, all that was needed was proof of a French commission and French ownership to uphold a capture. In a neutral's court, local law—in this case the Neutrality Act—and the law of nations were relevant.

Iredell's opinion in the *Mermaid* case gives much greater depth to the reasons why the Supreme Court dismissed so many British claims for restoration of their captured merchant vessels.[27] As Iredell viewed the case, the British had three arguments in favor of restoration of the captured vessel: that the privateer was outfitted for war in the United States; that it was forfeited to the United States by some local law; and that it was American property, not French. Admitting that the vessel was outfitted for war in Charleston, Iredell considered this a local offense against a neutral and punishable by the laws of the neutral. Assuming the collector's action of searching the vessel amounted to a seizure, Iredell stated that the seizure would have been for violation of a local law (which prohibited arming in a neutral port), punishable by local law but not affecting ownership of the vessel. If it were French, it remained French and was released by the customs collector as a French vessel.

For Iredell, Moodie's argument that the privateer had been forfeited under the Neutrality Act when it returned to Charleston was also a matter of local law and would not invalidate a capture of a prize after a bona fide sale to a French national. The privateer had never been condemned in the United States, during which title to the vessel would have passed to the national government, so the vessel was at least de facto French and thus protected on its return to Charleston with a prize by the terms of the French treaty. Forfeiture of the vessel



This aquatint and etching shows the British *Ship Mermaid* run aground off the coast of Grenada in 1794 while in pursuit of the French corvette *Brutus*. The Supreme Court heard a claim by the *Mermaid*'s British owners for restoration after it was taken as a prize by the French.

did not mean forfeiture of prizes it took while in possession of "real" French nationals.[28]

As for the enforcement provisions of the Neutrality Act in cases in which a court had ordered restoration, Iredell stated that since the lower courts decided *against* restoration of the *Mermaid* to its previous owners, there was nothing for the enforcement authority to do. The judicial branch was adequate to apply the terms of the French treaty. If the privateer had remained American-owned, the *Talbot* decision would have required restoration. However, such was not the case in the *Mermaid*, said Iredell, as the French owner of the privateer showed many real aspects of possession. The evidence had to establish American ownership very clearly. If cases could be brought upon ambiguous or doubtful evidence, there would be a "claim in every case" and the terms of the treaty with France would be nullified.[29]

From Iredell's point of view, then, there could be cases between belligerents that justified restoration of a captured vessel by a neutral court, particularly when the use of American privateers and criminal violations by American nationals could be proven, but the evidence had to be substantial. Otherwise, there would be a claim for restoration of every prize brought to a United States port, with dangerous diplomatic consequences. The continual adjudication of prize cases brought by the British in neutral United States courts risked offending one or the other of the parties and greater entanglement in the war. Divergent outcomes in the lower courts for the same privateer war would have laid the basis for allegations of favoritism and violation of the country's professed neutral status. Indeed, just such a situation had already occurred in 1795, according to the chief French Minister to the United States, Joseph Fauchet. Some prizes taken by the French-owned *Citizen of Marseilles*—the French privateer that captured the British ship *Betty Cathcart* and the Dutch ship *Den Onzekeren*—had been sent to New York and others to Charleston. In New York the prizes sold "without opposition," while in the district court of Charleston they were declared illegal.[30]

In *Geyer v. Michel* and its companion

Moodie v. Ship Betty Cathcart, the Court saw even more clearly the potential consequences of a continued federal judicial presence in disputes between two warring nations when the United States was attempting to follow a neutral policy as expressed in the Neutrality Act and the law of nations.[31] Evidence in these two cases included so much doubtful—and in one important instance probably perjured—testimony that the Court felt affronted by the obligation to decide crucial cases concerning the country's neutral status on such terms.

The history of modifications to the *Citizen of Marseilles* while in Philadelphia went back at least to its arrival in that port in September 1793. The ship, heavily armored when built, stayed in Philadelphia for more than a year while undergoing extensive repairs under scrutiny of the port officials. The shipwright refused to increase its force when prohibited by executive decisions.[32] The ship left Philadelphia in October 1794 with the same number of guns mounted as when it arrived, but there was some testimony that while in the Delaware River and in American waters its captain had ordered his crew to open several more ports and mount guns stored onboard.[33] If true, this conduct constituted illegal arming within the meaning of the Neutrality Act and made the vessel and its prizes subject to seizure upon its return to a United States port. The defense in both *Geyer v. Michel* and *Moodie v. Ship Betty Cathcart* was that provisions of the treaty with France protected the *Citizen of Marseilles* and its prizes from attachment and restoration.

In the district court Judge Bee made clear that the privateer's captain would be subject to criminal prosecution under the Neutrality Act. He also held that the law of nations provided for the power to restore a ship to its previous owner. As previously noted, Chief Justice Rutledge presided in the circuit court in November 1795 and reversed Bee's restoration decrees.[34] In the Supreme Court Iredell and his colleagues listened to attorneys read oral and written testimony of twenty-three witnesses and studied two sets of exhibits. The arguments on both sides rested on conflicting and dubious testimony; the correspondence and exhibits tended to support the claims of the French.[35]

The appellants argued that there was very good evidence that two guns were added to the armament of the privateer, by itself a violation of the United States Neutrality Law. That law had already been construed to offer not only the right to impose penal sanctions but also the right to restoration. Attorneys for the French argued that, even admitting that the force of the vessel had been increased in the United States, it did not follow that restoration should occur. To counter any possible reliance on the *Talbot* decision, they admitted that if the privateer were not French property, the Court should restore its prizes. However, the evidence overwhelmingly showed that the privateer had been French and remained such. The French captain and owner had been resident in America, but only on a temporary basis and without giving up his French domicile.

Iredell's extant argument notes end at this point, with three full days of argument remaining. Several pages of his notes for an opinion add to our awareness of the delicate nature of the Court's position.[36] The Court decided *Mermaid* only a few days before Iredell made these notes, and he expressly connected his reasoning in *Geyer* to the earlier decision. The facts in *Mermaid* actually presented a stronger case for restoration under the Neutrality Act than that made in *Geyer*, because that remedy was provided for in Section 3 of the Act only in cases of an original outfitting, which applied to the *General Lavaux.* Iredell believed that a decision that either ignored the treaty with France or gave an additional benefit to the French might then engulf the United States in the Anglo-French war. Diplomatic complaints of favoritism expressed in judicial decisions would follow, stating that an arm of the national government had broken the nation's own neutral posture. Therefore the

question of keeping neutral was, for Iredell, "of *infinite* moment." Iredell's understanding that any principle of the law of nations that declared outfitting or augmentation of force illegal was rarely used put him in disagreement with the district judge. Local law made these things illegal, and the reach of such a judicial decree by a United States court would be limited, without effect on later captures outside the United States of one enemy by another.

In addition, although Congress could have provided for restoration in all cases, it instead limited that remedy to original outfitting only. The Supreme Court would enforce restoration if the law of nations so required, but there would have to be "very clear proof" of that in a case under the Neutrality Act. The terms of the Act put the size of fine (perhaps just one shilling) and length of prison term (perhaps just one day) within the courts' discretion. While bound by principle and therefore less flexible than other arms of government, the courts had been given discretion in individual punishments by those terms. The legislation itself made restoration a drastic and unusual punishment. In an elided section Iredell wrote that a large augmentation could be as serious as an original outfitting, but a "small & trifling one deserves no notice, and the petty inquiries we have been obliged to make in this cause shew [how] improper such a case is for the consideration of a Court of Justice with the view with which this is brought before us."[37] Elsewhere Iredell noted that a restoration would fly in the face of the treaty with France, and that use of that sanction should thus be a decision for the executive or the legislature to make. Argument over every augmentation would be "an inexhaustible fund of dispute. . ."[38] Even if Iredell were to think pragmatically only of the consequences of the Court's decision and not of the legal principles involved, he saw much more "mischief" in following the arguments of the former owners. He was, however, sufficiently satisfied with the principles he applied in *Mermaid* and then in *Geyer* to affirm the decisions in these cases on the basis of legal principles.

Mermaid and *Geyer* marked a clear watershed in the continued success of the nation's neutrality policy. All branches of the national government worked together in response to the possibility of entering another war. The Court asserted the full scope of admiralty and maritime jurisdiction for the federal court system in order to protect the country's newly won sovereignty and the Court's own independence and to preserve the integrity of the nation's neutral status. For the same reasons, the Supreme Court declined to extend the Neutrality Act beyond the terms therein that punished individuals with criminal sanctions for their own actions. If abuses were flagrant, as they were in *Talbot* and later in the related case of *Cotton v. Wallace*, the law of nations—not the Neutrality Act—provided the basis for judicial intervention and a decree of restoration of a captured vessel.

The Court addressed personal violations of private American law enumerated by Congress in the Neutrality Act, but it did so in the light of its responsibility to enforce treaties as part of the "supreme Law of the Land." Public aspects of the law of nations that governed relations among countries during wartime were best left to diplomatic channels except in the most flagrant attacks on the nation's sovereignty. The Moodie cases and others like them blurred the private and public aspects for a time, but the Court managed to limit its role to the private questions of local American law. In this way the Justices performed an indispensable and independent role in the national neutrality effort.

The picture we now have of the Moodie cases and their counterparts is different from that originally conceived. Their importance to the development of the Supreme Court as an institution and to its role in matters of foreign policy is now quite clear. We also have a better understanding of how these cases helped the Supreme Court develop its view of the scope of its appellate jurisdiction. At the

time at which the events described in this paper began, the abuse of the federal judicial process by two European nations had become quite apparent and undoubtedly served as an important factor in the Supreme Court Justices' thinking as they began to restrict access to federal courts by the owners of captured vessels.[39] The Court used the short period of time between the outbreak of war in 1793 and the decisions of its 1796 terms to establish a role in foreign policy, initially through the assertion of a broad spectrum of admiralty jurisdiction and subsequently through the limitation of that jurisdiction. It also maintained its own integrity in the face of potentially endless disputes founded on unreliable and perjured testimony. All the while it remained in step with the other branches of government in their efforts to steer clear of foreign entanglements.

ENDNOTES

[1]The standard text by Julius Goebel on the early years of the Supreme Court has very little to say about the substance of these cases other than that "[T]he questions presented in nearly all the cases were questions of fact, and no considerations of national policy beyond what was spelled out in the Act of 1794 [the Neutrality Act] were involved." Julius Goebel, Jr., **Antecedents and Beginnings to 1801**, vol.1, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States** (New York, The Macmillan Company, 1971), p. 776. [Hereafter **Goebel**.]

[2]General background for these cases can be found in discussions of *Glass v. Sloop Betsey* and *Talbot v. Jansen,* beginning at pages 296 and 650 respectively in vol. 6 of Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800**. [Hereafter **DHSC**.]

[3]The buyers found the cargoes of West Indian goods to be valuable supplements to the reduced supply of such products available during wartime.

[4]Hunter Miller, ed., **Treaties and Other International Acts of the United States of America**, 2 vols. (Washington: Government Printing Office, 1931) 2:3. Sec. 17 protected French prizes from arrest; Sec. 19 allowed French vessels to enter and leave United States ports in cases of emergencies; and Sec. 22 prohibited the enemies of France from outfitting in United States ports and from there selling any prizes or their cargoes.

[5]Jefferson to District Attorneys, November 10, 1793. **Papers of Thomas Jefferson**, 27:338–39 [hereafter **PTJ**]; Jefferson to Foreign Ministers, November 10, 1793. *Ibid.*, 27:340–41. The Neutrality Act of June 5, 1794, codified this temporary executive determination.

[6]Goebel refers to the "fleet of admiralty causes that came up from the South Carolina District" in 1796, the Court's "first year of abundance." **Goebel**, pp. 690, 776. The only case to reach the Supreme Court that the British won was *Cotton v. Wallace,* decided on March 2, 1796. It concerned the same American citizens who tried to serve as captains of American vessels disguised as French privateers in *Talbot v. Jansen*. Maeva Marcus & James Perry, eds., **DHSC**, vol. 1 (New York: Columbia University Press, 1985), p. 266.

[7]Documents recently made available include "Notes of Arguments," written by Justice James Iredell for *Geyer v. Michel* and *Moodie v. Ship Mermaid,* and Iredell's "Notes for Opinion" in *Geyer*. The documents come from the invaluable collection of Iredell papers in the Charles E. Johnson Collection at the North Carolina Department of History and Archives, Raleigh, NC. The Documentary History Project is once again indebted to George Stevenson of that Department for his assistance. The Project will be publishing these and other notes kept by the Justices in volumes 7 and 8.

[8]James Wilson to Robert Morris, January 14, 1777; Robert Morris to James Wilson, January 31, 1777. In Paul Smith, ed., **Letters of Delegates to Congress, 1774–1789** (Washington, D.C.: Library of Congress, 1980), 6:102–05; 182–83.

[9]Alexander Hamilton to George Washington, May 15, 1793, **Papers of Alexander Hamilton**, 14:454–60; Hamilton to Rufus King, June 15, 1793, *ibid.*, pp. 547–49. [Hereafter **PAH**.]

[10]Thomas Jefferson to George Hammond, June 13, 1793, **PTJ**, 26:270–71.

[11]*Findlay v. The William,* 9 Fed. Cas. 57 (D. Pa., 1793); *Moxon v. The Fanny,* 19 Fed. Cas. 942 (D. Pa., 1793). No record of an appeal in either case has been found.

[12]The text of the proclamation is printed in **American State Papers, Foreign Relations**, 1:140. The use of the word "system" echoes the language used by James Wilson in 1777.

[13]"Notes of Cabinet Meeting on Neutrality" and "Rules on Neutrality," **PTJ**, 26:607–10.

[14]*Cf.* Stewart Jay, **Most Humble Servants** (1997), pp. 157–58, 168–70.

[15]The parties settled among themselves by August. **DHSC**, vol. 6, p. 310 n. 72.

[16]Jansen, captain of the captured vessel, went to court for an attachment of his vessel on June 20, 1794, on behalf of its original owners and of its cargo. The district court's decree of August 6th ordered a restoration of the property to the original owners. The appeal, which included some

new testimony, was heard in October, and Justice Wilson, an acknowledged expert in admiralty law, affirmed the decree on November 4, 1794.

[17]Extracts of letters from Moodie to Miller, June 23, 1794; November 24, 1794; November 28, 1794; May 8, 1795. FO 5/6, 5/11, Public Record Office, Kew, England.

[18]Joseph Fauchet to Minister of Foreign Affairs, May 29, 1794. Frederick Jackson Turner, ed., **Correspondence of the French Ministers to the United States**, 2 vols. (New York, 1972), vol. 1, pp. 357, 359.

[19]**U.S. Statutes at Large**, vol. 1, 381.

[20]*Ibid.*

[21]Alexander Hamilton to John Jay, June 4, 1794, **PAH**, 16:456–57.

[22]Treasury Circular to Collectors of Customs, June 17, 1794, **PAH**, 16:499–500. The Neutrality Act failed to resolve one thorny issue: the House deleted a section of it that would have forbidden the French from selling prizes or their cargo in the United States. The Jay Treaty contained such a prohibition, but it was not binding until late 1795. Although Moodie alleged violations of the Jay Treaty when he could, he met with no success.

[23]*Moodie v. Ship Mermaid,* 4 F.Cas.169 (D.Pa.1793) (No.1897), Bee's **Admiralty Reports**, 69.

[24]Bee would not have been able to participate in the circuit court decision, as he had been the judge in the court below, but would be permitted under the law to state reasons for his decision. Judiciary Act of 1789, **DHSC**, 4:44–45. His reasons can be taken to be the opinion published at the district court level.

[25]Rutledge reversed Bee's decision in companion cases *Moodie v. Ship Betty Cathcart* and *Geyer v. Michel,* cases that involved the same privateer and were paired with each other throughout their federal court proceedings. The later Supreme Court decision in *Geyer* also covered the *Betty Cathcart.* Alexander James Dallas made the connection between the two cases clear when reporting the *Geyer* case in his **Dallas Reports**, vol. 3, 285. [Hereafter **Reports**.]

[26]*Pennsylvania Gazette,* December 10, 1795; extract from a letter dated November 19, 1795. The diplomatic and political repercussions of the prize cases were not lost on this writer.

[27]The Court decided the case on March 1, 1796, but Dallas did not report it.

[28]By emphasizing the word "real," Iredell distinguished the *Mermaid* facts from those in *Talbot,* where the Court said the putative French captain of the privateer was not really French, but American.

[29]*See* Iredell's notes for an opinion in *Geyer v. Michel,* March 1796, to be published in vol. 7 of **DHSC**, forthcoming. [Hereafter **Notes**.]

[30]The Charleston decrees were reversed on appeal, several months after the date of the letter. Joseph Fauchet to Edmund Randolph, June 8, 1795, **American State Papers, Foreign Relations**, 1:614–17.

[31]Dallas reported the Supreme Court appeal in these cases in his **Reports**, 3:285.

[32]The exhibits showed that the shipwright had sought clearance from the governor to remount guns that had been on board when the vessel arrived. The governor in turn went to the Secretary for War for guidance, and the Secretary responded that the President would consider such changes an augmentation and should be prevented.

[33]*Moodie v. The Betty Cathcart,* Bee's **Admiralty Reports**, 292, 295.

[34]The same testimony was used for both *Geyer* and *Betty Cathcart.* During the additional testimony taken between the district and circuit court hearings, evidence surfaced about false testimony given by an Irish crewmember of the privateer in return for a bribe. He did not recant, but his testimony had been crucial for the victory Moodie and Mr. Geyer had in the district court, and Rutledge probably discounted it.

[35]Much of the new testimony had to do with the vessel's condition before reaching Philadelphia. It arrived there from Port au Paix on the island of San Domingue, filled with sick and wounded refugees from the recent slave revolts. The French claimed that the vessel had been commandeered for the use of the French government for that voyage and had its guns stored and portholes closed to make room for more passengers. The repairs in Philadelphia were meant to restore the vessel to its condition before the evacuation voyage, but the owners were not allowed to reinstall the guns.

[36]When Dallas reported the *Geyer* case he stated that the Justices "did not assign their reasons." **Reports**, 3:296. The manuscript pages of Iredell's opinion have large groups of paragraphs simply crossed out, and he totally revised the first page and part of another.

[37]Iredell, **Notes**.

[38]*Ibid.*

[39]Nonetheless, Moodie thought delay in itself had been worthwhile. Shortly after the losses in the Court's February 1796 term, he explained to Phineas Bond that he was fully convinced "that the detention of such considerable sums during the Proceedings in the different Courts has had as much if not greater effect in saving British Property than even the success of his Majesty's Cruizers." Moodie to Bond, April 23, 1796 (FO 5/15, UkKPR). The French complained throughout the war of the delays caused by groundless suits, in some of which they were not even awarded costs after winning.

The Jacksonian Origins of Chase Court Activism

MARK A. GRABER

Brady: Why is it, my old friend, that you have moved so far away from me?

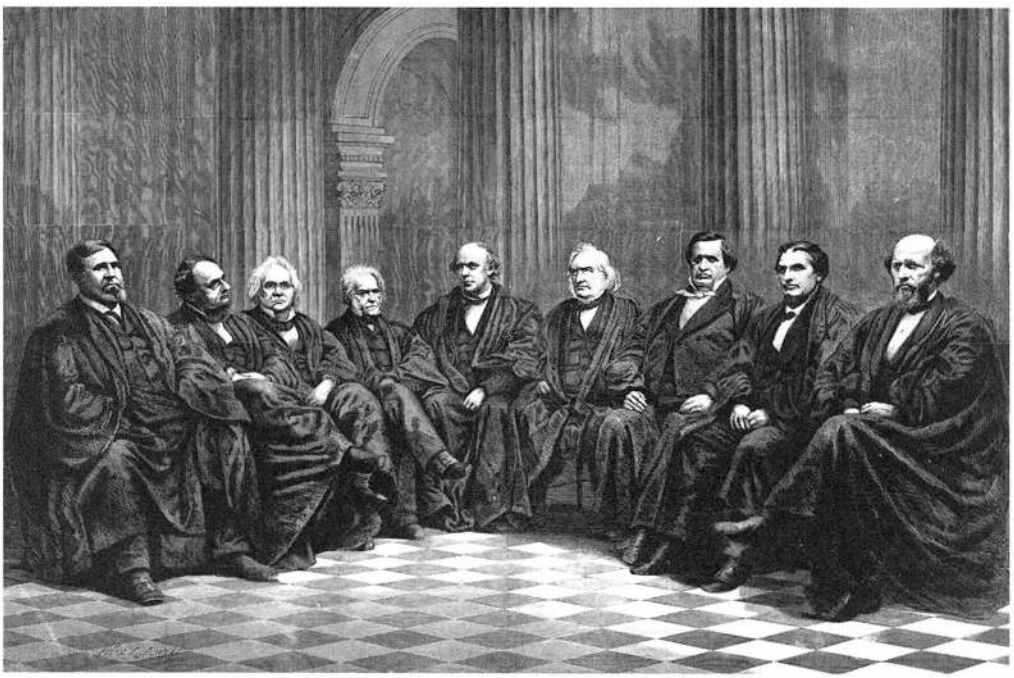
Drummond: All motion is relative. Perhaps it is you who have moved away—by standing still.[1]

Judicial review was seemingly born again during the Reconstruction. In *Marbury v. Madison*[2] the Marshall Court asserted the power to declare federal laws unconstitutional, but in thirty-five years that tribunal explicitly struck down only one federal statute and that statute was of hardly any consequence. In its almost thirty years, the Taney Court also explicitly declared unconstitutional only one federal statute,[3] and that statute had been repealed seven years before the Court declared it void. By comparison, during its mere ten-year reign the Chase Court is generally thought to have declared unconstitutional at least eight and possibly as many as ten existing federal laws.[4] That tribunal also asserted a significant constitutional limit on congressional power in a case declaring an executive action unconstitutional,[5] affirmed another federal law by an equally divided vote when a Justice almost certainly opposed to the measure was unable to attend the judicial session,[6] and issued the first judicial ruling declaring that a federal court trial violated the Bill of Rights.[7] Several Chase Court decisions condemned important and highly controversial national policies. The Justices in *Ex parte Milligan* ruled that neither the national executive nor the national legislature was constitutionally authorized during the Civil War to declare martial law in northern states where civilian courts were open. Six years later, in *Hepburn v. Griswold*, a Chase Court majority declared unconstitutional Treasury Secretary Chase's use of greenbacks to help finance the Civil War. Had Congress at the last moment not passed a law stripping the Supreme Court of habeas corpus jurisdiction, the Justices almost certainly would have declared unconstitutional portions of the 1867 Military Reconstruction Act.[8]

Future Courts continued along the path apparently blazed by Chase and his brethren by routinely striking down federal laws. No longer would the Supreme Court sit for more than fifty years without explicitly declaring a federal measure unconstitutional. The longest such drought after the Civil War lasted seven years, from 1936 to 1943.[9] The longest drought in peacetime lasted five years, and that gap occurred during a transition period between Chief Justices.[10] With the exception of Harlan Fiske Stone and Carl Vinson, every post–Civil War Chief Justice presided over a tribunal that declared at least eight federal laws unconstitutional and struck down an average of at least one federal statute every two years. Many decisions had little impact, but at least one major federal policy has bitten the dust in every decade after the Civil War.

This paper challenges the conventional understanding of the Chase Court as the tribunal that laid the foundations for modern judicial power. The dramatic increase after the Civil War in judicial decisions explicitly declaring federal laws unconstitutional masks far greater continuity with antebellum judicial practice than is generally recognized. Chase Court activism in major cases was grounded in inherited Jacksonian understandings of federal power articulated during the three decades before the Civil War in Democratic party platforms and in the messages of Democratic presidents vetoing constitutionally controversial exercises of federal power. The Chase Court Justices most likely to declare federal laws unconstitutional were the Jacksonian holdovers from the Taney Court and Justice Stephen Field, the only Lincoln appointee who was a lifelong Democrat.

Chase Court decisions declaring politically inconsequential laws unconstitutional arose from changes in judicial workload and style of opinion-writing in constitutional cases, not changes in judicial understandings

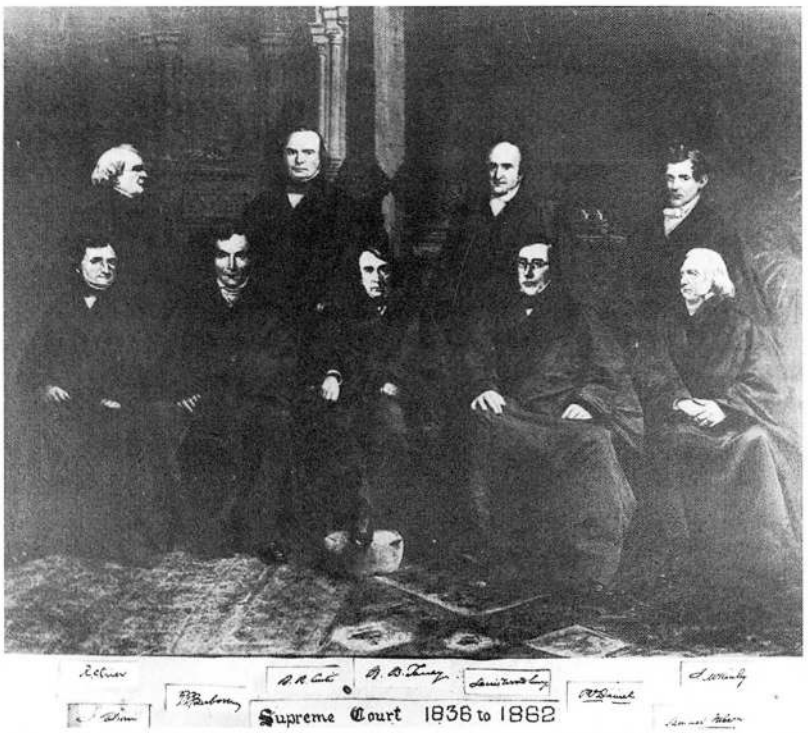


The author challenges the conventional notion that the Chase Court laid down the foundations of modern judicial power by dramatically increasing the number of judicial decisions it issued explicitly declaring federal laws unconstitutional. Instead, he argues, Chase Court activism was a continuation of Jacksonian principles of federal power and the Justices most likely to overturn federal laws were Jacksonian appointees from the Taney Court.

of either the powers of the federal government or the judicial power to impose constitutional limits on federal power. Much of the difference between the number of federal statutes declared unconstitutional by the Chase Court and the number of federal statutes declared unconstitutional by the Taney Court is explained by the sharp increase during the Chase years in the number of litigants asking the Justices to declare federal laws unconstitutional. Political changes combined with federal laws expanding the jurisdiction of federal courts doubled the number of cases on the Supreme Court's docket and nearly quadrupled the number of cases brought by litigants challenging the constitutionality of some federal action. The other major difference between the Chase and Taney Courts lay in the way those tribunals articulated constitutional limits on federal power. Following modern practice, the Chase Court articulated constitutional limits on federal power by explicitly declaring federal actions unconstitutional. By comparison, the Taney Court adopted such practices as statutory neglect and statutory misconstruction to impose similar constitutional limitations on federal power. In at least one instance, a series of Taney Court decisions and a Chase Court decision imposed the same constitutional limit on federal power, the only difference being that the Taney Court opinion held that the federal government could not rescind property rights previously granted while the Chase Court opinion more explicitly declared the offending federal law unconstitutional.

Chase Court decisionmaking in both major and minor cases exhibits no dramatic break from antebellum judicial practice. Supreme Court Justices did not respond to political changes wrought by the Civil War and Reconstruction by instrumentally adjusting their understanding of federal powers or the judicial power to declare federal actions unconstitutional. Jacksonians on the Chase Court retained their prewar commitment to construing most federal powers narrowly. Those Republican Justices who had been Whigs before the Civil War continued advancing the broader understandings of federal power associated with the antebellum jurisprudence of Whig Justice Joseph Story. Republican Justices with Jacksonian political connections advanced understandings of federal power broader than that of the pure Jacksonians but not as broad as that of the Republican/Whigs. The only substantial changes on the Supreme Court during the Chase years were the greater number of Justices more sympathetic with Whig understandings of federal power and the alterations in the style of judicial opinions imposing minor constitutional limits on federal power.

The post–Civil War Supreme Court began routinely imposing politically significant limits on federal power because the political relationship between the Court and the elected branches of the national government changed. The Republican ascendancy in 1860 marked the first time in American history that a necessary condition for judicial review of major federal legislation was met: the dominant majority in the elected branches of national government passed laws most Justices regarded as unconstitutional. This condition may seem obvious, if not banal. Still, scholars who laud the Taney Court for judicial restraint forget that the Justices who sat on that bench were almost never asked to impose constitutional restraints on federal power. The executive and legislative branches of government before 1860 were dominated by officials who, holding very narrow conceptions of federal power, repeatedly prevented constitutionally controversial policies from becoming law. Constitutional disagreements existed in Jacksonian America between Justices and elected officials. More often than not, however, federal Justices thought the national government was constitutionally authorized to pass policies that Jacksonian executives vetoed on constitutional grounds.[11] Chief Justice Chase presided over the first tribunal that declared several major laws unconstitutional because President Lincoln was the first national executive



Jacksonian sympathizers on the Taney Court did not have to invalidate federal laws because Jacksonians in the legislative and executive branches were usually successful at preventing strong exercises of national power from becoming law.

whose administration adopted policies that the judicial majority of his time believed unconstitutional.

The American judicial experience before and after the Civil War highlights the way in which the nature of constitutional disagreements between the judicial and elected branches of government influences the exercise of judicial review as much as does the extent and scope of those differences. Justices do not declare laws unconstitutional simply because they disagree with elected officials; they must also believe elected officials have passed measures the Constitution does not authorize them to pass. When Supreme Court Justices believe that the Constitution authorizes legislation that elected officials believe they are not constitutionally authorized to pass, the Justices may do little more than grouse at legislative failures to pass vital measures, unless the Justices believe that elected officials have a judicially enforceable, constitutional obligation to pass the measure in question. The Supreme Court almost never declared a major law unconstitutional before 1860 because in virtually all important disputes between the Justices and elected officials the Justices took a broader view of federal power than did the national executive or national legislature. The Court has routinely declared laws unconstitutional since 1860 because politics has been dominated by officials who, at least on some issues, believe they are constitutionally authorized to pass laws a judicial majority thinks unconstitutional.

I. Anticipating the Future or Reprising the Past: The Activists on the Chase Court

The dramatic and sustained increase after the Civil War in judicial decisions explicitly declaring federal laws unconstitutional supports prominent claims that judicial review in

its mature guise began and was established only during Reconstruction. In his acclaimed **American Constitutionalism**, Stephen Griffin declares that "[t]he power and activity of the Supreme Court as an institution assumed modern proportions only after the Civil War." In his view, "the vision of judicial review that is the focus of contemporary debate over the role of the Supreme Court is more a creation of the modern state than an accepted idea of the late eighteenth century."[12] "The activities of the post-Civil War decade," Stanley Kutler's study of the Chase Court similarly concludes, "might be seen as a foundation for the Court's later behavior and character."[13]

Scholars claim that changing conceptions of judicial review best explain the increase in judicial decisions explicitly declaring federal laws unconstitutional. Influential studies of Supreme Court decisionmaking conclude that Chase Court Justices and their successors had a more activist conception of the judicial power to declare laws unconstitutional than did Taney Court Justices and their predecessors.[14] The precise nature of this difference is a matter of some dispute. Robert Clinton thinks that the pre–Civil War Court would declare only laws of a judiciary nature unconstitutional, *Dred Scott* excepted.[15] Christopher Wolfe claims that the pre–Civil War Court was generally committed to declaring unconstitutional only those laws clearly inconsistent with the original intentions of the persons responsible for the constitution.[16] Sylvia Snowiss asserts that a transformation of judicial understanding, beginning with John Marshall but not completed until after the Civil War, was responsible for a gradual rejection of the rule that Justices should sustain all laws that were not unconstitutional beyond a reasonable doubt.[17]

However the claim is phrased, these commentators agree that Justices struck down more federal laws after than before the Civil War because the Justices sitting after the Civil War held theories of judicial review that justified striking down more laws than the Justices sitting before the Civil War. In this view, Justices after the Civil War were more likely to find unconstitutional laws that Taney Court Justices thought constitutional, and were more likely to think that Justices should declare unconstitutional laws that Taney Court Justices thought Justices should not void even if unconstitutional. Had such cases as *Ex parte Garland* and *Hepburn v. Griswold* been adjudicated before the Civil War, conventional wisdom maintains, the judicial majority would have sustained federal power to impose test oaths and make paper money legal tender.

Republican judicial appointees seem the best candidates for the jurists most responsible for the new conception of judicial review that the Republican-dominated federal judiciary would adhere to for the rest of the nineteenth and early twentieth centuries. If judicial review in its modern guise was established only when Lincoln appointees formed a judicial majority on the bench, it is natural to infer that the Lincoln appointees were the most enthusiastic champions of Chase Court activism. Similarly, if during the nineteenth century the Supreme Court struck down many more laws when the judicial majority was appointed by Republican presidents than when the judicial majority was appointed by Democratic presidents, then Republican appointees would seem to be more inclined to activism than Democratic appointees. Holdovers on the Chase Court from the Taney Court should have upheld the dying prewar tradition of judicial restraint. They certainly would not have established the practices that future Republican judicial appointees would follow. If, as several fine studies demonstrate, Jacksonians in postwar electoral settings adhered to the same general principles as Jacksonians in prewar electoral settings, it seems reasonable to assume that Jacksonians in postwar judicial settings would probably adhere to the same general principles as Jacksonians in prewar judicial settings. As Joel Silbey points out, "both the Democrats and their opponents remained true to their commitments through Reconstruction and beyond."[18]

In reality, the voting alignments on the Chase Court are just the opposite of what conventional wisdom suggests. My admittedly very rough survey of the legal arguments and opinions reported in the **U.S. Reports** found that, from 1864 until 1873, the Supreme Court was asked to declare federal laws unconstitutional in approximately seventy-one cases. In four cases the Justices ruled against jurisdiction; eighteen cases were decided on other grounds. In thirty-one cases the Justices unanimously held that a federal law was constitutional; in five cases they unanimously ruled that a federal law was unconstitutional.[19] In six instances, a divided Court held that a federal law was constitutional; in five instances a divided Court declared a federal law unconstitutional.[20] Two federal laws were sustained by an equally divided Court. The five decisions unanimously declaring federal laws unconstitutional demonstrate that all Chase Court Justices were more willing to declare laws unconstitutional than any Taney Court Justice. However, the vote in divided cases demonstrates that judicial beliefs associated with the Republican party were not primarily responsible for Chase Court activism. The closer the identification of the Justice with the deposed Jacksonian coalition, the more likely the Justice was to support constitutional limits on federal power. "The justices who cast their votes for judicial activism," Harold Hollingsworth's fine dissertation agrees, "were usually from the Democratic rather the Whig tradition in American politics and were committed to a negative rather than a positivistic conception of the government."[21]

The Chase Court Justices most likely to support federal power were Justices Samuel Miller and Joseph Bradley, the only two Justices on the Chase Court who never supported Jacksonian or Democratic causes at any point in their political careers. Both were committed Whigs before the Civil War and Republicans for the rest of their life.[22] While they sat on the Chase Court, Miller and Bradley exhibited the traditional Whig commitment to broad federal legislative power. Neither Justice voted to declare a major federal policy unconstitutional. Justice Bradley never voted to declare a federal law unconstitutional when the Chase Court was divided. Justice Miller voted to support federal power in ten of the eleven cases in which the Justices were divided, supporting only the judicial decision in *Railroad Company* that the United States could not tax the income municipalities obtained from corporate bonds. These voting patterns have particular importance because, as the only two former Whigs on the Chase Court, Bradley and Miller were most representative of any new judicial philosophy Republican appointees might have brought to the Supreme Court.

The greater the connection Lincoln's other judicial appointees had with Jacksonian or Democratic politics, the less likely they were to support federal power. Justice Stephen Field, the only Lincoln appointee who was a Democrat throughout his political life, joined every Chase Court decision striking down a federal law except *Gordon v. United States*, the decision striking down the organization of the Court of Claims. Field also voted to strike down the federal law in four of the five cases when a divided Court sustained federal power. The two other Lincoln appointees who displayed some affinity for activism in federal cases were Chief Justice Salmon Chase, who flirted with the Democratic party before and after the Civil War,[23] and Justice David Davis, who later left the bench to accept the Democratic party's nomination to become a Senator from Illinois. Chase voted against federal power in four of the ten nonunanimous cases decided while he was on the bench. Davis voted against federal power in five of the ten cases. Justices Noah Swayne and William Strong, who had been Democrats before the Civil War but who never wavered in their Republican commitments after the war,[24] voted more frequently to sustain federal power. Strong and Swayne supported majority decisions declaring federal laws unconstitutional only in *Collector v. Day* and *Railroad Co.*,

cases of little importance in which the Justices were nearly united. In sharp contrast to Chase, Davis and Field, Swayne and Strong never voted to limit federal power in a major case and never joined a dissent that claimed some federal action was unconstitutional.

Republican appointees clearly did not play the leading role in Chase Court activism, even when Justice Field is lumped in with the other Lincoln Justices. Had the post–Civil War bench held no Taney Court holdovers, the Supreme Court would never have imposed a major constitutional limitation on federal power between 1864 and 1873. A Chase Court composed entirely of the five Lincoln appointees would have ruled the legal tender act constitutional, sustained the federal test oath, and acknowledged that Congress had the power to impose martial law during the Civil War.[25] That hypothetical tribunal would also have declared several constitutional limits on federal power in politically inconsequential cases. Still, contemporary scholars would not be speaking of a rebirth of judicial review if all the Chase Court did was tinker with federal admiralty jurisdiction and prevent Congress from regulating all sale of certain illuminating oils.

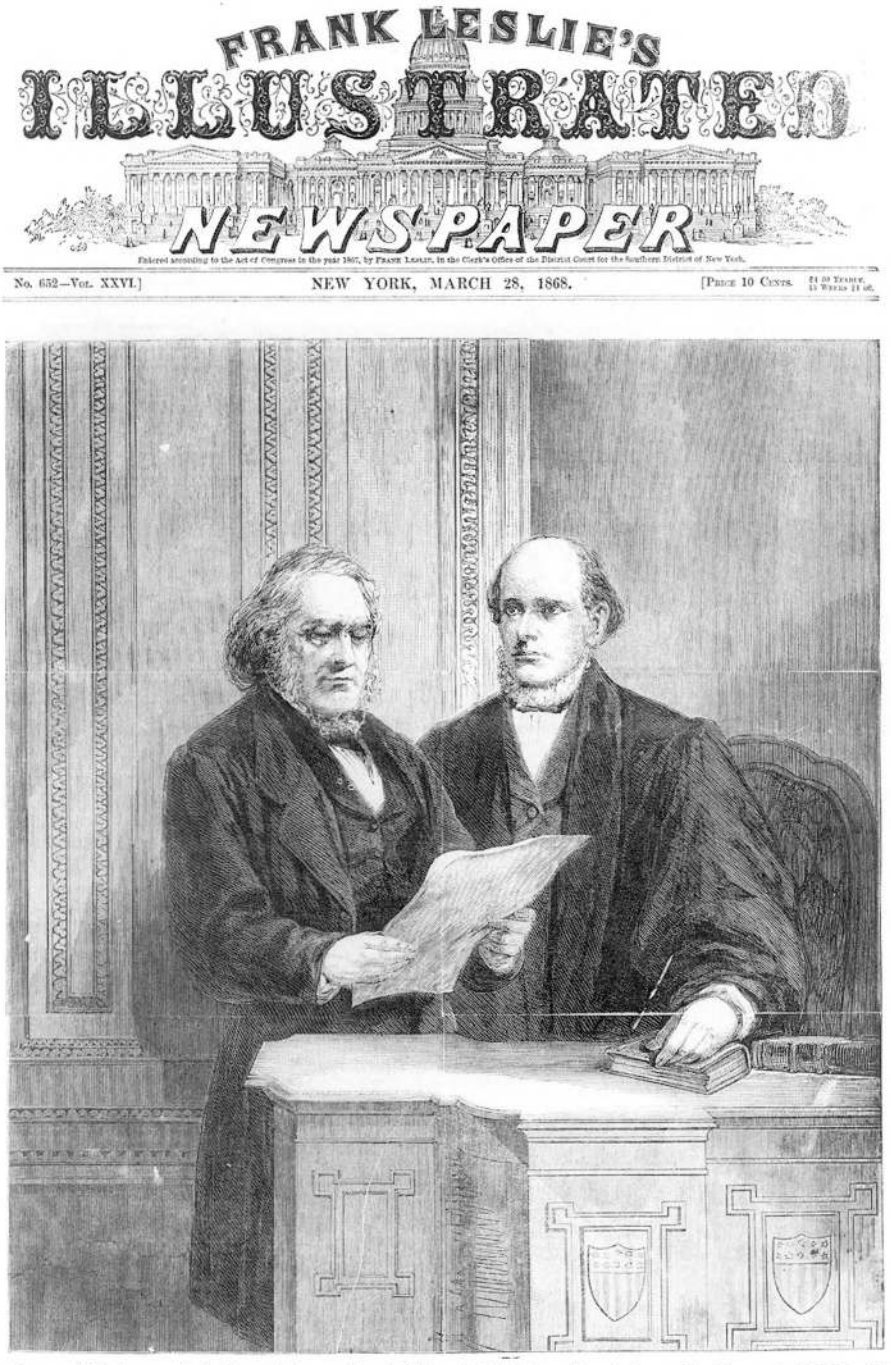
The Chase Court Justices most likely to declare federal laws unconstitutional were the holdovers from the Taney Court: Samuel Nelson, Robert Grier, Nathan Clifford, and James Wayne. Justice Nelson was a particularly aggressive proponent of judicial review during the Chase years: in all seven nonunanimous cases decided after 1864 while he was on the bench, Nelson voted to declare unconstitutional the federal action in question.[26] Justice Grier voted against federal power in five of six divided cases, upholding only the federal power to tax state banknotes in *Veazie Bank v. Fenno*. Justice Clifford voted against federal power in nine of the eleven nonunanimous cases, upholding the federal power to tax state banknotes in *Veazie Bank* and the federal power to tax corporate bonds held by municipalities in *United States v. Railroad Co.* Justice Wayne voted against federal power in two of three cases, breaking ranks only in *Ex parte Milligan* when he supported congressional power to impose martial law.

These Jacksonian judicial appointees dramatically changed their voting practices after Chase became Chief Justice. In their combined seventy-two years of judicial service under Taney, Justices Nelson, Wayne, Grier, and Clifford cast a total of eight votes explicitly declaring federal actions unconstitutional.[27] They more then quadrupled that number on the Chase Court, casting a total of thirty-six such votes in a combined twenty-eight years of service on that tribunal. No Democrat had previously voted to strike down federal laws with the frequency Democratic appointees exhibited on the Chase Court. The Jacksonian Democrats on the Taney Court cast a total of seventeen votes explicitly declaring federal actions unconstitutional in a combined one hundred and ninety-one years of service before 1864.[28] If one counts Justice Field as a Democrat, Jacksonians on the Chase Court almost tripled that number, casting a total of fifty such votes despite serving only a combined total of thirty-seven years.

The voting patterns on the Chase Court suggest two distinct explanations for the dramatic increases in explicit judicial declarations that federal laws were unconstitutional. The key to some Chase Court activism lies in the reasons why those Justices with Jacksonian sympathies on that tribunal were far more willing than the Jacksonians on the Taney Court to impose substantial constitutional limits on federal power. The key to the rest of Chase Court activism lies in the reasons why all the Justices on that bench were far more willing than previous Justices to write opinions explicitly declaring unconstitutional certain politically inconsequential laws.

II. Jacksonian Jurisprudence in Changing Times

One possible explanation for Jacksonian judicial activism after 1864 is that Jacksonian



Justice Samuel Nelson administered the oath of office to Chief Justice Salmon P. Chase in 1868. Like Justices Robert Grier, Nathan Clifford, and James Wayne, Nelson was a holdover from the Taney Court. He became a particularly aggressive proponent of judicial review during the Chase years. In all seven nonunanimous cases decided after 1864 while he was on the Bench, Nelson voted to declare unconstitutional the federal action in question.

Cases challenging the constitutionality of federal actions—both major and minor—increased dramatically after the Civil War, nearly quadrupling in number. One such case, *Ex parte Milligan*, which involved the trial of a Confederate sympathizer in a northern state, held that citizens could not be tried by a military court even during emergency war conditions. This cartoon shows Copperheads—northern Democrats who opposed the war—menacing the Union.

Democrats were far more willing to declare unconstitutional Whig/Republican measures than Jacksonian Democrat measures. This hypothesis is supported by the popular attitudinal model of judicial behavior, which understands conceptions of judicial power as purely instrumental, strictly as means for Justices to express their underlying policy preferences. "[J]ustices," the two leading proponents of this model claim, "use[] judicial activism and restraint as a means to cloak their personal policy preferences—that is, . . . justices who disapprove[] the action under review justif[y] their opposition in terms of judicial activism, whereas those who support[] the action adopt[] a restraintist posture."[29] This perspective suggests that Jacksonian Justices adopted the pose of judicial restraint before Lincoln took office solely because they agreed with the thrust of national policymaking from 1836 until 1860. In this view, those Justices immediately changed their jurisprudential tune when a hostile regime took control of the national legislature and national executive. Jacksonians on the Chase Court asserted judicial power with the fervor of new converts because they now disagreed with the thrust of national policymaking. Jacksonian activism manifested itself after 1864, not 1860, because of the lag necessary for Republican measures to reach the Supreme Court. One might note, however, that Jacksonian hostility to Lincoln's policies found earlier expression in *The Prize Cases*,[30] when Chief Justice Taney, Justice Nelson, Justice Clifford, and Justice Catron indicated that the national executive did not have the power to order southern ports blockaded and the national legislature was not constitutionally authorized to ratify such a decision retroactively.[31] Jacksonians in lower federal courts and in state courts also challenged Lincoln's policies before 1864.[32] Had the Democrats reestablished control over the national government in 1868, the Taney Court

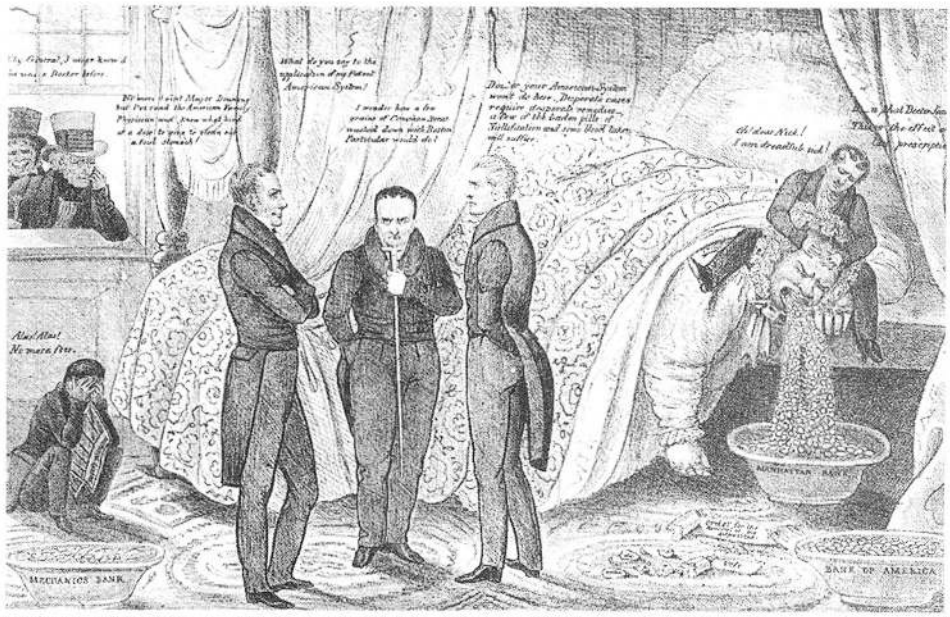
holdovers would have reverted to their original restrained stance, and Justices Bradley and Miller would have become the strongest opponents of federal power on the late Chase Court. At least this is consistent with claims made by those prominent political scientists who insist that judicial restraint merely masks agreement with underlying policies.

The common claim that "when the values of the justices conflict with the values of the relevant lawmaking coalition, no restraint will be apparent"[33] fails to explain why, with the important exceptions of the Hughes and Chase Courts, Supreme Court justices have not declared major federal laws unconstitutional immediately after a partisan change in the composition of the dominant national coalition.[34] The response of Jacksonian Justices to the new political regime was unprecedented. *Marbury* aside, Federalist Justices did not engage in a burst of judicial activism when the Jeffersonian coalition took power. National Republican/Whig Justices did not interfere when the Jacksonian coalition took power. Scholars who claim that judicial restraint masks sympathy to public policies under constitutional attack offer no explanation of Whig quiescence on the Taney Court. Of the five Whigs who sat on the Taney Court, only Justice John McLean displayed any affinity for declaring constitutional limits on federal power, voting to declare unconstitutional one minor federal law and two minor presidential actions.[35] No McLean opinion challenged a major Jacksonian initiative, either directly or indirectly. The other four judicial Whigs—Justices Henry Baldwin, Benjamin Curtis, Smith Thompson, and Joseph Story—never voted to declare a federal law unconstitutional.

This Federalist/National Republican/Whig judicial tendency to sustain federal laws was deeply rooted in Federalist/National Republican/Whig constitutional philosophy. John Marshall and his judicial allies sought to strengthen the national government. Whether Marshall would have gone so far in that direction as many New Dealers is open to question,[36] but Federalist/National Republican/Whig jurists were clearly more willing to endorse national powers that their Jeffersonian/Jacksonian/Democrat counterparts thought the Constitution reserved to the states. When there was a Jacksonian majority in the elected branches of government and a proto-Whig majority on the judiciary, the major judicial objection to public policy was the refusal of Jackson and his successors to pass policies that the Whig Justices believed were constitutional. No prominent Whig believed the Supreme Court could order national elected officials to incorporate a national bank or adopt a national program of internal improvements, however desirable or even necessary Whigs thought those policies to be. Thus, Whig Justices were frustrated proponents of national power on the Taney Court, reduced to complaining to their political allies when the national government repeatedly rejected as unconstitutional policies those jurists thought constitutional.

The behavior of Jacksonian Justices on both the Taney and Chase Courts was similarly motivated by an enduring constitutional philosophy, one that emphasized a judicial responsibility to limit federal power. Most Jeffersonians and Jacksonians did not object to judicial review of federal legislation. Those who did so primarily opposed judicial review of *state* legislation. Old Republicans sought to repeal Section 25 of the Judiciary Act, the provision that licensed judicial review of state court decisions.[37] By comparison, many vigorously attacked *McCulloch v. Maryland*[38] for not declaring unconstitutional the federal law incorporating the national bank.[39] This Jacksonian hostility to *McCulloch* suggests that Democrats understood judicial review of federal legislation as another means for preserving state prerogatives. Once Jacksonians gained control of the federal judiciary, virtually all opposition to judicial review ceased.[40]

Jacksonian sympathizers on the Taney Court almost never voted to declare federal laws unconstitutional because Jacksonians in



Although in *McCulloch v. Maryland* (1819) the Supreme Court upheld Congress's power to establish a national bank, President Andrew Jackson carried on a relentless campaign to undermine it, as shown in this cartoon of "Mother Bank." The Jacksonians' hostility to *McCulloch* suggests that they perfectly understood judicial review of federal legislation as another means for preserving state prerogatives and did not oppose judicial review at the federal level.

the executive and legislative branches of the national government almost always successfully prevented constitutionally controversial exercises of national power from becoming national law. The national platform of the Democratic party consistently declared that protective tariffs were unjust and that the national bank, a federally sponsored system of interested improvements, and distributing the proceeds from the sale of federal lands to the states for any reason were unconstitutional.[41] Most of the Justices appointed by Jacksonian presidents were on public record as endorsing these claims. They had little judicial occasion for expressing these views legally because Jacksonians in the national executive and national legislature killed the national bank, abandoned a national system of internal improvements, reduced protecting tariffs, and defeated most schemes to distribute the proceeds from the sale of public lands to the states. The dominant constitutional philosophy of the Jacksonian era was expressed in the numerous Jacksonian presidential vetoes that condemned as unconstitutional proposed Whig exercises of national power.[42] These Jacksonian political successes left the pre–Civil War federal government with very few laws that a significant number of citizens thought unconstitutional on the books for any period of time. The historian Charles Fairman properly notes that "over the years Congress had done very little that was open to serious question on constitutional grounds."[43]

Jacksonian political triumphs were responsible for Jacksonian judicial quiescence. Fundamental questions of constitutional power could not be litigated before the Supreme Court as long as the party of more narrow constitutional construction was victorious in the elected branches of government. Scholars who point out that, *Dred Scott* aside, the Taney Court never explicitly declared a federal law unconstitutional should note that, *Prigg v. Pennsylvania*[44] aside, that tribunal never actually declared a major federal policy constitutional. The most important federal policies Taney Court sustained before the Civil

War were the fugitive slave act of 1793,[45] the admiralty act of 1843,[46] and the congressional decision in 1832 to give states funds to repair the national road.[47]

Only after Republicans came to power did Jacksonian Justices have judicial occasion for expressing their hostility to federal power. The Republicans, a predominantly Whig coalition, construed federal powers more broadly than did their Democratic rivals.[48] After Republicans gained control of the national legislature and national executive, when debates occurred among elected officials over whether some policy was constitutional, the party advocating constitutionality frequently won. Jacksonian Justices had work to do during the Chase years because Jacksonian officials failed to prevent the national government from imposing martial law in both the North and the South, making paper money legal tender, and passing numerous other Reconstruction measures. Defeated in the national legislature, opponents of these constitutionally controversial policies turned to the courts for redress, a step Jacksonians had not been forced to take before 1860. It should hardly be surprising that the Supreme Court declared more laws unconstitutional in this political environment. For the first time since *McCulloch*, the Justices were being asked to declare numerous important federal policies unconstitutional.[49]

Essentially, Jacksonians became judicial activists after 1864 largely because they had had no previous opportunity to behave as such prior to that time. Their behavior in the Chase years demonstrates that *Dred Scott* was not a judicial aberration, merely the only pre–Civil War occasion southern Jacksonians had to employ their narrow understandings of federal power. Daniel Webster was convinced that the Taney Court during the 1840s was prepared to declare the national bank unconstitutional.[50] *McCulloch* failed to be overruled only because the bank war was won by executive veto before Jacksonians had to open the judicial front. It is Jacksonian political defeats, not instrumental changes in theories of judicial review, that explain the burst of Jacksonian judicial activism after the Civil War.

III. The Minor Cases

The increase after the Civil War in judicial decisions explicitly declaring minor federal laws unconstitutional resulted from changes in the judicial agenda and opinion-writing styles. The Chase Court declared more federal laws unconstitutional than the Taney Court partly because it was asked to do so more frequently: as mentioned above, a litigation explosion fueled mainly by the elected branches of government nearly quadrupled the annual number of Supreme Court cases challenging the constitutionality of federal actions. Supreme Court decisions striking down federal laws also increased after the Civil War because, before Chase joined the Court, the Justices relied on a different judicial technique for imposing minor constitutional limits on federal power. Taney Court Justices were quite willing to impose minor constitutional limits on the national government. Antebellum judicial opinions, however, rarely made explicit declarations that laws were unconstitutional when constitutionally restraining national power. When the various techniques Jacksonians used for limiting government power are identified, the primarily difference between Chase and Taney Court practice turns out to be one of judicial style rather than a difference in how federal powers were construed.

A. The Agenda

After the Civil War, the number of cases challenging the constitutionality of federal actions increased dramatically. My very rough survey of the legal arguments and judicial opinions found in the **U.S. Reports** suggests that the Taney Court was asked on only fifty-four occasions to declare a federal law unconstitutional, and the constitutional merits were reached in only two thirds of those cases. During the 1837, 1839, 1841, 1848, 1849, 1859,

and 1860 terms, the Justices were never asked to determine whether a federal action was constitutional. By contrast, the Chase Court heard as many as seventy-one constitutional attacks on some federal action and handed down approximately forty-nine decisions on the merits. At least three constitutional attacks on federal policy were heard each term, the high being fifteen in 1871. Overall, the Chase Court annually decided slightly less than five constitutional challenges to federal actions, while the Taney Court annually adjudicated slightly more than one such challenge.

This increase in cases concerned with the constitutionality of some federal action comprised part of a more general increase in cases decided by the Supreme Court. The number of cases the Court decided each year increased fairly steadily during the Taney years and jumped sharply during Reconstruction after Congress passed a series of measures expanding federal jurisdiction.[51] The Taney Court decided slightly over fifty cases a year; the Chase Court heard an average of almost 130 cases a year. For reasons that are not fully known, cases raising constitutional challenges to federal actions increased at an even more rapid rate: the Chase Court heard almost four times as many claims that some federal action was unconstitutional each year as the Taney Court, but only two and one-half times as many claims overall.[52]

The Chase Court did not encourage these increases. Both Taney and Chase Court Justices consistently ruled that Congress could divest federal courts of jurisdiction in any class of cases,[53] and that such legislation prevented the Justices from adjudicating those cases pending before the Court when the repeal was passed.[54] Both tribunals interpreted federal jurisdictional statutes narrowly, adjudicating only those cases that clearly met statutory and constitutional guidelines.[55] The Chase Court Justices heard more cases because their inherited principles required them to do so when Congress sought to foster federal litigation during the Chase years, not because those principles were trimmed to expand judicial power.

The increase in judicial opportunities to declare federal measures unconstitutional explains some of the increase in Supreme Court decisions to strike down national laws, but not all of it. Chase Court Justices certainly had four times more opportunities each year than Taney Court Justices to declare a federal policy unconstitutional, as described above—but they declared laws unconstitutional at an annual rate nearly *thirty* times greater than that of the latter. In nine terms, Chase and associates struck down between eight and ten laws; in twenty-nine terms, Taney and associates struck down only one statute. The remaining difference between these tribunals lies in their techniques—in the way each tribunal imposed minor constitutional limits on federal power.

B. Judicial Style

Scholars regard the Chase Court as more active than the Taney Court because they measure judicial activism by counting judicial decisions explicitly declaring laws unconstitutional, rather than judicial decisions imposing constitutional limits on federal power. However, the two categories are not identical, and the Supreme Court has numerous techniques for limiting government power that do not require declaring a statute unconstitutional. The Chase Court relied on these techniques in such cases as *Collector v. Day* and *United States v. Railroad Company*, when the Justices ruled that for constitutional reasons a statute could not be interpreted as regulating behavior that the plain language of the statute quite clearly regulated.[56] These decisions held that government could not constitutionally pass certain laws, but that constitutional barrier was used to justify the decision to (mis)construe the federal statute in a certain way, rather than a judicial declaration being made that the statute was unconstitutional. Taney Court Justices made more extensive use of this and other techniques for limiting federal power, regularly misconstruing or ignoring federal stat-

utes in circumstances where the Chase Court majority declared offending measures unconstitutional. When all judicial decisions handed down between 1836 and 1873 that imposed constitutional limits on federal power are included in the count, the Taney and Chase Courts appear equally committed to restraining the national government.

In at least twenty cases decided before the Civil War, the Supreme Court held that a constitutional limit existed on federal power.[57] The Justices in these cases did not abstractly note that the federal government could not constitutionally perform some action: the constitutional restraint on federal power was central to the outcome of each decision. In some cases the Court engaged in statutory neglect, ruling that the federal government could not perform a certain action but never determining whether the statute in question transgressed that limitation.[58] In other cases, the Justices engaged in statutory misconstruction, holding that a federal statute could not be interpreted according to its plain meaning for the sole declared reason that the statute was unconstitutional if so construed.[59] In *New Orleans v. United States*, the federal government had not passed a statute under the impression that no statute was needed to justify a federal action. The Justices concluded the action could not be justified even with a federal statute.[60] In another series of cases, the majority opinion lacked only an explicit declaration that the federal law under attack was unconstitutional.[61] Such a declaration was made, however, in the dissent.[62]

The last case in which the Taney Court imposed a constitutional limitation on the federal government provides a wonderful example of how antebellum Justices used statutory (mis)construction to limit federal power. In *Commonwealth of Kentucky v. Dennison*, Taney avoided declaring a federal law unconstitutional only by construing the statutory declaration that "it shall be the duty" of a state executive to extradite a fugitive from another state as stating a moral responsibility rather than an enforceable legal obligation. Taney admitted that "[t]he words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience." He rejected the plain meaning of that language only because "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."[63] *Dennison* holds that the national government may not require state officials to enforce federal laws. Instead of declaring the statutory provision void for constitutional reasons, the Justices merely declared the statutory provision to have no legal meaning for constitutional reasons.

By comparison, the first case in which the Chase Court imposed a constitutional limitation on federal power employed statutory misconstruction to justify striking down a federal law.[64] The law under constitutional attack in *Gordon v. United States* was part of a federal statute designed to ensure that the Court of Claims would be a court in fact as well as in name. Courts in the United States enjoy Article III status only if their decisions cannot be reversed by non-judicial officials. A lengthy debate over whether the Court of Claims should be a legislative (Article I) or judicial (Article III) body was apparently resolved when the Senate rejected an amendment to the bill permitting elected officials to revise the decisions of that bench. Congress than added without debate Section 14, a provision authorizing the Secretary of the Treasury to pay successful claimants in the Court of Claims. Oblivious to the debate and language of the bill, the Supreme Court in *Gordon* interpreted Section 14 as authorizing the Secretary of the Treasury not to pay certain claims. On that ground, the Justices declared unconstitutional the section in the Court of Claims Act that required the Supreme Court to hear appeals from the Court of Claims rulings. No appeal to the Supreme Court, they maintained, could lie from a body whose decisions could be upset by an administrative officer. Congress, which

had never intended to give the Secretary of the Treasury discretionary power, responded immediately by removing the offending section. Lyman Trumbull, the sponsor of both the original and repeal measure declared, "I do not think, and I did not think at the time, that the fourteenth section altered the previous provisions of the act," that "the construction of the law has been such as not to carry out the intention of Congress."[65]

The *Dennison* Court would have imposed the same constitutional limit on federal power without declaring the federal law unconstitutional. To the extent any doubt existed as to whether the statute authorized the Secretary of Treasury to deny claims sustained by the federal judiciary, the Justices of that Court would have ruled that Section 14 had to be interpreted as vesting executive officials with no discretion because the alternative interpretation made the statute unconstitutional. Given the creative ways in which antebellum Courts interpreted other minor federal statutes in order to avoid declaring them unconstitutional,[66] a fair probability exists that Taney Court Justices could have imposed the same constitutional limits on federal power as did the Chase Court without ever have to declare an obscure federal law unconstitutional.

In one line of cases, Taney and Chase Court opinions used different techniques to declare the same constitutional limit on federal power. All Justices on both tribunals agreed that the federal government could not grant land that had previously been granted to another person to a third party.[67] The Chase Court's decision in *Reichart v. Felps*[68] articulated that constitutional limit by declaring a federal law unconstitutional.[69] The crucial sentence in *Reichart* declares that "Congress is bound to regard the public treaties, and it had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the government."[70] Numerous antebellum cases also held that Congress could not constitutionally nullify private land titles. Unanimous or majority opinions in land decisions handed down during the Jacksonian era contain such sentences as "[a] patent is utterly void and inoperative, which is issued for land that had been previously patented to another individual"[71] and "[t]he President of the United States has no right to issue patents for land, the sale of which is not authorized by law."[72] In at least three cases, the Taney Court invalidated a federal land grant on the ground that a third party already had valid title to the property in question. The most famous beneficiary of this largess was John Sanford (or, more accurately, his heirs), who during the 1857 term managed to convince the Supreme Court to void both the Missouri Compromise and a federal grant of his land to another party (though not to spell his last name correctly in either opinion!).[73] Unlike the Chase Court opinion in *Reichart*, however, the Taney Court opinions did not claim the offending statute was unconstitutional; they simply insisted that the federal government could not constitutionally grant private property without considering whether some statute authorized that grant.

The common claim that the Chase Court was the first tribunal to exercise judicial review in modern form may stem from self-fulfilling prophecies. Judicial practice in obscure cases was quite similar during the years immediately before and immediately after the Civil War. The *Reichart* opinion indicates that Congress had exceeded its constitutional powers. The language declaring the federal law unconstitutional, however, seems no more clear than the analogous language in Justice McKinley's opinion in *Pollard's Lessee v. Hagan*, when that Jacksonian Justice gave three constitutional reasons why the federal government could not claim title to land below the high-water mark of state rivers.[74] Still, everyone knows that the Supreme Court did not declare a constitutional limit on federal power in *Marbury* and *Dred Scott*. Hence, no one scours the **U.S. Reports** for obscure cases to the contrary. Accidental brushups with ambiguous language in Taney Court opinions are ig-

nored, forgotten, or classified as something else. Everyone also knows that the Supreme Court began routinely declaring laws unconstitutional after the Civil War. Hence, some scholars look for obscure Chase Court cases exercising the power of judicial review and interpret ambiguous language in Chase Court opinions as either declaring a federal law unconstitutional or, at least, imposing a constitutional limit on federal power.

IV. Why a Jacksonian Tribunal

That Chase Court activism was rooted in Jacksonian constitutional beliefs seems consistent with the common claim that judicial review is countermajoritarian.[75] Defeated soundly by the Republicans in every national election held while Chase was Chief Justice, the Democrats nevertheless managed to retain their majority on the Supreme Court until at least 1871, some eleven years after that coalition lost control of the elected branches of the national government. Justices associated with the Democratic party cast crucial votes in those cases that struck down Republican Civil War and Reconstruction policies. Every Justice who joined the majority in *Ex parte Garland* and *Hepburn* was either a Democrat or, in Chase's case, actively seeing the Democratic presidential nomination. The only Republican who joined the majority opinion in *Milligan*, Justice Davis, became a Democrat soon after. *Hepburn* was overruled and the legal tender acts declared constitutional only when, after the appointments of Justices Strong, Bradley and Hunt, Justices associated with the Republican party finally enjoyed a clear judicial majority on the Supreme Court.

This simple countermajoritarian explanation of Chase Court activism does not acknowledge Republican responsibility for the continued Jacksonian influence on the Supreme Court. After Salmon Chase was appointed Chief Justice in 1864, the five Lincoln appointees had the votes necessary to sustain all federal laws. Those Justices became a clear majority the next year when Justice Catron died, leaving the Supreme Court with nine members. Had these Republican appointees voted as a block to sustain Republican Civil War and Reconstruction policies, the Chase Court would never have imposed a major constitutional limit on federal power.

Republicans did not gain control over the Supreme Court after 1864 because they knowingly risked maintaining that tribunal's Jacksonian majority. The constant defections of Justice Field and the less frequent defections of Chief Justice Chase and Justice Davis were rooted in the politics of the appointment process, and do not stand as instances when Justices surprised and/or disappointed their political sponsors. Although at least three quarters of the Republican electorate were former Whigs, three of Lincoln's five Supreme Court nominees were former or War Democrats. Chief Justice Chase and Justice Swayne were Democrats before they were Republicans. Justice Field is the only clear case in the first hundred years of U.S. national life when a President belonging to one party appointed to the bench a member of a rival party.[76] More significantly, Chief Justice Chase and Justice Field were known when appointed to hold a narrow Jacksonian conception of federal power.[77] That they behaved as Democrats after the war should not have been that surprising. At the time of his appointment, Justice Davis was a leading critic of Lincoln's martial law policy.[78] No politically astute observer was surprised by his vote in *Milligan*. Davis probably voted more like a Democrat on other issues than expected; in light of his past Jacksonian connections, Justice Swayne probably voted *less* like a Democrat than expected.

Lincoln's willingness to appoint Democrats and pseudo-Democrats to the federal bench formed part of a broader political strategy. Estimates suggest that approximately one quarter of his party's vote came from northern Democrats who finally tired of their party's southern tilt.[79] Those Democratic-

Republicans represented the crucial swing vote in many states. Hence, Lincoln felt a particular need to court the former Democrats in his coalition, as well as retaining the support of those Democrats who consistently supported war measures. This courting took a couple of forms. First, the former Whigs in the Republican coalition de-emphasized their economic concerns in an effort to promote a united front against slavery.[80] Second, and more relevant, Democrats and former Democrats received a disproportionate number of administrative positions. Four of the original seven members of Lincoln's cabinet were former Democrats, as was his first Vice President, Hannibal Hamlin. The second Vice President, Andrew Johnson, was a War Democrat.[81] Lincoln's willingness to appoint Supreme Court Justices who had close relationships with the Democratic party was consistent with this general strategy of broadening the base of support for his administration's primary goal: the military reunification of the United States.

Lincoln and the Republican party made a conscious decision to obtain short-term political support for the war effort by foreswearing Whiggish control over national institutions. As one consequence of this choice, a War Democrat became President after Lincoln was assassinated. Another consequence was that the judicial majority during the Chase years sympathized more with the policy preferred by that war Democrat than with those preferred by the Republican-dominated Congress. By 1866, Republicans might have preferred a more Whiggish President and Supreme Court. Still, the divisions in the federal government during the late 1860s resulted from choices Republicans had made in order to become the dominant national coalition. The Jacksonian influence on the Chase Court cannot be explained, as the countermajoritarian model suggests, by the simple refusal of life-tenured Justices from the previous regime to resign or die.

The Chase Court is best understood as a part of the governing National Union party, as the Republicans styled themselves in 1864.[82] National Unionists agreed that the Supreme Court should not declare Civil War measures unconstitutional while the war was being fought, and the Chase Court abided by this. National Unionists debated whether those measures should be struck down after the Civil War and also whether various Reconstruction proposals were unconstitutional. Strong sentiment existed within the Lincoln administration to abandon legal tender and martial law immediately after the Civil War. Prominent members of Lincoln's governing coalition articulated these sentiments after his assassination and supported President Johnson in his struggles against the national legislature.[83] The judicial decisions in *Milligan* and *Hepburn* represented sides in the intracoalitional struggles fought during the late 1860s. When declaring constitutional limits on federal power, Chase Court Justices articulated the constitutional understandings of the dominant National Union coalition's influential Jacksonian wing, not the Jacksonian opposition to the coalition.

Conclusion

Like **Inherit the Wind**'s Matthew Brady, the Supreme Court of the United States sometimes moves by standing still. Some changes in judicial willingness to declare laws unconstitutional are best explained by internal changes within the Court. Justices rethink their constitutional beliefs; more often, Justices with certain constitutional beliefs replace Justices with different constitutional beliefs. For example, the Warren Court moved into high gear when Justice Felix Frankfurter, the apostle of judicial restraint, was replaced by Justice Arthur Goldberg, a liberal activist.

Other changes in judicial willingness to declare laws unconstitutional are best explained by external changes in the political system. A new dominant national coalition arises that compels the Justices to apply existing constitutional beliefs to new issues. For

example, Supreme Court Justices did not change their constitutional opinions when Franklin Roosevelt became President. They declared more federal laws unconstitutional between 1933 and 1936 than between 1929 and 1932 because the Roosevelt coalition exercised national powers far more aggressively than the Hoover coalition.[84]

The Chase Court moved by standing still. The judicial majority on that tribunal understood the constitution and judicial power much as did the judicial majority on the Taney Court. If anything, owing to the greater influence of former Whigs, Justices on the Chase Court may have been willing to sustain some federal actions that the judicial majority on the Taney Court would have declared unconstitutional. Nevertheless, while the Court stood still, American politics moved. A new dominant majority formed in 1860, one that believed the Constitution sanctioned certain government policies that Jacksonians thought unconstitutional. The Chase Court's willingness to declare more major federal laws unconstitutional than had previous tribunals is best explained by the willingness of the Republican/Whig/National Union coalition to take far more constitutionally controversial actions than previous national officials.

The federal judiciary appeared restrained before the Civil War primarily because Justices do not impose constitutional limits on federal powers when persons opposed to such powers have the strength necessary in the elected branches of the government to prevent their exercise. During the first half of the nineteenth century, the United States was governed by political coalitions that took the narrower view of federal power on virtually all the constitutional debates of the day. Slavery aside, the Taney Court declared no controversial measure unconstitutional, because—slavery aside—the federal government from 1836 until 1860 almost never adopted a constitutionally controversial policy. Litigation became an important means of imposing constitutional limits on government only during the Chase years, when persons opposed to the exercise of federal powers began losing their struggles in the elected branches of government. Lincoln's war policies and subsequent Reconstruction measures marked the first time in forty years that the national government took a series of actions that the leading political opposition thought unconstitutional. Chase Court activism found its fuel in this political change of guard, not in changes in the dominant theory of judicial review. The only major internal change in judicial practice from Taney to Chase was in the Chase Court's much greater judicial willingness to impose constitutional limits on federal power by explicitly declaring federal laws unconstitutional.

Future Supreme Courts have resembled the Chase Court more closely than the Taney Court primarily because future political coalitions have resembled the Republican coalition more closely than the Jacksonian coalition. Since the Civil War, the United States has never been governed by a political coalition that advanced a more narrow understanding of federal power on virtually all constitutional debates of the day. Rather, every dominant national majority from 1864 to the present has passed or retained some laws that their leading political rivals thought unconstitutional. The dominant national coalition at any given time construes some federal powers more broadly than their main rival and other powers more narrowly. For example, the Reagan administration had a less expansive understanding of federal power to regulate the economy, but a more expansive understanding of federal power to regulate drugs, than did most Democrats. This structural feature of American politics guarantees that opponents of every constitutionally controversial measure will never have the strength in the national legislature or national executive to defeat all efforts to exercise the relevant federal powers. Defeated in the legislature on at least some issues, the proponents of more limited constitutional powers

turn to the courts for redress. As the American experience after the Civil War demonstrates, an activist government is the first condition for an activist Court.

ENDNOTES

[1]Jerome Lawrence and Robert E. Lee, **Inherit the Wind** (Bantam Books: Toronto, 1955), p. 60.

[2]1 Cranch 137 (1803).

[3]*Dred Scott v. Sandford*, 19 Howard 393 (1857).

[4]The cases are *Gordon v. United States*, 69 U.S. 561 (1865); *Ex parte Garland*, 71 U.S. 333 (1867); *Reichart v. Felps*, 73 U.S. 160 (1868); *The "Alicia,"* 74 U.S. 571 (1869); *Hepburn v. Griswold*, 75 U.S. 603 (1870); *United States v. DeWitt*, 76 U.S. 41 (1870); *The Justices v. Murray*, 76 U.S. 274 (1870); *United States v. Klein*, 80 U.S. 128 (1872). Stanley Kutler and Charles Warren include *Collector v. Day*, 78 U.S. 113 (1871), on their list of Chase Court decisions declaring federal laws unconstitutional. Charles Fairman and the editors of **The Supreme Court Compendium** do not. Compare Stanley I. Kutler, **Judicial Power and Reconstruction Politics** (University of Chicago Press: Chicago, 1968), p. 114, and Charles Warren, **The Supreme Court in United States History** (Volume Two) (revised edition), p. 534 n.2, with Charles Fairman, **Reconstruction and Reunion 1864–88** (Part One) (The Macmillan Company: New York, 1971), p. 1435 ("the Court was not finding fault with the statute: it merely said that, by reason of a doctrine deduced from the Constitution, the [income tax] statute could not be applied to salary paid for performing a function of the State") and **The Supreme Court Compendium** (edited by Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker) (Congressional Quarterly Inc.: Washington, D.C., 1994), p. 96. Warren believes the Supreme Court declared a federal law unconstitutional in *United States v. Railroad Co.*, 84 U.S. 322 (1873); *see* Warren, 2 **Supreme Court**, p. 534 n.2. Fairman disagrees; *see* Fairman, **Reconstruction**, p. 1435. This dispute is more verbal than substantive. Fairman agrees that *Collector v. Day* and *United States v. Railroad Co.* imposed constitutional limits on federal power. His point is simply that the Court declared, not that the entire statute was unconstitutional, but only that the statute could not be constitutionally applied to the case before the Justices.

[5]*Ex parte Milligan*, 71 U.S. 2 (1866).

[6]That case, *Farrington v. Saunders*, is unreported. *See* Fairman, **Reconstruction**, pp. 890–91.

[7]*Barney v. Schmider*, 76 U.S. 248 (1870) (federal trial violated Seventh Amendment).

[8]*See Ex parte McCardle*, 74 U.S. 506 (1869). Writing a month later, Chief Justice Chase declared that "had the merits of the McCardle case been decided the court would have doubtless have held that his imprisonment for trial before a military commission was illegal." S. P. Chase to Robert A. Hill, May 1, 1869, **The Salmon Chase Papers** (Volume 5) (edited by John Niven) (Kent, OH: Kent State Press, 1998), p. 302. Jeremiah Black, who had inside information, insisted that six Justices were prepared to declare military trials unconstitutional. Jeremiah S. Black to Howell Cobb, April, 1868, **The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb** (edited by Ulrich Bonnell Phillips) (DaCapo Press: New York, 1970), p. 694. Fairman suggests that Chase, Davis, Nelson, Grier, Clifford, and Field were the Justices to whom Black referred. Fairman, **Reconstruction**, p. 494. Late in his life, Justice Field insisted that all the Justices but Swayne would have declared martial law in the Reconstruction South unconstitutional. *See* Orville Hickman Browning, **Diary of Orville Hickman Browning** (Volume 2) (edited by James G. Randall) (Trustees of the Illinois State Historical Library: Springfield, IL, 1933), pp. 191–92.

[9]*See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Tot v. United States*, 319 U.S. 463 (1943). All information in this paragraph is taken from **The Supreme Court Compendium**, pp. 96–99.

[10]*See Callan v. Wilson*, 127 U.S. 540 (1888); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

[11]Several Supreme Court Justices informed President Monroe that the national government had the constitutional power to adopt a general system of internal improvements. Monroe rejected that advice, vetoing as unconstitutional the bill the Justices believed constitutional. Charles Warren, **The Supreme Court in United States History** (Volume One) (revised edition) (Little, Brown and Company: Boston, 1947), pp. 596–97.

[12]Stephen M. Griffin, **American Constitutionalism: From Theory to Practice** (Princeton University Press: Princeton, NJ, 1996), p. 97.

[13]*See* Kutler, **Judicial Power**, p. 125; G. Edward White, **The American Judicial Tradition: Profiles of Leading American Judges** (expanded edition) (Oxford University Press: New York, 1988), p. 86; William E. Nelson, "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860," 120 *University of Pennsylvania Law Review* 1166, 1168–69 (1972); Michael Les Benedict, "Salmon P. Chase and Constitutional Politics," 22 *Law and Social Inquiry* 459, 474 (1997).

[14]*See* Kutler, **Judicial Power**, p. 125; Griffin, **American Constitutionalism**, pp. 90–99.

[15]Robert Lowry Clinton, ***Marbury v. Madison* and Judicial Review** (University Press of Kansas: Lawrence, KS, 1989). *See* Matthew J. Franck, **Against the Imperial Judiciary: The Supreme Court vs. The Sovereignty of**

the People (University Press of Kansas: Lawrence, KS, 1996).

[16]Christopher Wolfe, **The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law** (Basic Books, Inc.: New York, 1986).

[17]Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (Yale University Press: New Haven, CT, 1990).

[18]Joel H. Silbey, **The American Political National, 1838–1893** (Stanford University Press: Stanford, CA, 1991), p. 88. Silbey specifically comments that "[t]he Democrats were as steadfast in 1864 and the 1870s as they were in 1844 against 'the accumulation of power by the federal government.'" Sibley, **American Political Nation**, p. 88.

[19]The cases are *Reichart v. Felps*, *The Alicia*, *United States v. DeWitt*, *The Justices v. Murray*, and *United States v. Klein*. Justices Miller and Bradley dissented in the latter case, but their opinion indicated that they agreed with the majority that the law in question was unconstitutional. *Klein*, at 148 (Miller, J., dissenting). Placing *Klein* on the list of cases with divided votes would have further strengthened the claims made in this section. *See also* note 7 above (noting the probable judicial divisions had a vote been taken in *Ex parte McCardle*).

[20]The cases are *Gordon v. United States*, *Ex parte Milligan*, *Ex parte Garland*, *Veazie Bank v. Fenno*, 75 U.S. 533 (1870), *Hepburn v. Griswold*, 75 U.S. 603 (1870), *Farrington v. Saunders*, *Virginia v. West Virginia*, 78 U.S. 39 (1870), *Collector v. Day*, *Miller v. United States*, 78 U.S. 268 (1871), *Legal Tender Cases*, 79 U.S. 457 (1871), and *United States v. Railroad Company*. The relevant division in *Ex parte Milligan* is over whether Congress could impose martial law in places where civilian courts were functioning. The Justices may have disputed whether a federal law was unconstitutional in *Thorp v. Hammond*, 79 U.S. 408. Counsel seems to have made such a claim in oral argument, but neither the official report of that case nor secondary sources state the judicial alignment in that case or the ground of difference.

[21]Harold Marvin Hollingsworth, **The Confirmation of Judicial Review under Taney and Chase** (Ph.D. Dissertation, University of Tennessee, 1966), p. 81. *See* Kutler, **Judicial Power**, p. 123.

[22]For Miller, *see* Charles Fairman, **Mr. Justice Miller and the Supreme Court 1862–1890** (Harvard University Press: Cambridge, MA, 1939), pp. 7, 26–27, 29. For Bradley, *see* Leon Friedman, "Joseph P. Bradley," **The Justices of the United States Supreme Court 1789–1978** (Volume II) (edited by Leon Friedman & Fred Israel) (Chelsea House Publishers: New York, 1980), p. 1184.

[23]For Chase, *see* S. P. Chase to August Belmont, May 30, 1868, 5 **Chase Papers**, p. 221 ("[f]or more than a quarter of a century I have been in my political views and sentiments, a Democrat"); John Niven, **Salmon P. Chase: A Biography** (Oxford University Press: New York, 1995), pp. 96, 120, 171, 186–87, 206, 227, 229, 427. For Davis, *see* Stanley I. Kutler, "David Davis," 2 **Justices of the United States Supreme Court**, pp. 1046, 1052.

[24]For Swayne, *see* William Gillette, "Noah H. Swayne," 2 **Justices of the United States Supreme Court**, pp. 990, 997–98. For Strong, *see* Stanley I. Kutler, "William Strong," 2 **Justices of the United States Supreme Court**, pp. 1154, 1161.

[25]The jurisdictional statute at issue in *United States v. Gordon* would have been sustained by an equally divided vote. The other minor federal statutes declared unconstitutional by the actual Chase Court would also have been struck down by the revised Chase Court.

[26]Nelson also hinted that there were constitutional grounds for his dissent in *The Circassian*, 69 U.S. 135 (1865).

[27]*See The Prize Cases*, 67 U.S. 635 (1862) (Nelson, Clifford); *State of Pennsylvania v. Wheeling and Belmont Bridge*, 59 U.S. 421 (1856) (Grier, Wayne); *Dred Scott v. Sandford*, 60 U.S. 353 (1857) (Wayne, Grier); *Rice v. Railroad Co.*, 66 U.S. 358 (1861) (Nelson, Wayne).

[28]The Jacksonian Justices are James Wayne, Roger Taney, Philip Barbour, John Catron, Peter Daniel, Samuel Nelson, Levi Woodbury, Robert Grier, John Campbell, and Nathan Clifford. For votes explicitly declaring federal laws unconstitutional not cited in note 27, above, *see Jackson v. Steamboat Magnolia*, 61 U.S. 296 (1858) (Daniel); *Propeller Genessee Chief v. Fitzhugh*, 53 U.S. 443 (1852) (Daniel); *Searight v. Stokes*, 44 U.S. 151 (1845) (Daniel).

[29]Jeffrey A. Segal and Harold J. Spaeth, **The Supreme Court and the Attitudinal Model** (Cambridge University Press: New York, 1993), p. 305.

[30]67 U.S. 635 (1863).

[31]Had the Taney Court in *Roosevelt v. Meyer*, 68 U.S. 512 (1864), not denied jurisdiction on dubious statutory grounds, the Justices would have almost certainly declared the legal tender act unconstitutional. Taney wrote a draft opinion for the Court in *Gordon* declaring the federal law unconstitutional, but died before the case was officially handed down. *Gordon v. United States*, 117 U.S. 697 (1864) (draft opinion of Taney, C. J.). Taney spent his last years as Chief Justice writing memos declaring the conscription, legal tender, and federal income tax (as applied to federal judicial salaries) acts unconstitutional. Hollingsworth, **Confirmation of Judicial Review**, pp. 55–60.

[32]Clear partisan divisions emerged after 1860 in lower federal and state courts when Civil War questions were adjudicated. With rare exceptions, Republican Justices voted to sustain and Democratic Justices voted to strike down the conscription and legal tender acts. *See Kneedler v. Lane*, 45 Pa. St. 238 (1864); Fairman, **Reconstruction**, pp. 544, 692–93, 700; Fairman, **Miller**, pp. 152–57.

[33]Segal and Spaeth, **The Supreme Court**, pp. 304–05.

[34]*See* Bradly Canon and S. Sidney Ulmer, "The Supreme Court and Critical Elections," 70 *American Political Science Review* 1215 (1976).

[35]For the federal law, *see State of Pennsylvania v. Wheeling and Belmont Bridge Company*, 59 U.S. 421 (1856). For the federal executive actions, *see United States v. Guthrie*, 58 U.S. 284 (1855), and *Ex parte William Wells*, 59 U.S. 307 (1856).

[36]*See* Howard Gillman, "More on the Origins of the Fuller Court's Jurisprudence: The Scope of Federal Power over Commerce and Manufacturing in Nineteenth-Century Constitutional Law," 49 *Political Research Quarterly* 415 (1996); Stephen M. Griffin, "Constitutional Theory Transformed," 108 *Yale Law Journal* 2115 (1999). One might note that all the Whigs on the Chase Court supported the Chief Justice's opinion in *DeWitt*, which, as Kutler notes, "reverted to the narrow construction of the commerce clause maintained, for the most part, by Taney Court Democrats." Kutler, *Judicial Power*, p. 118.

[37]*See* Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act," 47 *American Law Review* 161 (1913).

[38]17 U.S. 316 (1819).

[39]For the leading samples of this complaint, *see* Gerald Gunther, ed., **John Marshall's Defense of *McCulloch v. Maryland*** (Stanford University Press: Stanford, CA, 1969).

[40]Warren, 2 **Supreme Court**, pp. 216–17; Kutler, **Judicial Power**, p. 8.

[41]*See* Donald Bruce Johnson, ed., **National Party Platforms** (Volume I) (University of Illinois Press: Urbana, 1978), pp. 1–33.

[42]For a sampling of these vetoes, all of which rejected John Marshall's interpretation in *McCulloch* of the "necessary and proper clause," *see* James Madison, "Veto Message," **A Compilation of the Messages and Papers of the Presidents** (Volume I) (edited by James D. Richardson) (Government Printing Office: Washington, D.C., 1897), pp. 584–85 (no power to establish roads and canals); James Monroe, "Veto Message," 2 **Messages and Papers**, pp. 142–43 (no power to establish toll roads); Andrew Jackson, "Veto Message," 2 **Messages and Papers**, pp. 483–93 (no power to finance local improvements); Andrew Jackson, "Veto Message," 2 **Messages and Papers**, pp. 576–91 (no power to establish a national bank); John Tyler, "Veto Messages," 4 **Messages and Papers**, pp. 63–72 (no power to incorporate a bank); John Tyler, "Veto Messages," 4 **Messages and Papers**, pp. 330–33 (no power to improve navigation of rivers); James K. Polk, "Veto Messages," 4 **Messages and Papers**, pp. 460–66 (no power to construct local improvements); James K. Polk, "Veto Message," 4 **Messages and Papers**, pp. 610–626 (same); Franklin Pierce, "Veto Messages," 5 **Messages and Papers**, pp. 247–56 (no power to construct hospitals for the insane), 256–71 (no power to make local improvements); Franklin Pierce, "Veto Messages," 5 **Messages and Papers**, pp. 386–88 (no power to make internal improvements); James Buchanan, "Veto Messages," 5 **Messages and Papers**, pp. 543–50 (no power over education); James Buchanan, "Veto Messages," 5 **Messages and Papers**, pp. 601–07 (no power to make local improvements), 608–14 (no power to give public lands away to settlers).

[43]Fairman, **Reconstruction**, p. 697.

[44]41 U.S. 539 (1842).

[45]*Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

[46]*Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1852).

[47]*Searight v. Stokes*, 44 U.S. 151 (1845).

[48]*See* Silbey, **American Political Nation**, pp. 88–89.

[49]Not surprisingly, state courts also declared an increased number of federal statutes unconstitutional after the national government began passing more constitutionally controversial measures. *See* Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," **1978: The Supreme Court Review** (edited by Philip B. Kurland and Gerhard Casper) (University of Chicago Press: Chicago), p. 53.

[50]Merrill D. Peterson, **The Great Triumvirate: Webster, Clay, and Calhoun** (Oxford University Press: New York, 1987), p. 306.

[51]*See* Kutler, **Judicial Power**, pp. 143–60; William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863–1875," 13 *American Journal of Legal History* 333 (1969).

[52]*See* generally, David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years 1789–1888** (University of Chicago Press: Chicago, 1985), p. 286; Fairman, **Miller**, p. 62.

[53]*See Daniels v. Railroad Company*, 70 U.S. 250, 251 (1866); *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850); Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan," 86 *Columbia Law Review* 1515, 1589–1610 (1986); Fairman, **Reconstruction**, p. 495.

[54]*Ex parte McCardle*, 75 U.S. 506 (1868); *Insurance Company v. Ritchie*, 72 U.S. 541 (1867).

[55]*See* cases cited in note 53, above; *Walker v. United States*, 72 U.S. 541 (1867); *Cary v. Curtis*, 44 U.S. 236, 245 (1845); Fairman, **Reconstruction**, pp. 138–40, 251–52. The apparent exception to this policy was *United States v. Klein*, 80 U.S. 128 (1871). The Justices in that case made clear, however, that Congress could pass laws taking from the Supreme Court all appellant jurisdiction over cases decided in the Court of Claims. *Klein* holds that such laws could not be structured to deny jurisdiction only when a particular party was likely to win on the mer-

its, where "the decision in accordance with settled law, must be adverse to the government and favorable to the suitor." *Klein*, at 145. *See* Gordon G. Young, "Congressional Regulation of Federal Courts' Jurisdiction and Processes: *United States v. Klein* Revisited," 1981 *Wisconsin Law Review* 1189, 1193–94, 1260 (1981).

[56]*See* Fairman, **Reconstruction**, pp. 1435–36.

[57]For a detailed discussion of these cases, *see* Mark A. Graber, "Naked Land Transfers and American Constitutional Development," 53 *Vanderbilt Law Review* 73 (2000). A shorter version can be found in Mark A. Graber, "Declaring Laws Unconstitutional: Some Revisions and Revisionist Thoughts," *Law and Courts Newsletter* (Summer 1999).

[58]*See*, i.e., *Benner v. Porter*, 50 U.S. 235 (1850); *People's Ferry Company of Boston v. Beers*, 61 U.S. 393 (1858); *Ex parte Vallindigham*, 68 U.S. 243, 251 (1864); *Hunt v. Palao*, 45 U.S. 589 (1846); *McNulty v. Batty*, 51 U.S. 72 (1851); cases cited in note 72.

[59]*See*, i.e., *Lytle v. Arkansas*, 50 U.S. 314 (1850); *McNulty v. Batty*, 51 U.S. 81 (1851); *Kentucky v. Dennison*, 65 U.S. 66 (1860); *Veazie v. Moor*, 55 U.S. 568, 575 (1853); *Withers v. Buckley*, 61 U.S. 84, 92 (1858). For similar Marshall Court exercises in statutory misconstruction, *see Mossman v. Higginson*, 4 U.S. 12, 14 (1800); *Hodgson and Thompson v. Bowerbank*, 9 U.S. 303, 304 (1809); *Jackson v. Twentyman*, 27 U.S. 136 (1829); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809).

[60]35 U.S. 662 (1836).

[61]*Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Doe v. Beebe*, 54 U.S. 25 (1852); *Goodtitle v. Kibbe*, 50 U.S. 471 (1850).

[62]*Pollard*, at 233 (Catron, J., dissenting).

[63]*Dennison*, at 107–08.

[64]For the details in this paragraph, *see* Wilson Craven, Philip Nichols, Jr., and Marion T. Bennett, "The United States Court of Claims: A History," 216 *Ct. Cl.* 1, 22–24 (1978); William M. Wiecek, "The Origin of the United States Court of Claims," 20 *Administrative Law Review* 389, 399–401 (1968); Floyd Shimomura, "The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment," 45 *Louisiana Law Review* 625, 656–57 (1985).

[65]39th Cong., 1st Sess., p. 770–71 (speech of Mr. Trumbull). *See* Kutler, **Judicial Politics**, p. 116; Fairman, **Reconstruction**, p. 54.

[66]*See* cases cited in note 58, above.

[67]For a lengthy discussion of this constitutional principle, *see* Graber, "Naked Land Transfers."

[68]73 U.S. 160 (1868).

[69]*See* Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas Walker, **The Supreme Court Compendium: Data, Decisions, and Developments** (Congressional Quarterly, Inc.: Washington D.C., 1994), pp. 96–99.

[70]*Reichart*, at 166.

[71]*Stoddard v. Chambers*, 43 U.S. 284, 318 (1844). *See Sampeyreac v. United States*, 32 U.S. 222, 238–41 (1833).

[72]*Easton v. Salisbury*, 62 U.S. 426, 430 (1858). The *Easton* opinion held that such sales were "absolutely void." *Easton*, at 431.

[73]*Willot v. Sandford*, 60 U.S. 79, 82 (1857) (1816 confirmation defeats 1836 confirmation because "where there are two confirmations for the same land, the elder must hold it"); *Chouteau v. Eckhart*, 43 U.S. 344 (1844) (claim confirmed in 1812 defeats claim confirmed in 1836); *DeLaurie v. Emison*, 56 U.S. 525, 538 (1854) ("[t]he confirmation of the claim by Congress, in 1836, had relation back to the original of the title, but it could not impair rights which had accrued, when the land was unprotected by a reservation from sale; and when, in fact, the right of the claimant was banned"). *See Les Bois v. Bramwell*, 45 U.S. 449, 464 (1846); *Landes v. Brant*, 51 U.S. 348, 370 (1851) ("when Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the elder confirmation defeated the younger one"); *Stoddard v. Chambers*, 43 U.S. 284, 317 ("the elder legal title must prevail in the action of ejectment"); *Marsh v. Brooks*, 49 U.S. 223, 133–34 (1850) ("where the same land has been twice granted, the elder patent may be set up in a defence by a trespasser, when sued by a claimant under the younger grant"); *United States v. Covilland*, 66 U.S. 339, 341 (1862) ("a confirmation in the name of the original grantee, divesting the legal title of the United States, is binding on the government and on the assignees").

[74]"First, The shores of navigable waters and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Second, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposal thereof, conferred no power to grant to the plaintiffs the land in controversy in this case." *Pollard*, at 230.

[75]For the seminal assertion of this claim, *see* Alexander M. Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (Bobbs-Merrill Company, Inc.: Indianapolis, IN, 1962), p. 16.

[76]Samuel Nelson, a Democrat, was appointed by Tyler, a nominal Whig, though by the time of that appointment most Whigs had repudiated Tyler. Not until 1893, when Republican Benjamin Harrison appointed Democrat Howell Jackson, did another President clearly cross party lines for a Supreme Court appointment. Indeed, it was not until 1909, when Taft appointed Horace Lurton, that a President whose party controlled the Senate nevertheless appointed to the bench a member of the rival party.

[77]Hollingsworth, **Confirmation of Judicial Review**, pp. 36–37 (Chase); William Lasser, **The Limits of Judicial**

Power: The Supreme Court in American Politics (University of North Carolina Press: Chapel Hill, NC, 1988), p. 67 (Field).

[78]Davis was also more conservative on racial issues than most Republicans. *See* Willard L. King, **Lincoln's Manager, David Davis** (Harvard University Press: Cambridge, MA, 1960), pp. 5–6, 51. Lincoln almost appointed Orville Browning to the seat that Davis occupied. Browning was an ex-Democrat who opposed legal tender. *See* Fairman, **Miller**, pp. 57–58.

[79]Eric Foner, **Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War** (Oxford University Press: New York, 1970), p. 165.

[80]Paul Kleppner, **The Third Electoral System, 1853–1892: Parties, Voters, and Political Cultures** (University of North Carolina Press: Chapel Hill, 1979), p. 82; Foner, **Free Soil**, pp. 304–05, 168–74, 233, 239–44.

[81]*See* King, **Davis**, pp. 162, 169; Foner, **Free Soil**, pp. 149–50; Kleppner, **Third Electoral System**, pp. 73, 80; Niven, **Chase**, pp. 237, 284, 309.

[82]*See* Kleppner, **Third Electoral System**, p. 80.

[83]*See* Fairman, **Miller**, p. 93; Hollingworth, **Confirmation of Judicial Review**, pp. 65–66, 72; King, **Davis**, p. 251; Edward Bates, **The Diary of Edward Bates, 1859–1866** (edited by Howard K. Beale) (U.S. Government Printing Office: Washington D.C., 1933), p. 546; Kutler, **Judicial Politics**, pp. 92–93; E. G. Spaulding, **History of the Legal Tender Paper Money Issued During the Great Rebellion Being a Loan Without Interest and a National Currency** (Greenwood Press: Westport, CT, 1869), pp. 202–203, 15 (appendix), 35 (appendix); Fairman, **Reconstruction**, p. 689.

[84]Thirteen federal laws were struck down during Roosevelt's first term. One was struck down while Hoover was President. **Supreme Court Compendium**, p. 97.

"The Defendant Has Seemed to Live a Charmed Life"[1]: *Hopt v. Utah*: Territorial Justice, The Supreme Court of the United States, and Late Nineteenth-Century Death Penalty Jurisprudence

SIDNEY L. HARRING
and KATHRYN SWEDLOW

Introduction

On March 7, 1887, the Supreme Court of the United States decided Fred Hopt's fourth appeal to that Court.[2] The Utah Territory murderer's conviction had been reversed three times over seven years—his "charmed life"—but this time both his luck and his legal argument had run out: his fourth conviction was upheld. Justice Stephen J. Field dismissed Hopt's four major claims: that several members of the jury were improperly seated in spite of bias; that a doctor's evidence of cause of death was beyond the scope of his expertise; that the trial judge's "reasonable doubt" jury instruction was inadequate; and that the prosecutor's reference to the "many times the case had been before the courts" was prejudicial.[3] Five months later, on August 11, Hopt was executed by a firing squad in the yard of the Utah Penitentiary.[4] Hopt was only one of over two thousand convicted criminals, mostly murderers, who were legally executed in the United States in the two decades between 1880 and 1900.[5] However, his defense team of court-appointed Salt Lake City lawyers had kept him alive for seven years. During that time he had four jury trials, four appeals to the Supreme Court of Utah Territory, and four appeals to the Supreme Court of the United States.[6] He is the only death penalty litigant ever to be the subject of four full opinions of the Supreme Court of the United States.[7]

While death penalty appeals are in one sense only a small subset of criminal appeals, the fact that "death is different" means such appeals involve both a unique body of legal doctrine and a distinct cultural meaning. The Rehnquist Court is not the first Supreme Court to face a substantial workload of death penalty appeals.[8] That distinction falls to the Supreme Court of the 1880s and early 1890s, headed first by Chief Justice Morrison R. Waite and, after 1888, by Melville W. Fuller.[9] These are among the most conservative of the

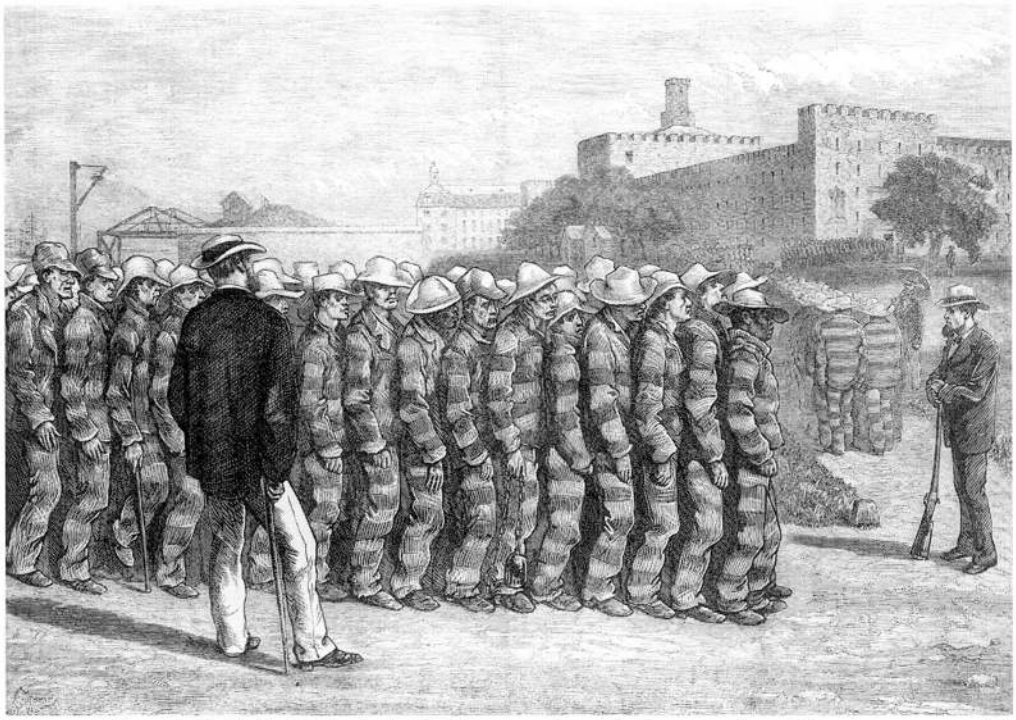
Supreme Courts of the United States, for a number of reasons.[10] Their role in burying the Civil Rights Amendments suffices to warrant that label.[11] Not only did Waite himself write opinions in *United States v. Cruikshank*[12] and *United States v. Reese*[13] limiting the reach of the Civil Rights Acts, he also wrote *Minor v. Happersett* denying voting rights to women on the ground that suffrage was not a right protected by the Fourteenth Amendment.[14] The seven to one vote in *Plessy v. Ferguson* has forever put the Fuller Court in the same reactionary camp on civil rights issues.[15]

These same Courts, however, produced a substantial death penalty jurisprudence that is remarkable and apparently inconsistent with the rest of their work. There was little federal criminal law jurisprudence in the late nineteenth century. The meaning of the constitution in the area of criminal law and criminal procedure was completely unestablished; each case broke new ground.[16] One hundred and fifty-one death penalty appeals reached the Supreme Court of the United States between 1875 and 1900, and 60% of those appeals led to reversals.[17] Given the place of "law and order" on the conservative agenda of the 1880s and 1890s, this record is remarkable. Legal scholars, who have written exhaustively on late nineteenth-century Supreme Court jurisprudence—for example, sixty articles on the complex constitutional property rights case *Pennoyer v. Neff*[18] alone—have largely ignored these cases.

While the Fuller Court bore the brunt of these appeals due to changes in the law of federal criminal appeals and heard 136 such cases by 1900, the Waite Court was the actual source of much of this jurisprudence, deciding sixteen death penalty cases between 1876 and 1888, of which it reversed nine and affirmed seven. These included some very important cases that still have meaning today. Two, *Ex parte Crow Dog* and *U.S. v. Kagama,* concerned the relationship between Native American sovereignty and United States law, using criminal jurisdiction to define tribal sovereignty.[19] One, *U.S. v. McBratney,* defined the legal status of whites on Indian reservations.[20] *Neal v. Delaware* and *Bush v. Kentucky* defined the right of blacks to representation on juries under the Fourteenth Amendment.[21] *Hurtado v. California*[22] refused to extend the Due Process Clause of the Fourteenth Amendment to state criminal cases, provoking a famous Harlan dissent that heralded twentieth-century developments in the criminal law as most constitutional due process rights were selectively incorporated and imposed on the states.[23] *Kring v. Missouri* defined ex post facto laws, directly forbidden the states by the United States Constitution and therefore not raising Fourteenth Amendment issues. In a rare 5–4 decision in this case, the Court reversed a state murder conviction on federal constitutional grounds.[24]

In the middle of all of these cases, curiously, came *Hopt v. Utah,* which made it to the Court four times from 1881 to 1887 and accounted for four of the Court's sixteen death penalty opinions.[25] Although *Hopt* is now never cited for any important point of law, and only occasionally cited for Harlan's use of the common law voluntariness test for confessions,[26] it helps document the death penalty jurisprudence of an age. Important legal principles were debated in *Hopt,* as they were in each of the cases cited above, but in *Hopt* these issues were buried with Hopt's execution.

The 1880s was an era of great civil strife in the United States and a time of unparalleled development of the police and prisons, the criminal law, labor unrest, and overt class warfare.[27] Moreover, this was a time when the death penalty, in general, was widely used without substantial social opposition. Crime then, as now, was the "central metaphor of disorder."[28] Nearly 900 people were legally executed in the 1880s and at least 1,215 people were legally executed in the 1890s, the highest proportionate execution rate in American history.[29] Some indication of the level of support for this state violence is indicated in

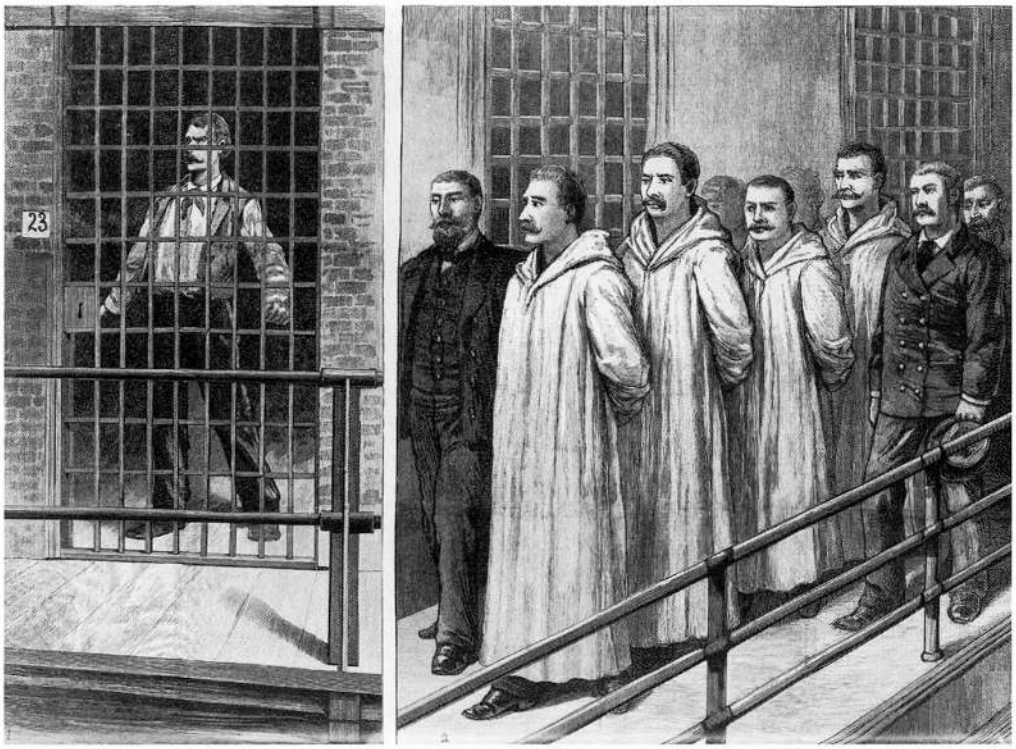


Prison conditions in the United States in the 1880s were miserable. Large numbers of inmates were crowded together in vermin-infested cells or bunkhouses. They were generally released during the day for tedious work assignments.

the number of illegal executions, or lynchings: these reached 1,540 during the 1890s, also their highest level in American history.[30] Hopt himself was threatened with lynching, a real prospect on the frontier and one that would obviously have meant that none of the legal issues in the case would have been litigated.[31] Yet the life of Fred Hopt—a frontier murderer whose case lacked any exceptional qualities—was spared three times by the highest court in the land.

While there is a substantial literature on the legal and social history of crime, the police, and prisons in the nineteenth century, there has been very little study of either the judicial processing of those crimes or the substantive criminal law and criminal procedure of the era.[32] Yet both substantive criminal law and procedure, as well as modes of appellate judicial decisionmaking, clearly have importance in understanding the place that crime and crime control played in the making of late nineteenth-century American society. The fact that all of this Supreme Court death penalty jurisprudence occurred at a time when there was little social discussion of the death penalty adds to the importance of these cases. While the pre–Civil War period produced a substantial reaction against the death penalty, resulting in its banning in a number of states, there was no parallel movement at the end of the century. The death penalty was accepted with little social comment, the just punishment for murder and other serious crimes.[33]

These death penalty opinions carry importance beyond their number because of their meaning within the social, economic, and political context of the Waite Court's other opinions. The cases represent the first time that any nation's highest tribunal devoted a substantial amount of attention to the death penalty. While the highest courts in the Commonwealth countries were beginning to hear a steady stream of death penalty appeals, those



Executions in late nineteenth-century America occurred behind prison walls, often following highly routinized execution procedures.

cases still numbered relatively few and never came close to the 150 cases the Supreme Court of the United States heard over just two decades. Even in the United States, most state supreme courts decided relatively few criminal appeals: for example, the New York Court of Appeals, hearing appeals from the most populous state with an active death penalty, decided only three death penalty appeals in the years between 1880 and 1900, upholding each of the convictions.[34] While the Waite Court's record of death penalty cases (sixteen over the years 1874–1888) pales by comparison to the Fuller Court's (136 cases over the years 1888–1900), it was a unique record in its time. The Hopt cases provide an opportunity to study the social context of crime, criminal law, and the death penalty in late nineteenth-century America, as well as the jurisprudence of death in that same period. The very ordinary nature of the case provides a window into the practice of death penalty law at the time; after all, it was court-appointed lawyers who kept an indigent Fred Hopt alive over those seven years.

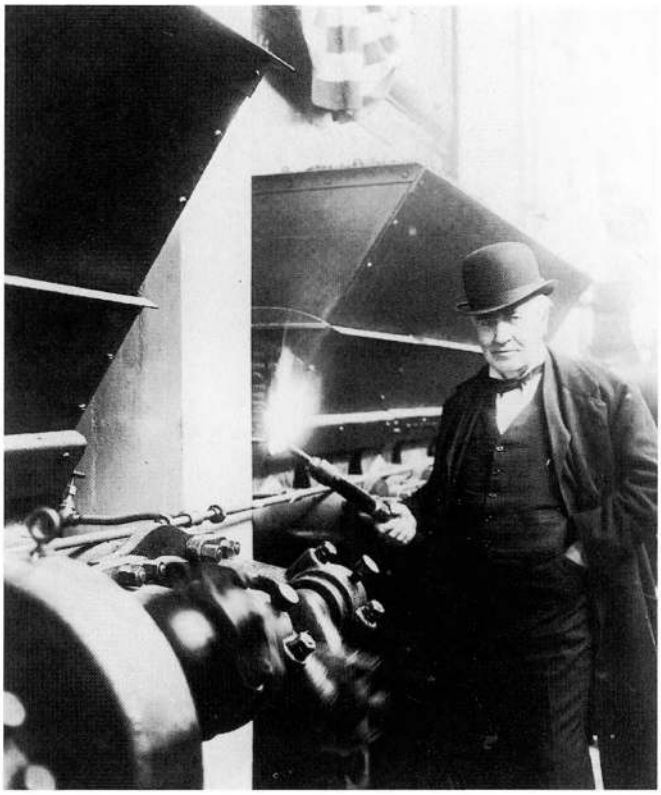
I. The Waite Court

The Waite Court was a conservative court and an activist one, dominated by Justices who felt free to use their judicial power to block civil rights legislation. This social conservatism was balanced by the strong nationalism of the Court, which was called upon to address a number of issues confronting, for the first time, a fully unified American nation in the post–Civil War period of westward expansion. On the regulation of the national economy, the Waite Court, intellectually dominated by nationalists like Stephen J. Field, Samuel Miller, and Joseph P. Bradley, often defended the rights of the states and the federal government to regulate the economy at the expense of corporate power.[35] This differentiated their jurisprudence from that of the Fuller Court (and

Lynchings were frequent in the late nineteenth century in both the West and the South. If it had not been for the powerful intervention of Sheriff Turner, Hopt might well have been lynched in downtown Salt Lake City.

saved it from fully sharing the latter's reactionary reputation), which produced dozens of opinions that embodied the triumph of laissez-faire conservatism, restricted the regulatory power of the federal government,[36] and denied the power of the federal government to levy an income tax.[37] Thus, for example, under the Waite Court the private economic rights of railroad companies had to yield to the needs of a unified country.[38] However, the Court's conservative judicial activism on social and economic legislation did not extend to interference in the criminal matters of state courts, where a competing, equally conservative states-rights view dominated. The states-rights issue was mired in northern political deference to southern racism, part of the cost of the compromise of 1876.[39] This impasse did not give way until the middle of the twentieth century.

The Waite Court's death penalty jurisdiction was not based primarily on the Fourteenth Amendment, or on the Constitution at all. Rather, it functioned as a common law appellate court with limited criminal jurisdiction over the federal judicial system, a far more limited federal system than we know today. This Court was as stable as it was conservative, dominated for generations by either small-town or corporate lawyers, often with railroads as major clients.[40] Morton Horwitz emphasizes the Justices' uniformity of thought on questions of social justice, pointing out that—except for questions of race—it was the issue of the danger of federal power and governmental centralization that divided the Court, jurisprudential concerns largely (though not entirely) irrelevant in death penalty cases.[41] Justices Miller, Field, Bradley, Harlan, and Gray served lengthy terms on the Court, pro-



Thomas Edison engaged in a rivalry with George Westinghouse over competing systems of electrification. Each used arguments about the electrocution of humans to promote their own inventions. Edison's system won out, leading to the installation of an electric chair in Sing Sing Prison that became the leading symbol of the death penalty in America from the 1890s through the 1950s.

viding an exceptional stability.[42] Morrison R. Waite, a corporate lawyer from Toledo who served as Chief Justice from 1874 through 1888, was less able than his illustrious brethren, but was still a very effective Chief Justice. He maintained the cohesion of the Court, efficiently organized the Court's growing caseload, and soothed the egos of more senior colleagues, keeping dissension (and dissents) to a minimum.[43]

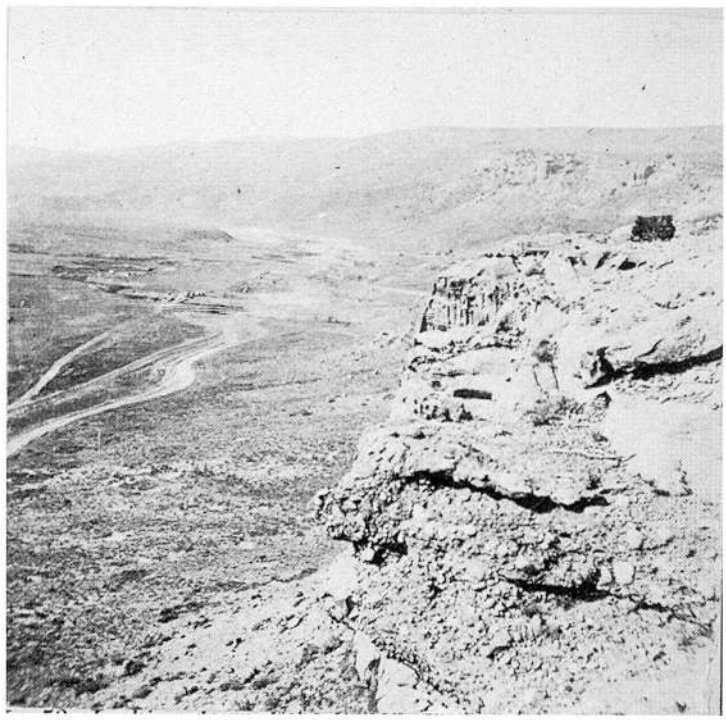
The biographies of the individual Justices contain only a few clues to their criminal jurisprudence, largely focusing on more important legal issues. Only Justice Samuel F. Miller (1862–1890) is known to have opposed capital punishment on moral grounds,[44] and only John Marshall Harlan believed in an expansive view of Fourteenth Amendment due process rights that extended to state criminal defendants.[45] However, while most of the Justices had little experience with criminal law, there was substantial expertise on the Court that must have come forth in the weekly conferences. Justice Horace Gray, author of two of the *Hopt* opinions, had served from 1864 to 1882 on the Massachusetts Supreme Court, the last nine as Chief Justice, hearing many criminal appeals.[46] A judicial formalist, boring and pedantic in style, he nevertheless had participated in the reform of the criminal law ongoing in England and America in the late nineteenth century. His opinions are clearly influenced by Charles Doe, Chief Justice of New Hampshire at the same time, a fellow Harvard Law School graduate, and a leading jurist in criminal law reform of the era.[47] Although a slow worker because of his meticulous habits, Gray was a workhorse on the Court, turning out hundreds of cautiously crafted opinions. He had no noticeable ideology, preferring the role of technician.[48] Justice Stephen J. Field had served for six years on the California Supreme Court, following six years of an active legal practice in the gold

rush town of Marysville that had included numerous criminal cases and time as a member of the state legislature in which he helped draft the California criminal code. Field was among the most conservative of the Justices, and one of the intellectual leaders of the Court.[49]

The United States Constitution leaves criminal matters primarily to the states, and there was thus little substantive Federal criminal law in the nineteenth century (well before the twentieth-century growth of the FBI, federal policing activity, and the creation—often by Congress—of federal regulatory and corporate crimes). Indeed, the federalization of state criminal procedure through the process of selective incorporation did not occur until well into the twentieth century.[50] The territories, encompassing much of the United States in the nineteenth century, had their own trial and appellate courts. While these jurisdictions were nominally federal in that the President appointed their judiciary, there were no criminal appeals to the Supreme Court of the United States until Congress provided that right from Utah Territory in 1874, a right to appeal limited to those convicted of murder and polygamy.[51]

In the context of more modern notions of due process, it might be surprising that criminal appeals were not provided for in federal law, and often only minimally provided for under state law, but this was the case everywhere in the common law world until the late nineteenth century.[52] Indeed, until 1874 there were only two provisions for criminal appeals in the federal courts, both rarely used. First, if two judges of a U.S. circuit court certified a division of opinion in a criminal matter, it could be appealed to the Supreme Court.[53] Second, common law *habeas corpus* actions were available to the Supreme Court, although this was restricted, except in very limited cases, to persons held under federal law.[54]

Two pieces of legislation expanded this jurisdiction. The first provision for a direct criminal appeal to the Supreme Court from a lower court allowed for appeals from the Supreme Court of Utah Territory of convictions carrying the death penalty or convictions of



Echo Canyon was a major route connecting Salt Lake City with the East. John Turner's body was dumped and burned here.

The execution by shooting of John D. Lee is well known in Utah history. Utah Territory's first execution, it was carried out in an open field.

bigamy. The latter was an anti-Mormon measure, occurring in the context of the Poland Act of 1874, which had imposed direct federal control of Utah Territorial legal institutions in an effort to legally destroy Mormon institutions, particularly polygamy.[55] Mormons, who comprised a majority of the residents of Utah, effectively controlled Utah legal institutions in order to protect their religious practices, particularly polygamy. This offended many non-Mormons, including a large majority of the members of Congress, so Congress passed a number of measures designed to weaken the Mormons' hold on Utah legal institutions.[56] A federal legal attack on Mormonism followed, peaking in the 1870s and 1880s. *Hopt* was the second murder case to reach the Supreme Court of the United States from Utah. The second piece of legislation expanding the Court's jurisdiction over criminal appeals arose from the first, *Wilkerson v. Utah*. This case still stands and continues to be cited for a macabre Eighth Amendment principle: Wilkerson challenged the legality of his execution by shooting on the ground that it was "cruel and unusual punishment."[57] The Supreme Court reversed on other grounds, but defined a very limited view of the Eighth Amendment's "cruel and unusual punishment" language that still holds today.[58]

For all of the imagery of violence in the frontier West, Utah saw few executions in the late nineteenth century. In 1869, Chauncy Millard was shot in the Provo jailyard for murdering a stranger in a saloon. In 1877, Mormon elder John D. Lee was shot at Mountain Meadows for his role in the Mountain Meadows massacre of twenty years before. In 1878, Wallace Wilkerson was shot in the Provo jailyard for a killing following an accusation of cheating in a game of cribbage. Seven years after Fred Hopt's execution, Enoch Davis was shot in 1894 for murdering his wife. Finally, 1896 saw two executions for murder: Charles Thiede was hung, also for the murder of his wife, and Patrick Coughlin was shot for killing two lawmen who were trying to arrest him.[59]

II. Fred Hopt, Jack Emerson, and the Killing of John Turner

Fred Hopt's case is of special interest for two reasons: not only did he appeal his convic-

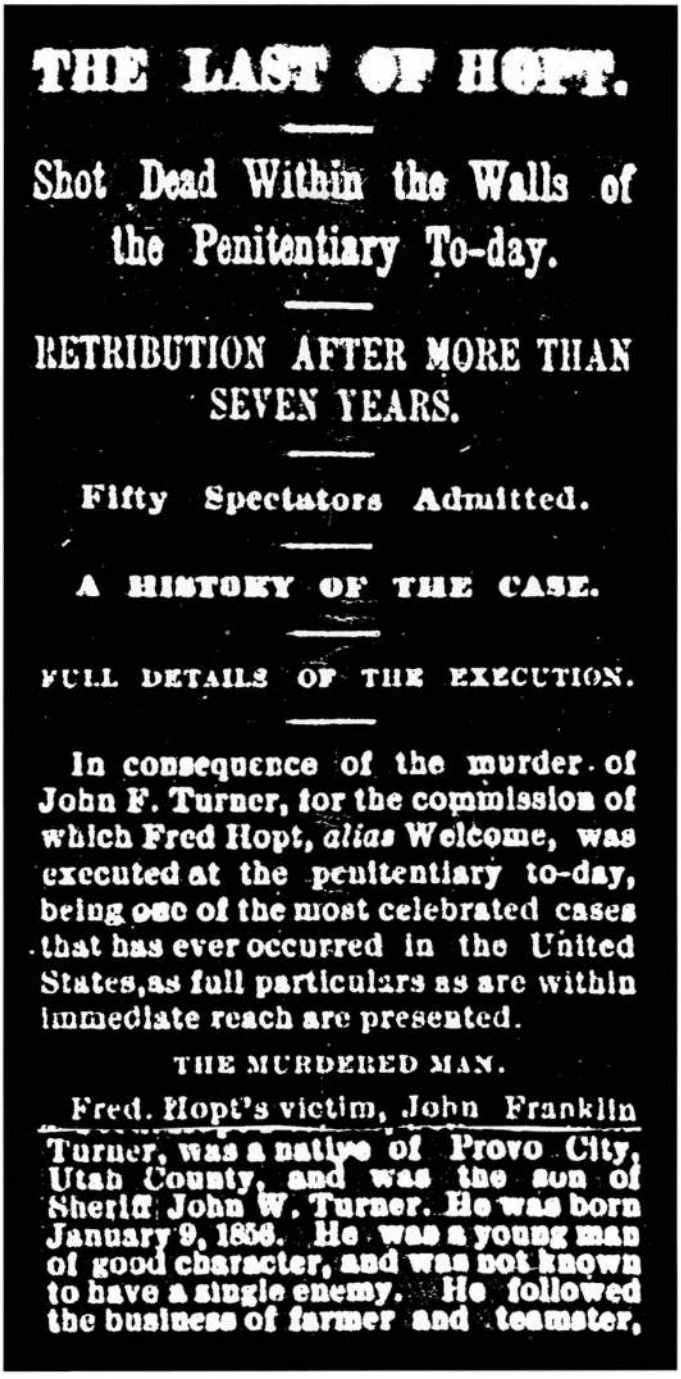
tion four times to the Supreme Court of the United States, [60] but, because the trial was held in Utah Territory, he fell under direct Supreme Court appellate jurisdiction before 1889, when it was generally extended to all federal criminal appeals. But for this jurisdictional anomaly, Hopt would have been hanged in 1881, his Utah Territory appeals exhausted with no further appeal possible. Once the case was docketed in the Supreme Court, the routine quality of Hopt's case reveals the standard of work that Supreme Court Justices in Washington were willing to put into an ordinary frontier murder case. Moreover, because Hopt was among the first convicted murderers to appeal to the Supreme Court, it handled each of his appeals carefully on its own merits, apparently unburdened by any concerns about the "problem" of excessive numbers of criminal appeals, or about broader policy issues concerning the death penalty. [61]

Factually *Hopt* does not differ notably from hundreds of other frontier murder cases.[62] Hopt was convicted of murder four times by four different juries. None of them took more than two hours to return a verdict, and one jury returned in only one hour.[63] The precise details of the killing are still unknown, for there were no witnesses to the actual event. However, a general picture of the killing can be pieced together from the very extensive appellate record, which includes a 250-page printed transcript (representing a 500-page manuscript transcript), testimony of twenty-five witnesses, and testimony from both Hopt and his co-defendant Jack Emerson.[64]

Six months after Hopt was first tried, Jack Emerson was convicted of the murder and received a life sentence. He did not appeal. The prosecution did not seek the death penalty in Emerson's trial, both because they held the theory that Emerson was only an accomplice in the killing and because he cooperated in the prosecution of Hopt. Emerson was released from prison on March 20, 1886, pardoned by the territorial governor six months after testifying in Hopt's fourth trial after he had served five and one half years of his sentence.[65]

Hopt and Emerson were accused of waylaying John F. Turner, a teamster, in his camp just outside of Park City on July 3, 1880, killing him from behind with an ax blow to the head, and burning his body three days later in Echo Canyon in order to conceal the crime.[66] Hopt stole Turner's horses, freight wagon, personal effects and goods, selling them a hundred miles east in Green River, Wyoming. Although the crime had occurred about July 3, it was July 19 before someone reported Hopt's sale of Turner's team.[67] This occurred because Turner, an itinerant teamster looking for work, was not expected at any particular place and was not missed; an unknown body was found in Echo Canyon on July 9 and buried without notice the next day.

Originally known by the alias Fred Welcome, Hopt was described as "a big burly German." Twenty-one years old at the time of the murder, he had been born in Brooklyn and raised in Milwaukee, and by the time of the murder had already had a hard life. As was typical of many criminal offenders, he was the product of a broken home and went on the road in his early teens. At the age of thirteen or fourteen he was apprenticed in Illinois to a man in the harness trade. He left after about three years and traveled much of the West over the next four years, working as a teamster, miner, and day laborer. He arrived in Utah from Nevada and Truckee, CA, in July of 1879, about a year before the murder.[68] He was a bit wild, drank a great deal, and often wound up in trouble with the law. In his own words, he was "full of hell."[69] Indeed, he might have escaped discovery in the Turner murder but for the fact that he was known to the victim's father, John W. Turner, Sheriff of Utah County and City Marshall of Provo. Hopt had twice served time in Sheriff Turner's jail. first for larceny, in the summer of 1879, and then for drunkenness in December of the same year.[70] He had then been released from Sheriff Turner's jail and slept in the Turner



THE LAST OF HOPT.

Shot Dead Within the Walls of the Penitentiary To-day.

RETRIBUTION AFTER MORE THAN SEVEN YEARS.

Fifty Spectators Admitted.

A HISTORY OF THE CASE.

FULL DETAILS OF THE EXECUTION.

In consequence of the murder of John F. Turner, for the commission of which Fred Hopt, *alias* Welcome, was executed at the penitentiary to-day, being one of the most celebrated cases that has ever occurred in the United States, as full particulars as are within immediate reach are presented.

THE MURDERED MAN.

Fred. Hopt's victim, John Franklin Turner, was a native of Provo City, Utah County, and was the son of Sheriff John W. Turner. He was born January 9, 1856. He was a young man of good character, and was not known to have a single enemy. He followed the business of farmer and teamster,

Hopt's execution was highly publicized. *The Deseret Evening News* published a lengthy account of the case the day after his death.

house, apparently an act of kindness accorded to him. Later, Turner locked Hopt back in the jail, reportedly angry because Hopt had gotten drunk.[71]

Unlike many other drifters, Hopt kept his family contacts. Initially, he refused counsel because he believed his father, then living in New Ulm, MN, would send him money. Although this money never came, his sister, a dressmaker, came from Montana to visit him in prison and sent $15 for a burial suit. His mother, living with his stepfather in Milwau-

kee, sent one letter in 1880 and never wrote again. He also had two brothers who were farmers in Oregon.

John F. Turner was twenty-four, a small man, standing five feet six inches tall, and weighing about 140 pounds. He was clean-shaven, with short black hair. He had been set up in the teamster business by his father who, in addition to being Sheriff of Utah County, had some small business interests including a local dealership for Fish Brothers wagons. Young Turner lived at home but made frequent forays out into the mining country of Utah searching for work, hiring out his two teams and wagons for general hauling purposes. In frontier Utah, young Turner made an impression distinct enough to make him relatively easy to trace. His family and friends recalled vividly every detail of his outfit. His two teams included two grays—one fleabitten, one a light dapple gray—a dark brown, and a "strawberry roan." Of his two wagons, both branded with his father's name and the Fish Brothers logo, one was new and one was two or three years old. One wagon was loaded with twenty-eight or thirty "hundredweight" of chopped barley, feed for the horses. His outfit also included a few suits of clothes and a canvas tent with gunny sacks hand-sewed to the bottom. These sacks were covered with sand when the tent was pitched in order to keep water from running under the tent. He had the usual tools of a teamster, including an ax.[72] Evidently he was almost self-sufficient, carrying little or no money and essentially living on a week-to-week basis out of the proceeds of small teaming jobs.[73] He left Provo just after noon on June 28, 1880, after dinner with his mother and father. Five days later he was dead.

Witnesses who saw young Turner around Park City described the last days of young Turner's life. He camped a quarter mile southeast of town, along the main road to Heber City at the mouth of a canyon near a sawmill, and spent his days unsuccessfully looking for work. By chance he met Fred Hopt and Jack Emerson. Hopt did not remember the exact day they met, uncertain if it was the last day in June or some time in the first three days of July, but recalled it occurring on Main Street in Park City.[74] While others, including E. M. Allison, the local sheriff (who knew both Turner and his father), saw Turner around Park City, his stay there was short, no more than three or four days by any account.[75]

During this time Hopt made frequent visits to Turner's camp, sometimes accompanied by others, including Emerson. Turner let his hobbled horses graze and was often seen by a boy who herded cows nearby. On Saturday July 3, the day of the murder, Hopt and Turner visited Jager and Moffatt's wood camp about three miles from town, looking for work. According to Hopt, they parted company early in the evening outside of Creek and Dodge's Saloon on Main Street, where Hopt went on to a restaurant for supper and Turner went back to his camp to check on his horses. Later that evening Hopt and Emerson were seen in Turner's camp; while there are no witnesses to the killing, it appears that the killing occurred at this time.[76] Nothing is known about the motive for the killing of Turner, although both theft and revenge for Hopt's imprisonment in Provo emerged at the trial as possible motives. According to one witness, Hopt swore revenge because of the way Sheriff Turner had arrested him for drunkenness "at a party one night."[77]

The testimony of more than a dozen witnesses paints a clear picture of the killing's aftermath. Hopt did little to conceal the crime and left a trail that was so obvious it is impossible to speculate what was on his mind; his acute alcoholism may have impaired his judgment. Sometime after eleven on July 3, the night of the killing, he appeared in Creek and Dodge's Saloon, drunk, with blood on his shirt, and boasted "I hit a damn son of a bitch; I hit him hard and I am going to get away with killing him."[78] A barber reported seeing blood on Hopt's shirt the next morning when he went for a shave.[79] Hopt, "chuck full of booze," ran Turner's horses at the Fourth of July races on Monday, July 5.[80]

Hopt and Emerson did not leave Park City until the morning of July 6, two and a half days after the killing. Each was driving one of Turner's teams, with one of the wagons carrying Turner's body concealed under the cargo. In the afternoon they arrived at William Reynolds' store in Wanship, fourteen miles from their starting point. Hopt traded two or three bags of barley for whiskey and bacon, thus revealing that he had little or no money.[81] Emerson remained on his wagon, taking no part of the exchange. Just before dark, about seven miles up Echo Canyon—the main route east toward Wyoming—rancher David Moore came upon Hopt camped by the road. They had a short conversation and Hopt offered to sell Moore a team. Moore asked Hopt how old the horses were, then joked that horses did not live that long in such rough country. Moore saw no one with Hopt, although he thought someone might have been sleeping in a tent.[82] It was near this spot that Turner's body was found three days later, hidden behind some rocks.

Hopt and Emerson continued east. On the evening of July 9, in Piedmont, WY, Hopt sold the team of gray horses and one of the wagons to W. H. Moss for $200. Emerson signed the bill of sale as a witness.[83] On July 12 Hopt and Emerson arrived in Green River, WY, and Hopt sold the second team. Trouble had broken out between Hopt and Emerson and Hopt got a room in a saloon, telling the keeper that he was afraid of his partner. That night he told his roommate that he had killed a man with an ax and then, in the roommate's presence, counted out his money. He was still drinking heavily.[84]

Hopt and Emerson's whereabouts over the next days are unknown, but they split up at some point. On July 18 Hopt was alone in Cheyenne under the surveillance of Thomas Carr, a railroad detective.[85] Carr had no knowledge of the Turner murder; he was simply watching a suspicious person. It is unclear what Hopt was doing in Cheyenne, but he was clearly noticeable. He was probably frequenting the saloons, spending his remaining money. By following the Union Pacific Railroad and the telegraph line east he had made his detection and capture a simple matter.

Meanwhile, Leonard Phillips found young Turner's body on July 9, wrapped in blankets and then in his tent, partially burned and hidden behind a large rock behind the campsite Hopt and Emerson had used on the night of July 6. The left side of the victim's head had been crushed by a blow from behind, struck by a left-handed assailant. Phillips reported the body and returned with the authorities the next day. They formed a coroner's jury with Phillips as foreman, found the cause of death a blow to the head, and buried the body in the canyon in which it had been found.[86]

At about the time Hopt landed in Cheyenne, Sheriff John Turner heard that Hopt had been seen traveling east, attempting to sell his son's teams and wagons. He also heard that a body had been found murdered and buried in Echo Canyon and feared the worst. On the evening of July 19 Sheriff Turner and a party of his men left Provo to investigate his son's disappearance. Driving all night, they reached Park City on July 20 and the gravesite in Echo Canyon on the 21st. They dug up the body, identified it as that of the young Turner, and sent it down the canyon to be coffined and cared for.[87] Sheriff Turner must have learned of Hopt's location in Cheyenne via telegraph that day, for he went straight from the canyon to Cheyenne by train, arriving midday on the 23rd. Carr met Turner's train with Hopt in his custody. There was a confrontation and Turner became emotional, so Carr sent Hopt to jail in the company of a local police officer. Carr and Turner followed, scarcely a block behind. As Hopt arrived at the jail, Carr caught up with him and Hopt, in Carr's words, "spontaneously confessed." (Hopt later denied making this confession.) Hopt was put in Turner's custody on a train and immediately sent back to Utah.[88]

On the return from Cheyenne to Salt Lake City large crowds gathered at several stations,

agitating to lynch Hopt. Sheriff Turner may have saved Hopt's life by repeatedly telling the mobs that he wanted the law to take its course.[89] The threat of lynching was a serious one in frontier Utah. Another murderer, Murphy, had been dragged out of the jail in Coalville, a mining town near Park City, and lynched in 1879. Hopt's lawyers accused A. J. Moore, a former deputy sheriff and one of the witnesses against Hopt, of participating in that lynching, although Moore denied it.[90] When Andrew Burt, City Marshall of Salt Lake City, was murdered three years after Hopt's arrest, his killer Harvey was lynched by a mob while being escorted to jail.[91] However, with a stop in Park City to pick up young Turner's body, the party arrived safely in Provo on July 27, met by 2,500 people with brass and marching bands.

Jack Emerson was arrested in Carbon, WY, on August 2, after wiring Sheriff Turner that he "had seen by the papers that he was wanted for murder." Working in Carbon as a miner, Emerson gave his address and freely submitted to arrest wearing the clothes of the murder victim. He gave a reporter an interview in his cell, written down on a piece of paper held on the back of an officer. In contrast to Hopt (at least in the view of the *Deseret Evening News*), Emerson was "not of the desperado tribe. He has by no means a repulsive look."[92] Indeed, Jack Emerson was not even his real name; ironically, it was a stage name, adopted when he had "done a little acting in Frisco." He was John McCormick, thirty-one years old, born in Glasgow, and a blacksmith by trade.

Unbelievable on its face, his story portrayed him only as an unwitting accomplice in the disposal of the property of an already dead Turner. While drinking in a saloon on July 4, he had been approached by Hopt. Hopt wanted someone to go to Colorado with him, driving an extra team, but wanted to leave early the next day. Emerson protested that it was a holiday and that he could not go until July 6, the day after.[93] Leaving on that morning, the two proceeded to Evanston, WY and from there to Green River. Emerson noted blood on a pillowslip and the strong smell of death. While he suspected that the teams might be stolen, he claimed he knew nothing of the killing, even though Turner's body was in the wagon for three days until it was burned and hidden in Echo Canyon.[94] At Green River he and Hopt quarreled about change for money Hopt had given Emerson, and Hopt left him. Sheriff Turner did not believe Emerson's story, believing instead that Emerson had killed Turner's son.[95] One witness put Hopt and Emerson with young Turner at the camp on July 3, the night of the murder, making Emerson as likely as Hopt to be the actual killer, or at least making him present at the killing.[96] In any case, it was impossible that Hopt, travelling with Emerson, had burned Turner's body without Emerson's knowledge.

Hopt and Emerson were put in adjoining cells in the Salt Lake City jail. Emerson loudly accused Hopt of the murders, so upsetting him that he threatened to kill Emerson, saying he might as well since he was going to die anyway. Later, Hopt was moved to another section of the jail.[97] For legal reasons, Emerson did not testify at Hopt's first trial, but he did do so in succeeding trials.[98] After Emerson's eventual release from prison, according to one account, "he wept like a child, asserting before high heaven that he had no hand whatever in the fearful tragedy. . ."[99] Aside from their cross-testimony, in which they blamed each other, the evidence against Emerson was substantial, although less than the evidence against Hopt; thus, their respective roles in the killing remain unclear.[100]

III. Hopt's First Trial: The Basic Criminal Case

Utah criminal justice, directly administered by federal officials appointed from Washington, may well have been more developed procedurally than other territories in the West. Arrested in July and August respectively, Hopt

and Emerson were indicted for murder on December 14. At arraignment they demanded separate trials, a request granted by the Court. Held without bail, Hopt was brought to court on January 25, 1881, and was assigned two lawyers, Lee J. Sharp and Thomas Marshall, as counsel.[101] For the entire seven-month period prior to this Hopt had refused assigned counsel, proclaiming that his father would send him money, and had done nothing to prepare his defense. This money never came and Hopt was indigent; his entire defense was provided at no cost. He seemed depressed in prison, refusing to prepare his case and delaying legal proceedings. His lawyers attributed this—probably accurately—to his acute alcoholism.

On February 9 his lawyers moved for a continuance in order to obtain important witnesses, but Judge Emerson, claiming that the delay in securing witnesses was Hopt's own fault, set the case for trial on February 16. Hopt's lawyers protested that it would be "judicial murder" to be forced to proceed without defense witnesses, but the trial was held anyway. At trial eighteen witnesses were called for the prosecution. The defense, unable to procure any of Hopt's witnesses—persons he knew in the saloons of Park City who, he claimed, could account for his movements the night Turner died—offered no witnesses. The jury convicted Hopt after one hour and fifteen minutes of deliberation.[102]

The evidence against Hopt was strong. When arrested, the left-handed Hopt had two pocketknives and a ring belonging to Turner in his possession. He had taken several days to sell Turner's two teams and wagons and had approached a number of people in an attempt to sell the teams. He was anxious to sell, offering the teams cheaply. A witness had seen Hopt and Emerson in camp with young Turner on the evening of July 3.[103] The same witness reported that Emerson and Hopt were there alone the next morning. Two people reported that Hopt had blood on his shirt on the night of the 3rd and early morning of the 4th. While being held previously in Sheriff Turner's jail in Provo, Hopt had told a witness that he planned to kill the young Turner and break jail. Confronted with his strong language, Hopt had allegedly boasted that "he would kill a man for breakfast." Finally, Hopt had confessed to a police officer while he was held in jail in Cheyenne.[104] He had also confessed to several others, although in more general terms. Emerson, who had been arrested wearing Turner's clothes, did not provide particularly damaging testimony: he claimed he had not known Hopt until they met on July 4, saying nothing that put Hopt at the murder scene and limiting his testimony to Hopt's control of Turner's team and wagons after the 4th, evidence corroborated by many witnesses. This self-serving story left Emerson innocent of murder charges, limiting his role to that of an accessory after the fact.

Hopt's attorneys were allowed until March 12 to file a motion for a new trial. On March 28 that motion was finally made and was denied. At his sentencing on April 4, Hopt was asked if he had anything to say, and responded, ""Yes, Sir, I have. I am not guilty." The judge then told him he had the choice of hanging or shooting, to which Hopt replied, "I prefer to be shot.'" He was sentenced to be shot on May 20.[105] The conviction was upheld on appeal to the Supreme Court of Utah Territory on April 28.[106] Hopt's lawyers then took a writ of error to the Supreme Court of the United States, alleging numerous errors in the trial, including that his confession was coerced.[107]

By the standards of the time the legal proceedings around Hopt's trial were relatively straightforward: a total of nine months lapsed between the commission of the crime and the setting of the execution date. Judging from the briefs, Hopt had capable counsel who raised the relevant issues in his defense. The fact that they offered no defense witnesses is a standard defense practice: there were none other than the defendant, and defense counsel doubtless had good reasons for not putting Hopt himself on the witness stand.

IV. Reversal, Retrial, Appeal, Reversal, and Retrial: The Cycle of Appeals to the Supreme Court of the United States

Justice Horace Gray, writing for a unanimous Supreme Court of the United States, issued an opinion on September 22, 1882, reversing Hopt's conviction on two of the less significant of the errors alleged. First, the Court held that the trial judge's jury instruction on the legal meaning of voluntary intoxication was in error. The trial judge had instructed the jury that "one who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. Intoxication is so easily counterfeited . . . that law has never recognized it as an excuse for crime." Justice Gray cited state cases supporting the proposition that, while this was the common law rule, there must be an exception when a statute establishes different degrees of murder, one requiring deliberate premeditation. Intoxication could be used to establish a lack of premeditation.[108] For this proposition he cited the Massachusetts case of *Commonwealth v. Dorsey*, a product of the Massachusetts Supreme Court on which Gray had sat for eighteen years.[109] In addition, Gray pointed to specific language in the Penal Code of Utah that required that intoxication may be taken into account when the statute required any "particular purpose, motive, or intent."[110] The Utah trial judge had clearly been wrong about the defense of intoxication under Utah law, adhering to a common law rule that had been changed by the statutory creation of two degrees of murder.[111] The second ground for reversal concerned a statutory requirement that the jury charge be reduced to writing before it is given. The trial judge had read an instruction from a printed book, but had not reduced that instruction to writing. To Gray, this proved "a clear disregard for the provisions of the statute," for it did not make the instruction a part of the record, therefore depriving the defendant of any ability to mount a legal challenge to an incorrect instruction.[112] Since either of these two errors mandated a reversal of the conviction, in Gray's view there was no need to address the remaining issues.

Gray's opinion did have the effect of improving the quality of justice in the territories by requiring better jury instructions reduced to writing and, in a broader sense, more attention by territorial courts to procedural formality. His jurisprudence on this issue might seem to be pure judicial formalism: the statute required reducing the charge to writing and since the judge did not do so, the conviction must be reversed. However, it was more than this, for there is an underlying jurisprudence of law reform here in two respects. First, under common law drunkenness was not a defense, but late nineteenth-century reformers favored a criminal jurisprudence more linked to culpability and taking more account of the circumstances of people's lives.[113] A rigid rule eliminating any jury consideration of drunkenness led to the potential for convicting defendants based on a level of culpability higher than that actually possessed. This was especially troublesome in a period when the death penalty for intentional murder was mandatory. If drunkenness mitigated the level of culpability required for murder, the defendant should get the benefit of that fact, reducing murder to either manslaughter or second degree murder.

Second, the quality of justice as practiced in America, both on the frontier and in the machine-dominated cities, was often poor. It was in the jury instructions that the substance of criminal law was transmitted to a jury for its deliberations. The problem with books of standard jury instructions was that the appellate court could not be sure that those instructions were actually read, as opposed to being offered in a simplified form. Therefore, in order to be certain that substance of the law was passed on to the jury, that text must be reduced to writing and incorporated into the record.

Thus, Gray's decision positively affected some broader processes of American justice.

However, his decision did not work as beneficially for Hopt's specific case. Utah could easily remedy the narrow technical errors committed in Hopt's trial simply by giving better jury instructions and reducing them to writing. By contrast, had Gray concluded that Hopt's confession was involuntary and therefore inadmissable, it would have been more difficult to retry him, although the prosecution had plenty of circumstantial evidence. By not addressing the confession issue, Gray left it for another appeal. This result was consistent with his technical jurisprudence: he simply decided the case on the narrowest possible grounds.

Utah Territory lost no time in retrying Hopt, beginning on March 3, 1883. The second trial appears to have been virtually identical to the first, except for the inclusion of Emerson's testimony. Indeed, there was no reason for the prosecution to change its strategy. This time the jury took two hours to convict. When Hopt appeared for sentencing on April 2 and was asked what method of execution he preferred, this time he requested a few minutes to "consider the matter." The judge gave him fifteen minutes, after which Hopt chose hanging. He was sentenced to hang on June 1.[114] Hopt again lost his appeal to the Utah Supreme Court[115] and, on January 4, 1884, the Supreme Court of the United States heard Hopt's second appeal.[116] Two months later, Justice John Marshall Harlan handed down the Court's unanimous judgment in this second appeal. This opinion is much more important and lengthy than Gray's, dealing with five distinct issues and reversing on three of them. Harlan's opinion reveals his constitutional jurisprudence and is unique for the era, among his first applications of his views about due process rights in criminal cases.

Notable among the issues Harlan addressed was the fact that Utah law required the presence of the defendant at trial.[117] While Hopt was present, a lengthy jury selection process had involved numerous challenges of individual jurors for bias. These challenges were then heard by special "triers" in small rooms outside of the courtroom, rather than in Hopt's presence. Although Hopt did not object to this at the time, Harlan, writing in language characteristic of his greatest opinions and relying on the Due Process Clause of the Constitution, held that "[what] the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with."[118] Moreover, Harlan held that Hopt's failure to object was irrelevant, since (to quote Blackstone) no person has the authority to dispose of or destroy life, an awesome process that has to occur strictly according to law. Harlan went on to assert that the public had an interest in Hopt's life and liberty, just as Hopt himself did.[119] This reasoning, characteristic of Harlan, used the Constitution in an active way to create a standard of according constitutional rights for criminal defendants far above what was customary at the time.[120] Ironically, Harlan came by these methods to the same conclusion in the appeal to which Gray would have come for narrow, formalistic reasons. This surely accounts for the fact that the rest of the Court signed the opinion, even though they did not agree with Harlan's constitutional jurisprudence. In his sweeping use of due process language Harlan's decision in this case mirrored his dissent in *Hurtado*, a case before the Court at the same time.[121] In *Hurtado* Harlan was unable to command a majority of the Court because his analysis held that broad due process language applied to the states, a stance which threatened the conservative principle of states rights. Since *Hopt* was a federal case, Harlan could use his broad due process language without this threat. Here it meant only that the territories and the federal government owed a high standard of due process to criminal defendants.

Illustrative of both the details that the Court analyzed in criminal cases and the way that the Court mixed broad constitutional with narrow factual issues, that was not the end of the opinion. For one thing, the case involved a

macabre evidentiary issue. The body of the victim, placed in a wooden coffin, was examined by a doctor at the railroad station in Salt Lake City. At the same time on that same platform testimony placed a body shipped from Echo, UT, and contained in a hermetically sealed metallic box. While it seemed that there was only one body, this confusing testimony raised uncertainty over whether the surgeon had really examined Turner's body. Certainly he had examined a body on the platform and testified in court that a blow to the left side of the head with an ax had caused its death—but under oath he could not point out who had told him the body he had examined was that of Turner. Harlan ruled that that identification was hearsay, since it was introduced to prove the fact that the body was Turner's and was not subject to cross-examination.[122]

Another error testifies to the character of the frontier justice at the trial. In his jury instruction, the trial judge simply stated that the fact "that an atrocious and dastardly murder has been committed by some person is apparent." Since that fact was of course an issue before the jury, the judge's instruction was thus prejudicial.[123]

On two more important issues Harlan did not find error. First, there was still the matter of Hopt's confession to detective Carr. According to Carr, Hopt began to make a confession as soon as he arrived at the Cheyenne jail. Harlan applied the common law "voluntariness" test to the confession, finding no error in its admission. While he noted that there was some distrust of confessions not made before judges, the rule against their admissibility "had sometimes been carried too far," sacrificing "Justice and common sense at the shrine of mercy." This amazing statement of policy for the time indicated Harlan's conservatism on criminal justice issues. He was clearly not about to find the confession involuntary and did not make a serious effort to move beyond the most superficial common law statement of the rule. For example, much of Harlan's analysis turns on the absence of evidence of inducement by Carr, writing that "the presumption upon which weight is given to such evidence, namely that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases."[124] Obviously, the *Miranda*[125] view of the confession process does not dismiss such a presumption. This second *Hopt* opinion is still cited when courts discuss the "voluntariness" test in Fifth Amendment and due process jurisprudence. Indeed, it is the only remnant of the Hopt cases likely to be known to modern criminal lawyers; although *Hopt* was the Supreme Court of the United States' first opinion on the legal status of a criminal confession, it did not break new legal ground.[126]

Second, the prosecution had called Jack Emerson as a witness against Hopt. Under common law, the statement of a codefendant was not admissible because of the obvious conflict of interest involved, making the testimony potentially unreliable. However, after the murder but before the second trial, Utah changed the law, allowing codefendants to testify like any other witness and leaving the matter of their credibility to the jury. Hopt's attorneys argued that this was an ex post facto law, prohibited by the Constitution. However, Harlan held up a narrow meaning for that Constitutional clause, limiting it to laws that either attach criminality to a new act or aggravate an existing crime and provide a higher penalty for it. Laws amending rules of evidence were thus not Constitutionally forbidden ex post facto laws.[127]

The impact of this second reversal in Utah left local authorities angry and frustrated. They retried Hopt with great speed, convicting him of murder a third time on May 10, 1884. This trial differed from the second in two respects. First, because of the macabre confusion over the identification of the body in the previous trial, the state exhumed the skull of Turner and produced it in court, introducing it as evidence and showing that the entire side of the head had been shattered by a blow. Second and more dramatic, Hopt, in a

desperate attempt to save his life, took the stand in his own defense. He admitted having seen Turner in Echo Canyon, but denied being anywhere near him when he was killed. The prosecution rigorously cross-examined Hopt, but he was "cool and deliberate throughout," with an explanation for every piece of incriminating evidence offered against him. However, the jury was not moved at all by his testimony and convicted after only one hour of deliberations, the quickest verdict yet.[128]

This time, post-conviction events took a turn toward both legal and extralegal vigilante Justice. Angry at the Supreme Court's repeated reversals, the trial judge refused to grant a stay of execution: Hopt was to be shot while his appeal was pending. This outraged a number of members of the Utah bar, and lawyers petitioned the Utah Supreme Court for a stay on the ground that this amounted to "judicial murder." In that court it was openly stated by the appellate judges that the trial judge's actions were necessary in order to avoid another reversal by the Supreme Court of the United States and because of the popular demand for the execution of Hopt. The acting governor was asked to intervene, but he took the position that it was a legal matter before the courts. Within a few days the Utah Supreme Court acted again. Surely in response to the charges of "judicial murder," the court affirmed the conviction one day before the scheduled execution on June 12; the court also denied the stay of that execution.[129] A mass meeting was held in downtown Salt Lake City passing a resolution urging the governor not to grant a stay. However, the newspapers and other community leaders took the position that Hopt should be executed according to the law or not at all. The governor finally granted a last-minute stay pending Hopt's third appeal to the Supreme Court of the United States.[130]

On January 28, 1885, one year after it had heard Hopt's second appeal, the Supreme Court of the United States heard the third appeal in the case. Justice Horace Gray's opinion was handed down two months later, matching Harlan's speed. The opinion was short, focusing on one issue: Utah law required that the jury charge be a part of the written record of the case. The record, however, merely stated that "the court charged the jury." The Supreme Court could not review the charge on this record.[131] It seems that the trial judge had tried to circumvent the kinds of problems he had in the U.S. Supreme Court with earlier jury instructions by simply leaving them out of the record, at the same time letting the record reflect that he had charged the jury, in complete defiance of Gray's initial reversal in the first Hopt appeal.[132]

Gray's opinion produced two dissents in an era when dissents were far less common than today: Waite and Harlan. There were no dissenting opinions, so the reasons for their existence cannot be known. However, it seems that both Waite and Harlan had abandoned Hopt, seeing no merit to his continuous appeals and also, surely at least in Waite's case in his consciousness of his bureaucratic role as Chief Justice, aware of the implications of creating the kind of appellate framework that encouraged repeated appeals from the territories to the Supreme Court of the United States. Outside of his well-known constitutional due process jurisprudence, Harlan had no interest in ordinary criminal cases.

In the meantime, Hopt had become one of the senior inmates in the Utah Penitentiary. Through the diaries of Mormon polygamists, prisoners at the same time, it is possible to paint a vivid picture of Hopt's life in prison. The prison, holding a hundred to a hundred fifty men, contained three separate bunkhouses where the men slept two to a bunk, sharing a mattress. These included about a dozen other men accused of murder.[133] Hopt was confined with about sixty of the roughest inmates in bunkhouse number one. Secure inside a twenty-four-foot high wall, the men had free run of the grounds during the day, using the mess hall as a workroom. The scene was dirty and vile: air foul from spitting and smoking, filthy clothes and bedding, vermin, freez-

ing cold in the winter and stifling hot in the Utah summer.[134]

Hopt was a troublemaker and his time in prison had not passed smoothly. He had attacked another inmate, W. H. Halliday, with scissors, severely injuring him. According to prison authorities, Hopt had also been involved in several escape plots, all foiled at early stages. In one plot, he arranged a fight between two inmates. Hopt's plan was to take the weapon from the guard who responded, then kill whoever he needed in order to get out of the prison. The guards, learning of the plan, did not attempt to stop the fight. While at the city jail, he had tampered with his irons, removing them so that he could escape. He had disassembled his bed-frame, intending to use the iron bars as weapons when he could get a guard close enough. Again, his plan was discovered. In another plan, he had somehow gotten possession of an old Colt revolver, which he had turned over to the warden after finding out that it did not revolve. In the midst of all this, he earned a small income in prison by making bridles.[135]

V. "Many Times the Case Had Been Before the Tribunals": The Fourth Trial, the Final Appeal, and the Execution of Fred Hopt

Utah Territory tried Hopt for a fourth time on September 21, 1885. The evidence at trial generally followed the form of the third trial, with Hopt again testifying and denying his guilt. The jury deliberated an hour and a half and once again convicted him. He was again sentenced to death. The Utah Supreme Court affirmed this conviction in January 1886.[136] This opinion, the longest and most detailed of the four Utah Supreme Court opinions, was carefully done in anticipation of what Utah must have hoped would be the final appeal. Judge Powers, starting out on the defensive, set the tone of the opinion:

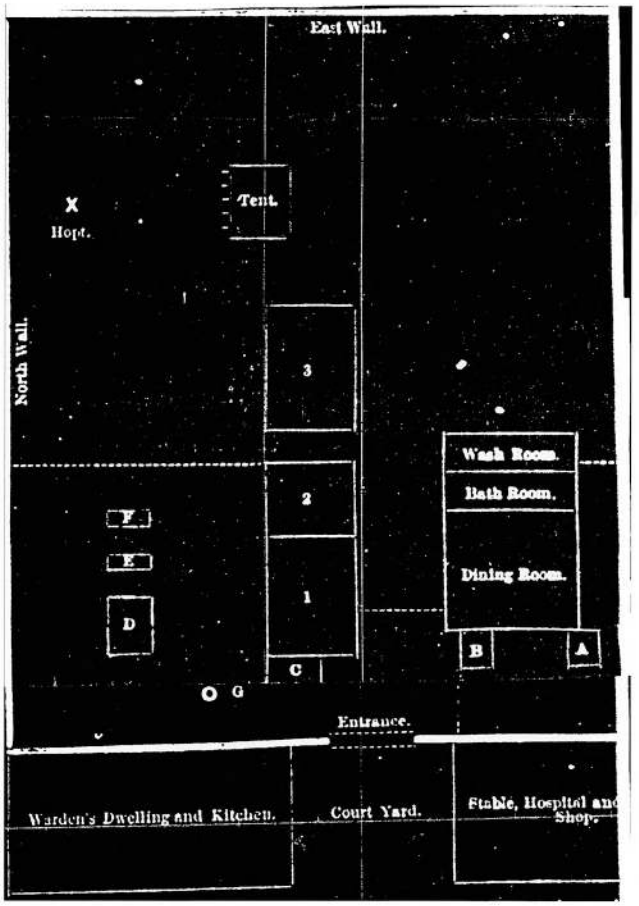
> [The defendant] has seemed to live a charmed life, for he has been tried four times, each time convicted of murder in the first degree and sentenced to death, and three times he has been granted new trials. The case is now here for a review of the fourth trial. The record, although a long one, is remarkably free from error. The defendant has been defended by able counsel appointed by the court, and all his rights appear to have been carefully guarded.[137]

Powers wrote a lengthy opinion, citing a number of cases and affirming the conviction.

On January 21, 1887, Hopt's fourth appeal was argued before the Supreme Court of the United States. Justice Field's opinion was handed down six weeks later on March 7. Hopt's conviction was upheld: his luck had run out. Field took his cue from Judge Powers, beginning his opinion with the same procedural history: "He was four times convicted in that court [the territorial court] . . . of murder in the first degree. The judgment of death pronounced against him on each previous conviction was reversed by this court."[138]

While it is impossible to determine what moved the Court to put an end to Hopt's appeals, it is not clear that it was simply a matter of doctrine. Although the quality of the Utah proceedings had clearly improved, there was still at least one serious error in the record. The first issue on appeal concerned jury bias. Because the Hopt case was notorious in Salt Lake City, every juror knew of it. Several jurors expressed that they had opinions in the case, but that they could still hear the evidence impartially. Field carefully analyzed the statements of these jurors, one by one, holding that the trial judge's determination of their competency was conclusive.[139]

Field then disposed of a few minor issues. Hopt had argued that the question of whether the blow came from a left- or right-handed assailant was a question of fact for the jury to decide and objected to expert medical testimony that the blow came from the left. Field

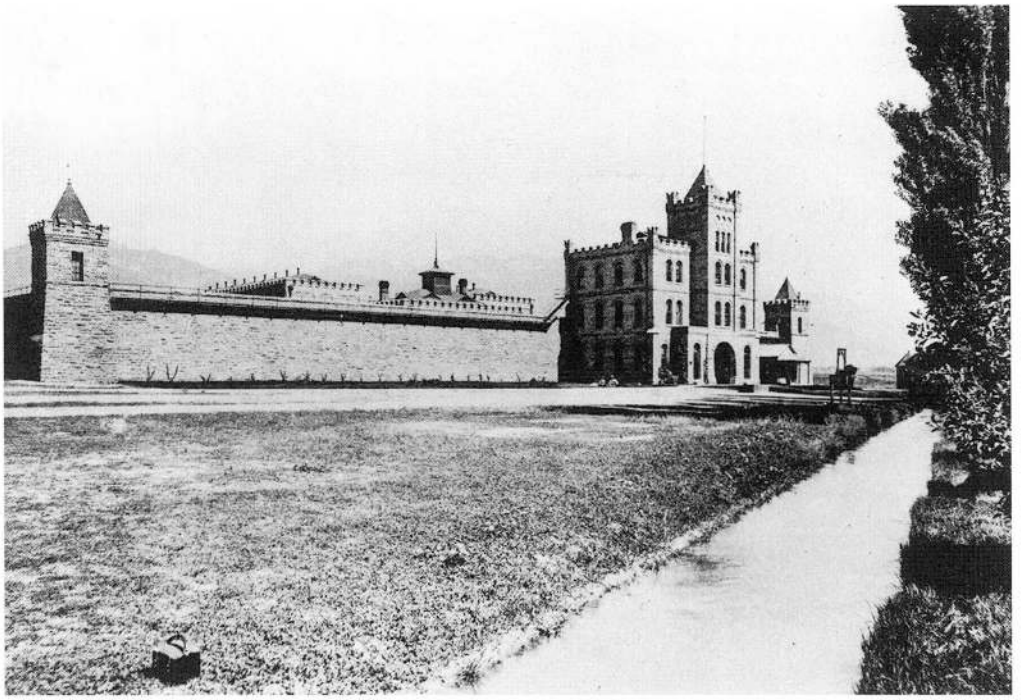


An engraving of the interior of the Utah Territorial Prison, showing the location of Hopt's execution. The execution scene was highly formalized, with all prisoners curtained in their cells and the executioners firing from an enclosed tent, protecting their identity.

did a short analysis of the kinds of evidence to which medical doctors routinely testified, holding that it was admissible.[140] Hopt had also objected to the trial court's jury instruction on the meaning of "reasonable doubt." Field dealt with the difficulty of this standard in some detail, pointing out that it is subject neither to scientific analysis nor to the law of probabilities, before holding the trial judge's instructions satisfactory.[141]

Finally, at summation the state's attorney had made a reference to "the many times" the case had been before the tribunals. Defense counsel had objected, and the remark had been withdrawn. In his instructions the trial judge had instructed the jury to consider the case on the evidence given only in this trial and not in any previous trial. Field did not see how these references had prejudiced Hopt, remarking, perhaps ironically, that because the jury knew he had been tried so many times, they might be more careful with their verdict.[142]

It is difficult to know what to make of Field's opinion. One reading of it is simply that a majority of the Court sensed that their continued reversals of Hopt's conviction based on a long list of technicalities were weakening the whole system of justice in the territories. In this view, while the Court was initially determined to hold territorial courts to their view of a reasonable standard of substantive and procedural justice, over time it became clear that, in practice, such a policy was impossible. Field may have been instrumental in the Court's coming to this conclusion. He was one of the most conservative members of the Court, supporting states' rights against federal imposition. While this principle was not directly relevant here,



The "Sugar House Penitentiary," the Utah Territorial Penitentiary in the 1890s, expanded in order to accommodate a large population of Mormons imprisoned for polygamy. Hopt was executed inside the wall at the left, although behind the area covered by this photo.

because Utah's criminal justice system was federal, the principle that local authorities should dispose of routine criminal cases without Washington interference logically follows. Field had also practiced criminal law in frontier California and must have seen that Utah justice typified the kind of justice that he knew and accepted. Finally, it could not have escaped the majority of the Court that if the Supreme Court of the United States made a practice of this kind of review of ordinary criminal cases, there were profound implications involved for both workload and policy.[143] In the *Hopt* cases alone Hopt's lawyers had raised dozens of technical issues on appeal and three Supreme Court Justices had written four opinions, three unanimous, analyzing in detail over a dozen of those issues, reversing three times on six errors.

After this final opinion was handed down, Hopt was moved from the general population of the prison to the condemned cell: a small steel cage, inside a wooden cell, not unlike the "sweat-box" but larger. Two men guarded it around the clock. Hopt spent forty-five days in this cell. Rudger Clawson, a Mormon polygamist imprisoned at the same time, reported that "his mental anxiety . . . must have been very great. He looked for relief almost up to the last moment."[144] Hopt and his lawyers hoped for a pardon, but none was forthcoming.

Hopt was shot in the yard of the Utah Penitentiary just after noon on August 11, 1887, before fifty witnesses. It was a somber morning in the prison, with death hanging in the hot air as inmates filed by the condemned cell to shake Hopt's hand and say good-bye. The entire prison population was then locked in their rooms, with blankets hung over the windows so they could see nothing.[145] Hopt specifically requested that Sheriff John Turner be excluded from the execution and this request was respected. Just before the execution five hooded men, lawmen who had volunteered for the task, arrived in a wagon and were each handed loaded rifles. They took up positions

in a tent-like structure, covered top and sides, with an opening at shoulder level for their guns. Hopt, wearing a black suit and hat, sat in a chair across the yard. Just before taking his seat, he was given the opportunity to say his last words. Once again he denied his guilt, stating that if he "had had as fair a trial the first time as I did the last, I should not have been in this position." A doctor pinned a piece of white paper about two and a half inches in diameter over his heart to serve as a target. Hopt refused a blindfold and faced the five rifles protruding from the tent. Marshall Dyer commanded that the rifles be raised, then called out in a clear, calm voice: "Ready, aim, fire." Hopt's body remained motionless as the rifles fired, then the chair slowly fell over backwards.[146] Two rifle balls pierced the target, with another hitting high, and another low, killing him instantly.[147]

Sheriff Turner, waiting in a carriage outside the gate, heard the shots and pronounced himself satisfied. Turner was then allowed inside the gates and viewed Hopt's body, which had been placed in a coffin. By one o'clock the coffin had been delivered to officials of the Roman Catholic Church for burial.[148] Just before he was shot, Hopt had told Warden Brown that, if he found an afterlife, he would send a hailstorm within forty-eight hours. Hailstones over two inches in diameter soon fell on the prison.[149]

VI. Conclusion

Hopt's four trials and eight appeals consumed seven years. It is impossible to say for certain what considerations moved the Supreme Court of the United States to finally uphold the verdict of guilty. The simplest view reduces to judicial formalism: once the lower courts were instructed regarding their errors, they corrected them, shaping up their legal procedures, making the errors in the succeeding trials less serious as the Utah courts remedied their deficiencies. Instead of being clear violations of procedure, the latter errors turned on problems of structuring a fair jury. Jury issues often arose in civil rights cases in the South; thus the Court's refusal to look in detail at the substantive fairness of jury process had a political context.[150] There is nothing remarkable about this view; in fact, this is the way the appellate process is supposed to work. It is designed, not to permit dangerous and guilty offenders to escape retribution, but to insure that local criminal trials comport with basic due process.

On the other hand, it may be that persistence won out as the Justices deferred to the self-determination of the people of Utah. The cycle of retrial and reversal is theoretically without end, but the Supreme Court of the United States cannot ultimately stop a state or territory from the perpetual retrial of a case without judicially directing an acquittal or constitutionally requiring legal standards that cannot be met. Hopt was singularly unpopular in Mormon Utah, for he had killed the son of a Mormon sheriff.[151] Hopt himself hated Mormons and blamed the Mormons for his fate. To the end he professed a desire to slay Mormons in wholesale lots. A Mormon prisoner reciprocated his view, writing that "the 'Mormon people,' and I might add the world at large, will not seriously regret the departure from this earth of such men as Fred Welcome."[152] Thus, Hopt's four Supreme Court appeals must be understood in the context of federal/territorial jurisdictional conflict that reflected federal control of Utah's criminal justice system as a part of the federal campaign against Mormons.

This point was made directly by Mormon prisoner Rudger Clawson in an 1887 letter to President Grover Cleveland requesting a pardon:

> When I entered the prison [in 1884], *fourteen* of its inmates were undergoing punishment for *murder*, five having been sentenced to life, and the remainder with two exceptions to a long term of years. Of this number,

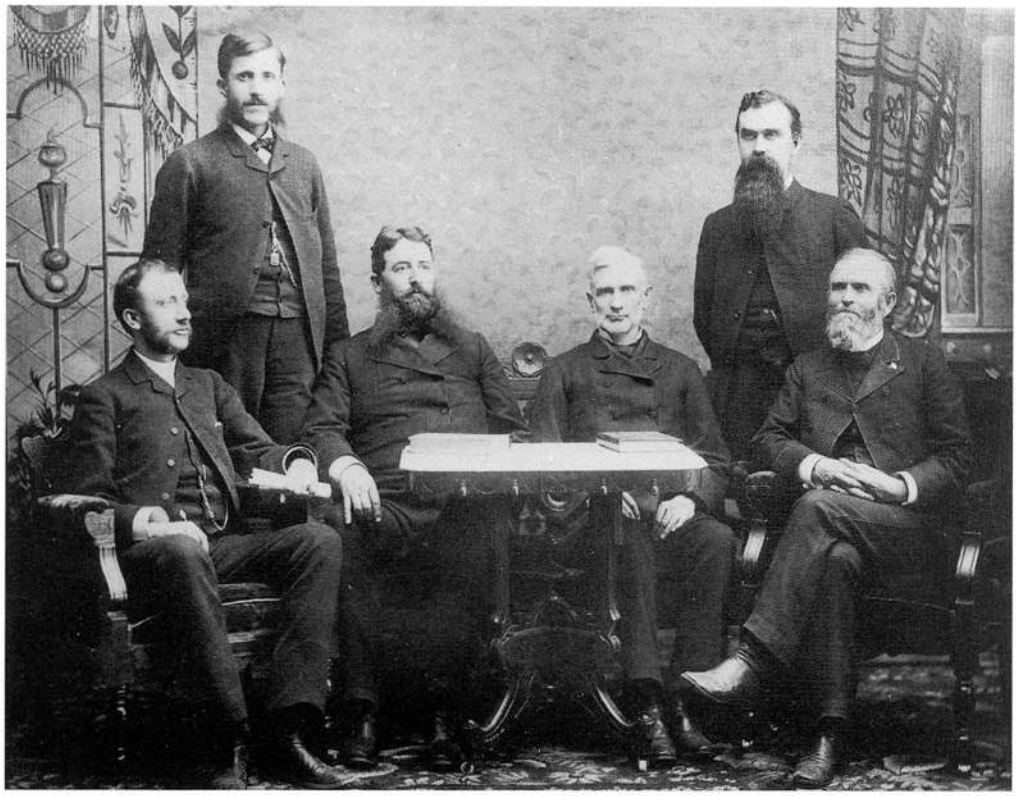
> *ten* have gone out on a full and free pardon, two have been released and two only remain, one of whom is a life man. The immediate outgrowth of my alleged crime is life, of their crime, death.[153]

Cleveland did not respond. The logic of this appeal challenged the entire legitimacy of the Mormon prosecutions. Hopt, one of the two remaining murderers referred to in the letter, was the only one of these fourteen murderers to be executed. While there is no evidence at all that this discrepancy had anything to do with Hopt's ultimate execution, it is clear that, in this context, executing Hopt had the effect of striking a kind of balance on the scales of federal Justice in Utah: if polygamists were routinely getting several years in prison, carrying out the ultimate sentence against a murderer restored a measure of proportionality.

There is no indication that the Supreme Court of the United States ever thought that Hopt's four appeals represented any kind of procedural problem impeding local justice. Nor, despite some popular protest in Utah and the anger of territorial judges, is there evidence that retrying the cases placed the Utah legal system in any serious difficulty. However, the quality of justice in Utah—especially in the first two *Hopt* cases—fell below common law legal standards, even in the absence of modern due process law,[154] and Utah's trial process clearly involved serious problems that could not be remedied through the territorial appeal system. The fact that the Utah Supreme Court upheld all four of Hopt's convictions demonstrates this. The Supreme Court of the United States made no new law in any of the Hopt appeals. However, although the Hopt cases are forgotten in modern criminal law, aside from occasional citations during discussion of *Miranda* as a conservative adoption of the common law voluntariness test in the confession issue, the Court's decisions in this seemingly ordinary frontier case in fact crossed boundaries of procedure, substantive criminal law, evidence, and constitutional law. The Court's four opinions cannot be dismissed as based on technicalities. While these opinions cannot be judged in modern doctrinal terms, they are clearly not erroneous. They reflect the Court's dissatisfaction with the quality of territorial justice.

That no other death penalty defendant has ever received four full opinions of the Supreme Court of the United States is a jurisdictional accident, the result of the Evarts Act of 1891, which created the circuit courts of appeals, and a related jurisdictional reform of 1911 which left as the only option a discretionary appeal to the Supreme Court.[155] In the early 1890s, the Fuller Court faced hundreds of criminal appeals, including over a hundred death penalty cases, largely due to jurisdictional peculiarities of the Indian Territory, but never faced four repeat appeals. Almost all of the cases that it reversed led to plea bargains and convictions for reduced charges. The Fuller Court was also a more conservative Court and over time became increasingly likely to uphold death penalty convictions, which also avoided the problem of repeated appeals. Modern death penalty jurisprudence has certainly produced the same pattern of repeated appeals, although they are now substantially confined to federal district and circuit courts of appeals.

Utah Territory would not yield. This was not just due to Hopt's notoriety, because many notorious murders have led to prison sentences. More than that, the *Hopt* case became a test of the integrity of Utah's legal system, which was stressed by the unrelated polygamy cases and the attack on Mormonism. Sheriff Turner's popularity and political clout also prevented a compromise. Although the Mormon issue clearly underlies the *Hopt* case, it is strangely absent from it; the magnitude of Hopt's crime transcended such lines.[156] Because the territorial legal system of Utah was federal, none of the legal actors in the case were Mormon.[157] Hopt and Emerson were itinerant workers, roaming the West in search



The Utah Territorial Supreme Court and high-ranking legal officials were photographed in the 1880s. Pictured left to right, Associate Justice Powers; U.S. Marshall Ireland; Governor Murray; Chief Justice Zane; U.S.Attorney Dickson; and Associate Justice Boremen. These men were all federal appointees, sent to Utah to impose "law and order" on Utah's predominantly Mormon population.

of work, inhabiting the mining towns of Utah, and going from saloon to saloon; as such they were in, but not of, Mormon Utah. Hopt received his last rites from a Roman Catholic priest. Faced with the choice of the Mormon shooting or the common law hanging, he vacillated, choosing hanging once, and shooting three times, once requesting, almost assuredly sarcastically, fifteen minutes to think about the choice.

Due process issues did not generally loom large in death penalty jurisprudence and were of only limited use to Hopt. Justice John Marshall Harlan saved Hopt from the firing squad once by linking the second *Hopt* opinion to his dissent in *Hurtado*, arguing that basic due process rights needed to be extended to criminal defendants. However, Harlan—foreshadowing a weak record on death penalty appeals before the Fuller Court—then abandoned Hopt on the next appeal, joining in a dissent with the bureaucratic Waite that would have upheld Hopt's death sentence. As discussed above, these justices may have made this decision out of awareness of the institutional problems attendant on taking so many criminal appeals on technicalities of law from the territories. Their decision left the pedantic Grey writing the opinion that saved Hopt's life in his third appeal.

None of this leaves much of a legal legacy for Fred Hopt—but it does leave something. At its most basic level, criminal law is about being careful to administer justice in the lowest courts for a society's most common people. If courts are not willing to give full effect to the intricacies of criminal law and procedure in routine cases, the rich common law ju-

risprudence that defines America law is meaningless. Legal historians now agree that a substantial legal order existed on the western frontiers, even though there was also a culture of violence there.[158] Perhaps in Fred Hopt's case the full picture of the law in 1880s America comes together: the juxtaposition of the rough, mean, poor Fred Hopt, brutally killing a young teamster in a western camp, then reaching the Supreme Court of the United States four times through the efforts of court-appointed lawyers. Hopt got four murder trials and lost all four easily, convicted every time in hardly more than the proverbial "time that it took to elect a foreman"—something over an hour. The Court spent a good deal more time thinking about this case than the juries did. Taken in the context of the Court's role in structuring late nineteenth-century America, Hopt's appeals themselves are insignificant. However, the very fact that the Court intervened so extensively in territorial murder cases had great significance, setting a higher standard of justice on the frontier and making the symbolic point that even frontier justice must be subject to procedural formality.

Justice Harlan was impressed enough with this case to attempt to use it, like *Hurtado*, to expand his ideas about constitutional due process in ordinary cases. However, because it was a federal case, it was not a particularly useful case for this purpose. Harlan abandoned any interest in the case after the second appeal, illustrating one of the central problems of turning important criminal appeals on procedural issues: ultimately murder cases are about murder, not about procedure. Procedural problems with a case can almost always be remedied on appeal. In this case, such remedies left Hopt to face the penalty for murder provided by Utah Territory law.

ENDNOTES

[1]*People v. Hopt*, 4 Utah 247 (1886), 249.

[2]*Hopt v. Utah*, 120 U.S. 430 (1887).

[3]*Id.* at 432–442.

[4]"Record of Executions in Utah," *Deseret Evening News*, January 22, 1922.

[5]There were 880 legal executions during the 1880s and 1,215 in the 1890s. Until the 1940s, the level of executions averaged above 100 a year. During the 1890s there were also 1,540 lynchings (a form of illegal "execution"), the highest incidence of lynchings in American history. William J. Bowers, **Legal Homicide: Death as Punishment in America, 1864–1982** (1974) [hereinafter **Legal Homicide**], 3–65.

[6]The full procedural history of the case, including full transcripts from each of the four trials, can be found in the original case files held in RG 267, "Supreme Court Appellate Records," National Archives, Washington, D.C. These materials are readily available on microfilm in **United States Supreme Court Cases and Briefs.**

[7]Obviously, the extensive motion practice common in modern death penalty litigation simply did not exist in the last century, nor did the repeated collateral appeals that characterize modern death penalty proceedings. Hopt had four direct appeals of his four convictions.

[8]Despite a literature of hundreds of law review articles and several dozen books on the death penalty jurisprudence of the Rehnquist Court, none have put this jurisprudence in a historical perspective as, for example, Leonard Levy tried to do with the Burger Court's criminal procedure jurisprudence in **Against the Law: The Nixon Court and Criminal Justice** (1974). We have chosen not to cite the death penalty jurisprudence of the Rehnquist Court. An introduction to this voluminous literature can be found in Victor Streib's **A Capital Punishment Anthology** (1993), which contains excerpts of forty-two recent articles. Just as there is a continuity in the death penalty jurisprudence of the Waite and Fuller Courts, and while the Rehnquist Court has acquired an infamous reputation among many legal scholars for the perfunctory nature of its death penalty appeals emphasizing efficiency and a deference to state court decisions, it too continues a jurisprudence, this one begun in the Burger Court.

[9]This is the first of two articles on this death penalty jurisprudence. The second article focuses on the Fuller Court's death penalty decisions, 1889–1900.

[10]The literature on the Waite and Fuller courts is extensive. *See* Charles Fairman, **Reconstruction and Reunion 1864–1888** (parts 1 and 2; 1971) [hereinafter **Reconstruction and Reunion**]; Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888–1910** (1993) [hereinafter **Troubled Beginnings**]; Arnold M. Paul, **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895** (1960); Morton J. Horwitz, **The Transformation of American Law, 1870–1960** (1992) [hereinafter **Transformation**]; Herbert Hovenkamp, **Enterprise and American Law, 1836–1937** (1991); William Swindler, **Court and Constitution in**

the Twentieth Century: The Old Legality, 1889–1932 (1969); Willard King, **Melville W. Fuller: Chief Justice of the United States** (1950); C. Peter Magrath and Morrison R. Waite, **The Triumph of Character** (1963) [hereinafter **Triumph of Character**]; Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** (1992) [hereinafter **John Marshall Harlan**]; Tinsley E. Yarbrough, **Judicial Enigma: The First Justice Harlan** (1995) [hereinafter **Judicial Enigma**]; Carl Brent Swisher, **Stephen J. Field: Craftsman of the Law** (1930) [hereinafter **Stephen J. Field**].

[11]The "burial" of the Civil Rights Acts, passed to enforce the Fourteenth Amendment, was well under way at the time Morrison Waite became Chief Justice, but the Supreme Court accelerated its course under his leadership. *See* Fairman, **Reconstruction and Reunion,** part 2, *supra* note 10, 132–289.

[12]92 U.S. 542 (1876).

[13]92 U.S. 214 (1876).

[14]88 U.S. 162 (1875).

[15]163 U.S. 537 (1896); Fiss, **Troubled Beginnings**, *supra* note 10, 352–385.

[16]Criminal matters, taken together, played an extremely small role in Supreme Court jurisprudence. Fairman, **Reconstruction and Reunion**, an exhaustive two-part study of the Chase and Waite Courts from 1864 to 1888, *supra* note 10, devotes seven pages of a 2,300-page study to criminal matters.

[17]We define a "death penalty appeal" as any criminal appeal in which the accused faced the possibility of a death sentence. While most of these appeals involved defendants under sentence of death, a few were interlocutory appeals brought before a conviction.

[18]95 U.S. 714 (1878). Adrian M. Tocklin, "*Pennoyer v. Neff*: The Hidden Agenda of Stephen J. Field," 28 *Seton Hall Law Review* 75 (1997), contextualizes this voluminous literature.

[19]118 U.S. 375 (1886). Sidney L. Harring, ***Crow Dog's Case*: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century** (1994).

[20]104 U.S. 621 (1882).

[21]103 U.S. 370 (1881); 107 U.S. 110 (1883).

[22]110 U.S. 516 (1884).

[23]Jerold Israel and Wayne LaFave, **Criminal Procedure** (1985) [hereinafter **Criminal Procedure**], 42–43. *Hurtado* marks the beginning of the Supreme Court's line of cases struggling with the extension of Fourteenth Amendment due process to state criminal cases, a process that finally occurred in the mid-twentieth century as "selective incorporation" but which was heralded by Harlan's famous dissent in *Hurtado*. *See* also Beth, **John Marshall Harlan**, *supra* note 10, 216–221.

[24]107 U.S. 221 (1883). Ex post facto laws were forbidden in the text of the Constitution itself and therefore were not involved in the dispute over the narrowing of the Fourteenth Amendment. Yet four Justices dissented in this case, refusing to extend any constitutional protection to state prisoners.

[25]First cited as *Hopt v. People* 104 U.S. 631 (1882); thereafter as *Hopt v. Utah* 110 U.S. 574 (1884); 114 U.S. 488 (1885); 120 U.S. 430 (1887).

[26]A leading criminal procedure treatise by Israel and LaFave, *supra* note 23 (1985), 264, cites *Hopt* at the outset of its discussion of the common law voluntariness test, making it clear that this is simply an example of the application of the common law rule.

[27]Lawrence M. Friedman, **Crime and Punishment in American History** (1993) [hereinafter **Crime and Punishment**]; Sidney L. Harring, **Policing a Class Society: The Experience of American Cities, 1865–1915** (1983) [hereinafter **Policing a Class Society**].

[28]Martin J. Weiner, **Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914** (1990), 11.

[29]Even the absolute number of executions in the United States in the 1890s was exceeded only by that in the period of the 1930s and 1940s. After the 1890s the number of legal executions declined slightly, despite the rapidly increasing population, until the 1930s. That decade saw 1,670 legal executions, the highest absolute number. However, given the much higher population in the 1930s, this still meant fewer executions per capita. Bowers, **Legal Homicide,** *supra* note 5, 3–65; Raymond Paternoster, **Capital Punishment in America** (1991). Historian Watt Espy has systematically collected data on the death penalty. *See* V. Schneider and J. O. Smykla, "A Summary Analysis of Executions in the United States, 1608–1987: The Espy File," in Robert M. Bohm, **The Death Penalty in America: Current Research** (1991); M. W. Espy and J. O. Smykla, **Executions in the United States, 1608–1987** [machine readable data file], Ann Arbor, MI, Inter-University Consortium for Political and Social Research (1991).

[30]*Id.* W. Fitzhugh Brundage, **Lynching in the New South: Georgia and Virginia, 1880–1930** (1993); Edward L. Ayers, **Vengeance and Justice: Crime and Punishment in the 19th Century American South,** (1984); Charles D. Phillips, "Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889–1918," 21 *Law and Society Review* (1987), 361–374; E. M. Beck and Stewart E. Tolnay, "The Killing Fields of the Deep South: The Market for Cotton and the Lynching of Blacks, 1882–1930," 55 *American Sociological Review* 526 (1990); Susan Sterett, "'Entitled to Have a Hearing': Due Process in the 1890s," 3 *Social and Legal Studies* (1994), 47–70, at 59–66.

[31]L. Kay Gillespie, **The Unforgiven: Utah's Executed Men** (1991), 52 [hereinafter **Unforgiven**].

[32]Friedman, **Crime and Punishment**, *supra* note 27, is

an excellent introduction to this literature. Note that in chapter 11 on "The Evolution of Criminal Process: Trials and Errors," Friedman devotes twenty-four pages to the criminal trial process and only four pages, 255–258, to criminal appeals. For other studies *see* Harring, **Policing a Class Society**, *supra* note 27.

[33]Louis Mazur, **Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865** (1991). While we lack comparable histories of the meaning of the death penalty in late nineteenth-century America, *see* Michael Madow, "Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York," 43 *Buff. L. Rev.* 461 (1995) [hereinafter "Forbidden Spectacle"], and John D. Bessler, "The 'Midnight Assassination Law' and Minnesota's Anti-Death Penalty Movement, 1849–1911," 22 *Wm. Mitchell L. Rev.* 577 (1996) for examples of the writing that exists on this topic. Minnesota bucked the national trend and abolished capital punishment early in the twentieth century. In 1912 the United States government published a bibliography of references on capital punishment that appears to be a comprehensive review of the published literature on the subject up to that point: Hermann H. B. Meyer, **Select List of References on Capital Punishment** (1912).

[34]Madow, "Forbidden Spectacle," *supra* note 33. The best known of the New York cases, *In re Kemmler* (136 U.S. 436 [1890]), went to the U.S. Supreme Court on the Eighth Amendment issue that the death penalty by electrocution was "cruel" in causing great pain before death and "unusual" in that it had never been used before. The Court, not bothered by either of these arguments, upheld Kemmler's death sentence. The underlying issue in the case was a dispute between Thomas Edison and George Westinghouse over whether "direct current" (in which Edison was heavily invested) or "alternating current" (in which Westinghouse was invested) should be used to electrify America. Edison's company put a great effort into arguing that "direct current" was safe, while "alternating current" was dangerous to human life. The use of Westinghouse's alternating current to kill Kemmler reinforced Edison's position. Edison's company mounted a huge lobbying effort to legally abolish the use of alternating current as a threat to public safety; ultimately, the New York legislature filed a detailed report on the use of electricity as a means of execution that defended the practice. Deborah W. Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century," 35 *Wm. and Mary L. Rev.* 551 (1994); Thomas P. Hughes, "Harold P. Brown and the Executioner's Current: An Incident in the AC-DC Controversy," 70 *Publications in the Humanities*, 143–165 (1965); Theodore Bernstein, "A Grand Success," *IEEE Spectrum* (February 1973), 54–58; Arnold Beichman, "The First Electrocution," *Commentary* (May 1963), 410–419. The report of the legislative committee which studied electrocution is bound in **People of the State of New York, Ex. Rel. William Kemmler, Appellant, Against Charles F. Durston, Agent and Warden of Auburn Prison, Respondent** (two vols. bound in Court of Appeals, 1847–1911, vol. 893, Buffalo, 1890, held in the New York State Library, Albany).

[35]Fairman, **Reconstruction and Reunion,** part 2, *supra* note 10. The nationalism of the Waite Court comprises a major theme of Fairman's work.

[36]*United States v. E.C. Knight & Co.,* 156 U.S. 1 (1895); Fiss, **Troubled Beginnings**, *supra* note 10, 107–154.

[37]*Pollock v. Farmer's Loan & Trust Co.,* 158 U.S. 601 (1895). *See* Fiss, **Troubled Beginnings,** *supra* note 10, 75–100.

[38]*Munn v. Illinois*, 94 U.S. 113 (1877). *See* Fairman, **Reconstruction and Reunion**, part 2, *supra* note 10, "The Granger Cases," 290–371.

[39]William B. Duker, "The Fuller Court and State Criminal Process: Threshold of Modern Limitations on Government," 1980 *B. Y. U. L. Rev.* 275. Although referring to the later Fuller Court, Duker describes the Supreme Court's general refusal to interfere with state criminal cases in the late nineteenth century.

[40]Short biographies of all of the Justices can be found in Kermit L. Hall, **The Oxford Companion to the Supreme Court of the United States** (1992) [hereinafter **Oxford Companion**].

[41]Horwitz, **Transformation**, *supra* note 10, 3–31.

[42]Miller served from 1862 to 1890, Field from 1863 to 1897, Bradley from 1870 to1892, Harlan from 1877 to 1911, and Gray from 1882 to 1902.

[43]Magrath, **Triumph of Character**, *supra* note 10. Both Waite and Fuller were outsiders, surprise appointments to the highest judicial office in the land. Neither had a substantial record of public service; they had rarely been to Washington, possessed no judicial experience, and were not known nationally. Sitting Justices coveted promotion to the Chief Justiceship in both 1872 and 1888, and resented the appointment of less able and experienced outsiders.

[44]Charles Fairman, **Mr. Justice Miller and the Supreme Court, 1862–1890** (1939), 323–325 [hereinafter **Miller and the Court**]; Fairman, **Reconstruction and Reunion**, part 2, *supra* note 10, 732. While on circuit in 1864, Justice Miller was obligated to pronounce a mandatory death sentence on a person convicted of killing an officer arresting deserters. Miller wrote that "[t]he penalty . . . is one which my private judgment does not approve; for I do not believe that capital punishment is the best means to enforce the observance of the laws, or that, in the present state of society, it is necessary for its protection. But I have no more right, for that reason, to refuse to obey the law, than you had to resist it." *U.S. v. Gleason*, Fed. Case No. 15,216 (1867).

[45]Beth, **John Marshall Harlan,** *supra* note 10, 216–222; Yarbrough, **Judicial Enigma,** *supra* note 10, 182–185.

[46]Gray also served from 1853 to 1861 as the Reporter of that court. His decisions reflect a scholarly care unusual in nineteenth-century jurisprudence. It was Gray who initiated the practice of using recent Harvard Law School graduates as his clerks to assist him in the research necessary to support his opinions. John E. Semonche, "Horace Gray," in Hall, **Oxford Companion,** *supra* note 40, 345–346.

[47]G. Edward White, **The American Judicial Tradition: Profiles of Leading American Judges** (1976), 109–128; John Reid, **Chief Justice: The Judicial World of Charles Doe** (1967).

[48]Beth, **John Marshall Harlan,** *supra* note 10, 141; Semonche, "Horace Gray," in Hall, **Oxford Companion,** *supra* note 40, 345–346.

[49]Swisher, **Stephen J. Field,** *supra* note 10, 73–104.

[50]A limited scope of federal criminal jurisdiction was a major states' rights issue in the early nineteenth century. Stewart Jay, "Origins of the Federal Common Law," *133 U. Pa. L. Rev.* 1003–1116 and 1231–1333 (1985); Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic," 4 *L. & Hist. Rev.* 223 (1986); Robert C. Palmer, "The Federal Common Law of Crime," 4 *L. & Hist. Rev.* 267 (1986); Wilbur R. Miller, **Revenuers and Moonshiners: Enforcing Federal Liquor Law in the Mountain South**, 1865–1900 (1991); Friedman, **Crime and Punishment,** *supra* note 27, 261–276.

[51]Edwin Firmage and Richard Mangrum, **Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-Day Saints, 1830–1900** (Urbana: University of Illinois Press, 1988) [hereinafter **Zion in the Courts**].

[52]David Rossman, "Were There No Appeal: The History of Review in American Criminal Courts," 81 *J. Crim. L. & Criminology* 518 (1990); Marc M. Arkin, "Rethinking the Constitutional Right to a Criminal Appeal," 39 *UCLA. L. Rev.* 503 (1992); Erwin C. Surrency, **History of the Federal Courts** (1987). For a complete treatise on Supreme Court jurisdiction in the 1890s, *see* Robert Desty, **A Manual of Practice in the Courts of the United States** (1899).

[53]Fairman, **Reconstruction and Reunion,** *supra* note 10, 730.

[54]William F. Duker, **A Constitutional History of Habeas Corpus** (1980); Lester B. Orfield, **Criminal Appeals in America** (1939). This is how, for example, American Indians managed to appeal their criminal convictions to the Supreme Court, arguing in a writ of habeas corpus that, as members of sovereign nations, the United States had no jurisdiction over them.

[55]18 Stat. 253; (1874) Firmage and Mangrum, **Zion in the Courts,** *supra* note 51, 148–149; Stephen Cresswell, "The U.S.. Department of Justice in Utah Territory, 1870–90," 53 *Utah Hist. Q.* (Summer 1985), 204–222; Thomas Alexandar, "Charles S. Zane, Apostle of the New Era," 34 *Utah Hist. Q.* (1966), 290.

[56]On the legal struggle between the Mormons and the United States, *see* Firmage and Mangrum, **Zion in the Courts**, *supra* note 51.

[57]99 U.S. 130 (1878).

[58]Martin R. Gardner, "Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad," *Wash. U. Law Q.* (1979), 450–51.

[59]Jean Ann Walters, **A Study of Executions in Utah** (1973) [hereinafter **Study of Executions**], 22–32; Gillespie, **Unforgiven**, *supra* note 31, 42–60. In Mountain Meadows in 1857 a band of Mormons and Indians attacked a wagon train from Missouri, killing all adults and children old enough to remember the incident. The Mormon hierarchy concealed Mormon participation in the attack and blamed Indians; however, for political reasons John D. Lee ultimately took responsibility for the attack.

[60]Hopt is still the only criminal defendant who is the subject of four full opinions of the Supreme Court of the United States, and the only defendant under the death penalty to have three death penalty convictions set aside by the Supreme Court.

[61]Thurgood Marshall, "Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit," 86 *Columbia Law Review* 1 (1986); Lungren and Krotoski, "*Policy Lessons From the Robert Alton Harris Case,*" 40 *UCLA L. Rev.* 295 (1992).

[62]Hopt's four case files each contain copies of a trial transcript and of all of the Utah documents involved in the appeal. The fourth case file is the most extensive (not surprisingly since the state was able to improve on its case each time); it runs 253 printed pages, and is the one that has been relied on for this article. *Hopt v. Utah* 120 U.S. 430 (1887), original case file held in National Archives, RG 267, Supreme Court Appellate Cases, Washington D.C.

[63]The juries took one and one half hours, two hours, one hour, and a half hour respectively, a total of six hours for all four trials. These are remarkably swift verdicts.

[64]The following account is pieced together from this transcript, a record of Hopt's fourth trial (hereinafter **Transcript**). It is the most complete of the four transcripts, not only because the government was able to clarify its basic case after three trials, but also because Hopt himself only testified in his third and fourth trials. While all four transcripts exist as part of the official United States Supreme Court case files, held in the National Archives, RG 267, the basic facts of the case—as put together on the evidence of numerous witnesses—never changed beyond the successive inclusion of the testimony of the two defendants in the second trial (Emerson) and the third (Hopt).

This leaves one of the most extensive records of any frontier murder trial.

[65]*Deseret Evening News*, August 11, 1887, 2. We can only speculate as to the reason the governor pardoned Emerson before Hopt's fourth appeal had been decided by the Supreme Court. In the event, it was a full year before the Supreme Court affirmed Hopt's fourth conviction, and it is unlikely that anyone had any idea of the result prior to its occurrence. Perhaps the territory had great confidence that there would never be a fifth trial, or trusted Emerson to remain available as a witness. It is also possible that the Utah Territory had decided to call a halt to any further Hopt trials, no matter what the result. There surely was little precedent for a fifth trial, although, by the same token, there was little precedent for the fourth trial. Certainly Emerson ingratiated himself with the Mormon prisoners, who worked for his release; Stan Larson (ed.), **Prisoner for Polygamy: The Memoirs and Letters of Rudger Clawson at the Utah Territorial Penitentiary, 1884–87** (1993) [hereinafter **Prisoner for Polygamy**], 48.

[66]Echo Canyon was on the main route east from Salt Lake City toward Wyoming, the route of the Union Pacific Railroad. Today it is the route of both the railroad and Interstate 80 between Echo, UT and Evanston, WY.

[67]"The Sheriff and the Murderer," *Deseret Evening News*, August 2, 1880, 1. Other than Hopt's general denial that he was the one who killed Turner, there are no substantial factual disputes in the *Hopt* case. While the eight different reported opinions all give extensive accounts of the facts, the best single account—a complete history of the case—is found in the *Deseret Evening News*, August 11, 1887, 2, published the day Hopt was hanged. The account continues throughout the paper.

[68]Hopt was referred to as a "big burly German" in the *Deseret Evening News*, "The Turner Murder," July 23, 1880, 3. The other biographical information is from the extended account of the case published in the *Deseret Evening News*, August 11, 1887.

[69]*Deseret Evening News*, August 11, 1887.

[70]*Id.* The *News* reported that Hopt had been "several times arrested for violating the laws, the charge against him on one occasion being grand larceny."

[71]Testimony of John W. Turner, **Transcript**, 185–186. While it is clear that Turner locked Hopt up twice in his jail, it is not clear what the charges were.

[72]Testimony of John W. Turner, **Transcript**, 32–33.

[73]None of the testimony mentions any money, suggesting that young Turner had little or no money on his person when he was killed. Indeed, Hopt was broke two days after the alleged killing, forced to sell Turner's barley on July 6 in order to get money to buy whiskey. However, he was on a drinking binge on July 4 and 5, and may have spent during the binge whatever cash he took from Turner.

[74]Testimony of Fred Hopt, **Transcript**, 220. This testimony obviously does not help the case at all, since these dates include the entire four-day time span that Turner was in Park City. Even assuming that Hopt was often untruthful, his testimony of a chance encounter on Main Street is the most likely account of their meeting.

[75]Testimony of E. M Allison, **Transcript**, 92–93. Given that Turner left Provo after noon on June 28th, the forty-mile trip could not have been completed until late on the 29th at the earliest. Given that Turner was in no particular hurry and was carrying 3,000 pounds of barley, he may well have arrived in Park City on June 30th or even on July 1st.

[76]Testimony of Alfred Simon, **Transcript**, 94–98; Testimony of Meyer Seccel, **Transcript**, 206–208. Simon saw Hopt and "another man;" Seccel saw Hopt and Emerson together with Turner.

[77]Testimony of William Sutton, **Transcript**, 145–147.

[78]Testimony of Charles Bates, **Transcript**, 113–115.

[79]Testimony of John Funk, **Transcript**, 154–155.

[80]Testimony of A. J. Moore, **Transcript**, 105.

[81]Testimony of William Reynolds, **Transcript**, 114–115.

[82]Testimony of David Moore, **Transcript**, 116–118.

[83]Testimony of W. H. Moss, **Transcript**, 119–121.

[84]Testimony of George Campbell, **Transcript**, 124–135. Campbell testified that Hopt counted his money in front of him, but that he could not recall whether it was $180 or $280. There is no further mention of the proceeds of the sale of the teams in the testimony. Hopt must have been nearly broke when arrested. If so, he spent at least $180 within ten days. Emerson, of course, might have shared that money.

[85]Testimony of Thomas Carr, **Transcript**, 137–138.

[86]Testimony of Leonard Phillips, **Transcript**, 62–66.

[87]Testimony of Silas Allred, **Transcript**, 34–48.

[88]Testimony of Thomas Carr, **Transcript**, 137–140. According to Carr's testimony it was no more than "10 or 20 or 30 minutes" before Hopt confessed. Hopt, of course, contended that his confession was "unvoluntary."

[89]*Deseret Evening News*, "The Turner Murder," July 23, 1880, 3.

[90]Testimony of A. J. Moore, **Transcript**, 110.

[91]*Deseret Evening News*, August 25, 1883, 28.

[92]*Deseret Evening News*, "Arrest of Emerson," August 3, 1880, 3.

[93]*Id.*

[94]We have deliberately not attempted to reconcile the two versions of the crime. However, it is important to note here that on Emerson's own facts, the two did not set out from Park City until July 6, reaching Echo Canyon, where the body was dumped, at the earliest on July 7. Since Turner was killed on July 3 and this was Utah in July, the stench of the body could not have gone unnoticed by Emerson.

[95]*Id.*

[96]*Deseret Evening News*, "The Hopt Murder Case," February 18, 1881, 3.

[97]*Deseret Evening News*, "The Turner Murder," August 6, 1880, 3.

[98]Following a common law rule of evidence, Utah law did not permit co-defendants to testify against each other because such testimony was seen as inherently self-serving and unreliable. After the Supreme Court of the United States reversed Hopt's conviction, the territorial legislature hurriedly amended the law to permit such testimony. This enabled Emerson to testify against Hopt in the second, third, and fourth trials.

[99]Larson, **Prisoner for Polygamy**, *supra* note 65, 48. Here it may not be impertinent to point out that Emerson was an actor.

[100]In spite of Emerson's protestations of his complete innocence, the most likely interpretation of these facts is that Emerson and Hopt acted together in the killing of Turner, given that they were both seen with Turner the night of the killing. Emerson's story of being approached by Hopt in the saloon the next day was uncorroborated and was obviously self-serving, since it put him far from the murder scene.

[101]Sharp and Marshall represented Hopt in his first two trials, at the first two Utah appeals, and in his second appeal before the Supreme Court of the United States. They withdrew as counsel before the third trial and were replaced by S. H. Snider and W. G. Van Horne. Snider and Van Horne represented Hopt in his remaining trials and appeals, including the third and fourth appeals to the Supreme Court. Evidently, two Washington lawyers, John R. McBride and J. G. Sutherland, represented Hopt in his first Supreme Court appeal. There were no provisions for the defense of indigent defendants at this time, and it is not clear if any of Hopt's lawyers were ever paid. This may explain why Sharp and Marshall did not journey to Washington for the first appeal and why Sharp and Marshall withdrew as counsel after their extraordinary legal achievement of winning two successive appeals in the Supreme Court. Utah Territory prosecuted the case as an ordinary criminal case, using several different prosecutors over the four trials. The Solicitor General of the United States represented Utah Territory in all four Supreme Court appeals.

[102]*Deseret Evening News*, August 11, 1887. The details of the trial are also reported in the *Deseret Evening News*, February 17, 18, and 19, 1881.

[103]This testimony is obviously inconsistent with Emerson's testimony that he only met Hopt on July 4, the day after the killing. If true, then Emerson was at the scene when Turner was killed with an ax blow.

[104]*Id.*

[105]*Id.* It is important to note that under the common law the death penalty was the only penalty for murder. During much of the nineteenth century the majority of American jurisdictions, including the federal government, followed this law. However, in 1798 Quaker Pennsylvania adopted a different rule that divided murder into two types, one "premeditated and deliberate," which carried the death penalty, and one containing all other categories of murder, which carried the punishment of life imprisonment. By the late nineteenth and early twentieth centuries, most jurisdictions had adopted the Pennsylvania formula, distinguishing first and second degree murder.

[106]*People v. Hopt*, 1 Utah 79 (1881).

[107]*Hopt v. People*, 104 U.S. 631 (1882).

[108]*Id.*, 634.

[109]103 Mass. 412, cited at 634 (1869).

[110]Compiled Laws of Utah of 1876, 568–569.

[111]The whole voluntary intoxication issue was meaningless in the context of the trial. There was no evidence that Hopt was intoxicated at the time of the killing. Furthermore, Hopt denied committing the crime itself and so could not raise the defense of intoxication. Rather, the defense lawyers had raised the issue in their summation to the jury and requested the instruction. Although, on these facts, the trial judge could have refused to give the instruction, once he gave it, he could not give it incorrectly.

[112]104 U.S. at 635.

[113]J. C. Smith and Brian Hogan, **Criminal Law** (7th ed.) (1992), 218–232.

[114]*Deseret Evening News*, August 11, 1887.

[115]*People v. Hopt*, 3 Utah (1883).

[116]110 U.S. 574 (1884).

[117]Compiled Laws of Utah, 1876; Utah Code of Criminal Procedure, Section 218.

[118]110 U.S., 579.

[119]*Id.*

[120]Beth, **John Marshall Harlan**, *supra* note 10, 216–222; Yarbrough, **Judicial Enigma**, *supra* note 10, 178–185. Neither of these biographies of Harlan discuss or even cite *Hopt*, a case not seen as important by any scholars.

[121]*Hopt* and *Hurtado*'s time before the Court overlapped almost completely. *Hopt* was argued on January 4 and decided on March 3, two months after it was first heard. *Hurtado* was argued on January 22 and 23 and announced the same day as *Hopt*, after only about six weeks before the Court. This is great speed by modern standards, but reflects a different process. Both cases were probably decided at the weekly Conferences, a few weeks after they were heard. Then they were assigned to Justices Harlan and Stanley Matthews respectively for the writing of the opinions. Each Justice took about one month to write the opinion, which must have been only perfunctorily circulated among his fellow Justices.

[122]110 U.S. 580–581 The body, obviously very decomposed after weeks in the Utah summer, had been soldered into a zinc coffin. Hopt's lawyers obviously knew of the great difficulty the prosecution faced in proving the identity of the body without this identification.

[123]*Id.*, 582–583.

[124]*Id.*, 584–585.

[125]384 U.S. 436 (1966).

[126]Israel and LaFave, **Criminal Procedure**, *supra* note 23, 264. On the history of *Miranda* in this context, *see* pp. 262–266. Harlan missed an opportunity here to begin an expansive Fifth Amendment and Fourteenth Amendment jurisprudence of police interrogation, investigating the circumstances under which Hopt was interrogated by a Cheyenne police officer while in custody in the Cheyenne jail. However, it is clear that there was little jurisprudence at that time that would have supported Harlan in such an effort and that the rest of the Court would not have signed an opinion involving it. Up to this time the Fifth Amendment simply had not been read in an expansive way.

[127]110 U.S. at 588–589.

[128]*Deseret Evening News,* August 11, 1887.

[129]*People v. Hopt*, 3 Utah 396, 404 (1884).

[130]*Deseret Evening News*, August 11, 1887, 1.

[131]*Hopt v. Utah*, 114 U.S. 488 (1885), 490–491.

[132]It is impossible to know the judge's reasons for this action. There is no conceivable alternative explanation, given Gray's earlier opinion, unless we assume that the trial judge intended that Hopt be shot without the appeal reaching the Supreme Court of the United States. If this is true, it was a major test of the reach of the Court's authority. The Court won and its jurisdiction thereafter reached every corner of the frontier. (This jurisdictional conflict in death penalty cases is still not over. Evidently, Utah executed Gary Gilmore while his application for a stay was still being considered by the Supreme Court of the United States. Alex Kozinski, "Tinkering with Death," *The New Yorker*, February 10, 1997, 48–52, at 49.)

[133]In 1884, there were about ninety prisoners in the Utah Penitentiary, including about twelve murderers. Mormons imprisoned for cohabitation raised the total number of inmates substantially over the next few years. By May 1885 there were ninety-six regular convicts and six Mormon "cohabs." In mid-1886 there were about 150 inmates, including about fifty cohabs and 100 regular inmates. By June 1887, there were eighty-eight Mormon cohabs and about 100 gentiles. These groups were not entirely mutually exclusive: there were a few Mormon regular prisoners and a few gentiles imprisoned as cohabs. Larson, **Prisoner for Polygamy**, *supra* note 65, 6–8.

[134]*Id.*, 41–53.

[135]*Deseret Evening News,* August 11, 1887, 2. This story appears inconsistent with the fact that Hopt was "a mechanical genius," who should have been able to fix the weapon: a revolver is a simple mechanical device. Also, the fact that the pistol "did not revolve" would not stop it from being used to fire a single shot.

[136]*People v. Hopt*, 4 Utah 247 (1886).

[137]*Id.*, 249. The transcript of the trial was 500 pages long.

[138]*Hopt v. Utah,* 120 U.S. 430, 431 (1887).

[139]*Id.* at 432–436 (1887).

[140]*Id.* at 436–437.

[141]*Id.* at 439–441.

[142]*Id.* at 442.

[143]Like the two biographies of Harlan cited earlier in this paper, Swisher's biography of Field, **Stephen J. Field,** *supra* note 10, does not mention the *Hopt* case at all.

[144]Larson, **Prisoner for Polygamy**, *supra* note 65, 149.

[145]*Id.* 149–150, 203–204. George Kirkham, a Mormon inmate, wrote: "I felt as I never felt in my life. My feeling was So Depressed that I could not Eat My Breakfast. I walked the Yard. Soon after we were told if we Wished to Go and Speak to Welcome to be Brief. Most all went by his Door where he Stood and Shook hands with him. I went and he said Good by. That was the first time I ever Shook hand with a perso[n] that was going to the World of Spirits. All was prepared and at 1 o'clock we were looking up and while we were Sitting in our bunks with the Iron Bars Windows covered up with Blankets all at once Bang went the Guns and all was over." *Id.* at 163.

[146]*Deseret Evening News*, August 11, 1887.

[147]Hopt's apparently instant death stood in sharp contrast to the previous Utah execution, that of Wallace Wilkerson in May 1879. Three of the bullets hit above Wilkerson's heart, with the fourth hitting his left arm. He stood up after he was shot, then fell to the ground still alive. During the fifteen minutes it then took him to die, the authorities were uncertain whether they should raise him, reconstitute the firing squad, and shoot him again. Gillespie, **Unforgiven**, *supra* note 31, 48–49. Evidently the fifth shot in both executions was a blank, a military tradition still adhered to in Utah. Walters, **Study of Executions**, *supra* note 59, 9–10.

[148]*Deseret Evening News*, August 11, 1887.

[149]Melvin L. Bashore, "Life Behind Bars: Mormon Cohabs of the 1880s," 47 *Utah Hist. Q.* (Winter 1979), 22–41, 36.

[150]Fairman, **Reconstruction and Reunion**, *supra* note 10, 438–480.

[151]Larson, **Prisoner for Polygamy**, *supra* note 65, 204.

[152]*Id.*, 204.

[153]Rudger Clawson to Grover Cleveland, February 24, 1887. *Id.* at 144. Emphasis in the original.

[154]If anything, modern cases have been more sensitive to the prejudicial effect of extraordinary publicity than was Justice Field in the fourth opinion, although modern law accords substantially with Field's view that some prejudice can be cured by proper judicial instruction and the juror's willingness to set aside those prejudicial views.

[155]Evarts Act, Ch. 517, 26 Stat. 826 (1891); Act of March 3, 1911, sec. 240, 36 Stat. 1157. Edwin Surrency, **History of the Federal Courts**. 221.

[156]However, it must be noted that every other murderer in prison with Hopt was ultimately released.

[157]The federal control of Utah's territorial legal system resulting from the Poland Act of 1874 meant that Utah

judges and U.S. marshals were outsiders, appointed directly from Washington. Firmage and Mangrum, **Zion in the Courts**, *supra* note 51, 148–151.

[158]*See*, for example, Roger D. McGrath, **Gunfighters, Highwaymen, and Vigilantes: Violence on the Frontier** (1984); Lawrence M. Friedman and Robert V. Percival, **The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910** (1981). Clare V. McKanna, Jr., **Homicide, Race, and Justice in the American West, 1880–1920** (1997), contains a review of this literature on pp. 3–44.

Justice Harlan's "Great Betrayal"? A Reconsideration of *Cumming v. Richmond County Board of Education*

C. ELLEN CONNALLY

In 1899 the Supreme Court of the United States decided the case of *Joseph W. Cumming, James S. Harper, and John C. Ladeveze v. The County Board of Education of Richmond County, State of Georgia.*[1] The litigation arose after the all-white Richmond County School Board closed Ware High School, a segregated, tax-supported, all-black high school in the City of Augusta, GA. The plaintiffs did not seek integration of the Augusta Public Schools. They did not lodge a complaint regarding the separation by race of children in the primary grades. They did not attempt to compel the board to provide a high school for blacks. Their demand was for injunctive relief that would force the closing of the white high school through the withholding of tax support until the black high school was reopened. This approach succeeded in the trial court but failed in the Georgia Supreme Court.[2] In an opinion written by Justice John Marshall Harlan, the Justice who had just three years before asserted that the constitution was color-blind,[3] the Supreme Court of the United States sustained the ruling of the Georgia Supreme Court denying the request for injunctive relief. Ware High School was not reopened.

Historians and legal scholars cite *Cumming v. Richmond County Board of Education* as the first school desegregation case decided by the Supreme Court of the United States.[4] It was also the decision that first applied the doctrine of separate-but-equal to public schools,[5] and held that separate schools do not violate the Equal Protection Clause of the Fourteenth Amendment.[6] *Cumming* also established the proposition that tax-supported state schools are within the purview of the states and must not be disturbed by the federal government except in cases in which federal rights are involved.[7] With such significant findings attributed to the case, it is interesting to note that *Cumming* has only been cited by the Supreme Court six times since 1899.[8]

In 1980, historian J. Morgan Kousser used *Cumming v. Richmond County Board* as the framework for his study of the black elite in

A bird's-eye view of Augusta, Georgia, in 1872 shows the building that housed Ware High School (indicated by arrow), the first public high school for African Americans in Georgia and one of only five such schools in the South in that era. This is the only known image of the school building, which was demolished after it was closed in 1897 by the Richmond County School Board.

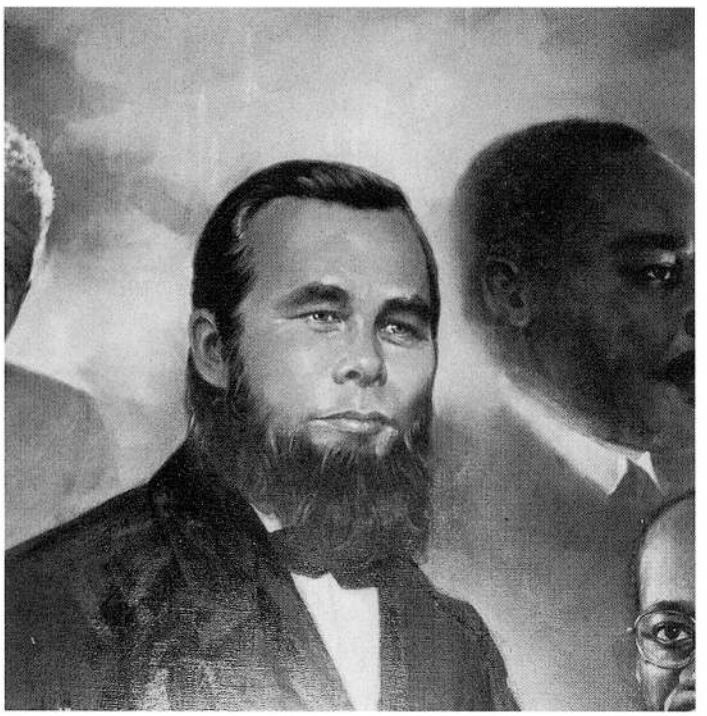
late nineteenth-century Augusta.[9] Kousser's stands as the only in-depth study of the case.[10] To the extent that Kousser related the social history of Augusta's black elite, he was very successful. However, as the 100th anniversary of the *Cumming* decision approaches, Kousser's misinterpretation of some legal aspects of *Cumming* and its misinterpretation by some courts makes timely a reconsideration of the case and its legacy.

A careful analysis of the ruling in *Cumming* demonstrates that the decision did not deal directly with the issue of racial segregation in public schools. Because the existence of a black high school was at issue, lower federal courts and state courts fashioned a separate-but-equal formula for schools out of *Plessy v. Ferguson*[11] *and Cumming,* later including *Berea College v. Com. Of Kentucky.*[12] *In referring to Cumming*, historian Loren Miller says that "[i]n time the fiction grew that the Supreme Court had considered and determined th[e] issue with finality, whereas the truth was that it had only skirted around the question and had spoken only by evasions and indirections."[13] *Cumming* was misread and misinterpreted in order to justify society's desire to maintain segregated schools, a tradition that has a long and tragic legacy in American society.

The roots of *Cumming v. Board of Education* lay in the black community of Augusta at the conclusion of the Civil War. The desire of the freedmen there to gain an education, coupled with the desire of the black elite to provide educational facilities for all blacks and upward mobility for their own children, led to the formation of Ware High School in 1872.[14] William J. White, one of the leaders of Augusta's black community and a former agent of the Freedmen's Bureau, was a moving force in the community's desire to provide a public education for blacks. Indeed, the frequency of his visits to the school board meetings in the 1870s and 1880s "might have qualified him as an ex-officio member of the board."[15] Active in the Republican party, White had the distinction of serving as Chairman of the Eighth Congressional District Republican Convention.

The case against the school board was tried in the Richmond County Courthouse (pictured). The plaintiffs demanded injunctive relief that would force the closing of the white high school through the withholding of tax support until the black high school was reopened. This approach was successful in the trial court, but failed in the Supreme Court of the United States.

William Jefferson White, known as "the father of negro education in Georgia," was one of the founders of Ware High School. Although he was a leader in Augusta's black community, many questioned whether he had any African blood, and he was considered a "voluntary negro."



White was what later historians would call a "voluntary Negro:" "[h]e looked like a white man, and there were rumors that his African blood was negligible, if it existed at all."[16] His commitment to education earned him the title "Father of Negro Education in Georgia."[17]

The South lacked the tradition of public education possessed by other parts of the nation. Aristocrats of the antebellum South had been reluctant to tax for educational purposes. To them, education for the masses was not necessary. The marked individualism of Southerners, the reluctance of the white elite to provide an education for the masses of poor whites, and their abhorrence to education for blacks all contributed to this lack of interest in education, particularly public education. Historian John Hope Franklin attributes this lack of interest in education to the fact that "[i]n the antebellum South widespread illiteracy and the neglect of education were outstanding characteristics of the culture of the region. The attitude was aptly summed up fifteen years after the close of the Civil War by Virginia's Governor F. W. M. Holliday, who said that public schools were a "luxury . . . to be paid for like any other luxury, by the people who wish their benefits."[18] And in fact the people of Augusta, both black and white, paid tuition to go to the publicly supported high schools. Only the primary grades, then known as common schools, were free.

In 1872 the state of Georgia passed legislation for the creation of public schools.[19] Though mandating segregation, the law specifically provided that the Richmond County School Board "shall provide the same facilities for both [white and Negro children], both as regards schoolhouses and fixtures, attainments and abilities of teachers, length of term time and all other matters appertaining to education." The law was unique to Augusta and Richmond County because "no other Georgia school board could establish high schools under the state law."[20] In nineteenth-century America, a high-school education was not the norm but the exception, an attitude that the statute reflects. As a result, it is important to note that Ware High School was the only public high school for blacks in Georgia before 1915, and one of perhaps four in the eleven ex-Confederate states in 1880.[21] The provision of the Georgia statute that required the board to provide common schools for both races was clearly mandatory under Section Nine of the 1872 statute.[22] However, the authority given to the school board under Section Ten of the statute to "establish schools of higher grade at such point in the county as the interest and convenience of the people may require" became a major issue of dispute.[23]

Prior to the formation of Ware High School, the black high-school-age students of Augusta could attend the Augusta Baptist Institute. However, in 1879 that school moved to Atlanta, leaving an educational void. This removal motivated White and other blacks, including future *Cumming* plaintiff James S. Harper, to petition the school board for a tax-supported high school for blacks. White and other petitioners stressed the importance of training teachers for elementary schools and the provisions of the law that provided for equal facilities. The Augusta *Chronicle*, the city's leading newspaper, gave editorial support for the high school, stressing the importance of training teachers and the necessity of providing both races with the same opportunity. "If the whites have high schools, grammar, intermediate and primary schools," the *Chronicle* editorialized, "let the colored children have them also . . . Give both races exactly the same opportunities and equal advantages."[24]

White's substantial influence on the board showed in his ability to win support for the high school and select the school's first principal, Richard R. Wright. Wright was a product of the abolitionist-based American Missionary Association schools in Atlanta, and was the first valedictorian of Atlanta University.[25] He advocated classical education for blacks, a highly controversial subject in the late nineteenth century.[26] Even more in-

dicative of White's influence, "the board deferred to him in naming the school for a former agent of the Freedmen's Bureau, Edmund Asa Ware."[27] Ware, a native of Massachusetts and a 1863 graduate of Yale, was a part of the wave of Northern abolitionists who saw the Civil War as a prelude to the greater mission of educating emancipated slaves.[28]

From Ware High School's inception in 1880 until its demise in 1897, it served as a model for black high schools. "Ware High School became a solid academic secondary school, a source of pride and an avenue of mobility for Augusta's striving black community."[29] White politicians, including Populist Tom Watson, could point to Ware as an example of white tax money going to support the colored girls and boys at the expense of whites and the benefits not only of a common school, but also a high school. As in other parts of the South, Augusta had significant numbers of black voters for more than two decades after Reconstruction. It is therefore highly likely that, in supporting Ware, the school board was "responding to the pressures of the black electorate . . . overriding the objection of one board member [who argued] that the shortage of places in black primary schools should be alleviated before allocating money to the higher branches."[30] So long as blacks voted, the 800-dollar yearly net expense of Ware High School was a good investment for the Democrats.[31]

As Kousser points out, Ware was supported by the close-knit circle of black families that comprised the black elite of the city of Augusta.[32] These families had close connections with the Republican party through William J. White, James S. Harper, and Judson Lyons,[33] and were closely related by kinship and marriage.[34] In addition, their fair skin made them generally indistinguishable from the white population, and they were also related to prominent white families by blood.[35]

By the 1890s associations between whites and blacks based on personal relationships began to wane. Black businesses and services that had been started after the Civil War and had traditionally had an all-white clientele frequently did not survive the turn of the century. The new generation of white leadership that grew to adulthood after the Civil War had no reason to continue such associations, which had been established by their parents and grew out of slavery and other antebellum relations. In addition, with the demise of the Republican party in the South, blacks were gradually disenfranchised. The loss of personal relations along with the loss of the vote gradually eroded whatever power such groups as Augusta's black elite possessed.

Between 1873 and 1898, decisions of the Supreme Court of the United States gave legal support to the social trends that worked against blacks in late nineteenth-century America. In the *Slaughterhouse Cases*[36] and in *United States v. Cruikshank,*[37] the Court drastically curtailed the Privileges and Immunities Clause of the Fourteenth Amendment. In 1883, in the *Civil Rights Cases,*[38] the Court virtually nullified the restrictive parts of the Civil Rights Act of 1875. In 1896 in *Plessy v. Ferguson,*[39] the Court subscribed to the doctrine that "legislation is powerless to eradicate racial instincts," and laid down the separate-but-equal doctrine as justification for segregation. Two years later, in *Williams v. Mississippi,*[40] the Court completed the opening of "the legal road to proscription, segregation, and disenfranchisement by approving the Mississippi plan for depriving Negroes of the franchise."[41] In Augusta, an all-white primary eliminated blacks from municipal politics in 1899; a murder and lynching led to the absolute segregation of streetcars in 1900.[42]

As Booker T. Washington accepted the mantle of leadership of the black race in 1895, he sanctioned the Court's movement away from social and civil rights for blacks in post-Reconstruction America. Washington's was a new program "of racial coexistence based upon the concept of racial separation."[43] In his 1895 Atlanta Exposition speech, he told blacks and the world that the key to black success was

vocational education and that "for years to come the education of the people of my race should be so directed that the greatest of the mental strength of the masses will be brought to bear upon the everyday practical things of life."[44] Washington believed that blacks had no need for the traditional classical education in Greek and Latin exemplified by Ware High School. A basic education with emphasis on a trade and industrial education would suffice for blacks. Though Washington is now seen as the major advocate for vocational education for blacks, he should not bear the total responsibility for that vogue in the late nineteenth century; August Meir argues that "Washington simply brought to a climax a trend [toward industrial and agricultural education] that was well under way before the middle 1890s."[45]

The Richmond County School Board's decision on July 10, 1897, to chose a basic education for three to four hundred primary students over a classical education for sixty high school students mirrored the dispute that raged between Washington's followers and those of W. E. B. DuBois at the beginning of the twentieth century. The demise of Ware High School arguably reflected the adoption of Washington's point of view of education for blacks to the detriment of the talented tenth. It further closed a chapter on an era when black Republicans had strong influence over the Board of Education and its decisions.

In this period of economic downturn, the school board decided that if money was to be spent for the education of blacks, a primary education for the many was preferable to a classical education for the few—the sixty children of Augusta's black elite. Ware High School had been named after a white abolitionist, and its principal at the time was president of the Negro Teachers Association. Given these facts, the school board arguably saw Ware as a source of agitation, present and future, for the white establishment. Since the black high school students were already paying tuition, the board argued, let them continue to pay a lesser amount and attend one of the three church-supported schools that had been started since 1880. This would allow the school board to educate the greater number of primary-age black children. From the perspective of the board, less-educated blacks were less likely to assert their rights. Arguably, too, the board came to realize that with the loss of the franchise Ware High School was no longer the good political investment it had been.

The friends and colored patrons of Ware High School were called before the school board before the announcement of the final decision and given an opportunity to voice their concerns over the closing. Although the decision in all likelihood had already been made, this meant that the blacks could not say they had been denied a hearing. William J. White and John Ladeveze made impassioned pleas. However, at the hearing before the all-white board, they were told the reasons for the discontinuation were purely economic, a position that the board maintained throughout the litigation:

> Four hundred or more negro children were being turned away from the primary grades unable to be provided with seats or teachers; because the same means and the same building which were used to teach sixty high school pupils would accommodate two hundred pupils in the rudiments of education; because the board at this time was not financially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education and because there were in the City of Augusta at this time three public high schools—the Haines Industrial School, the Walker Baptists Institute and the Paine Institute—each of which were public to colored people and were charging fees no larger than the board charged for pupilage in the Ware High School.[46]

The board did, however, promise to reinstate Ware when the board's financial condition improved.

The original cause of action that the supporters of Ware filed in the Richmond County Court was a petition for equitable relief against the Board of Education and the tax collector. This action for an injunction sought to enjoin the collection of that portion of the property tax levied for school purposes and allocated for the support of the white high schools. It further sought to bar the board from expending 10% of the taxes—the amount spent on the white high schools—until Ware was reinstated.[47] The petitioners alleged that the tax was illegal and void because the county provided a high school for whites but did not provide the same facilities for blacks. The plaintiffs further alleged that they were persons of color and entitled to the full benefit of any system of high schools organized and maintained by the board. By suspending the black high school, the plaintiffs alleged, the board was wholly debarring them from any participation in the benefits of a high school education, although they were being taxed for it.

> They (the plaintiffs) rely upon so much of the constitution of the United States as declares that no State shall deny to any person within its jurisdiction the equal protection of the laws, and aver that the action of the board is a denial of the equal protection of laws; and that it is inequitable, unlawful and unconstitutional for the board to levy upon the petitioners, or for the tax collector to collect from them, any tax for educational purposes, from the benefits of which petitioners, in the persons of their children of school age, are excluded and debarred.[48]

In seeking this injunctive relief to prevent the collection of the tax and bar spending on the white high schools, the petitioners did not challenge the provisions of the Georgia statute that required segregated schools. Nor did they demand compliance with the *Plessy* decision, which, on the basis of separate but equal, would have required the county to maintain a black high school because it operated a white high school. They made no objection to the taxes paid for the support of the segregated common school, nor to the fact that the school board was all white and lacked black representation. Instead, they argued that, as taxpayers, they were paying taxes for a white high school which they could not attend. Therefore, they argued, the board should either close the white high schools or reinstate Ware.[49]

In addition to the action filed by Cumming, Ladeveze and Harper, there was a companion case entitled *Albert S. Blodgett and Jerry M. Griffin v. School Board.* Separate cases were filed because the lawyers disagreed about the appropriate cause of action in this complicated area of nineteenth-century extraordinary writs. *Blodgett* relied primarily on the Equal Protection Clause of the Fourteenth Amendment and sought a writ of mandamus directing the board to reinstate Ware High School.[50] *Blodgett* argued that continuing to support the two white schools while eliminating Ware was simply an unconstitutional denial of equal protection, and asserted that the board should be ordered by the court to comply with the law. The trial court found that since the board had some discretion under the statute, an action in mandamus was not proper, and it denied the writ. (In ruling on both cases, the trial court did not render a separate opinion in *Blodgett.*)

In response to the request for equitable relief in both cases, the board argued that under the 1872 statute it had no duty to establish a high school, and if it did in fact establish one the school's continued existence would be purely discretionary.[51] Ruling in *Cumming,* the trial court did not follow the *Plessy* decision, which would have required separate but equal facilities. Instead, the court dismissed the case against the tax collector and

enjoined the board from using any funds for the support of the white high school until equal facilities were provided for blacks. The trial judge, Enoch H. Calloway, was a plantation-born former state senator who had a reputation as a racial moderate.[52] The trial court held that

> . . . the establishment and maintenance of schools of higher grade than common schools, authorized by section 10 of the act [of 1872], is a matter that rests exclusively in the sound discretion of the board. But if the discretion is exercised in the establishment [of such schools] and [they are] maintained in harmony and in compliance with section 9 of the said act, the board must provide the same facilities for high education of both races.[53]

From the victory for the plaintiffs in the trial court, the Board of Education appealed to the Georgia Supreme Court. In reviewing the 1872 Act, the Georgia Supreme Court agreed with the Board of Education and found that the board was required to provide common schools but that any action relative to high schools was solely within their discretion. Based on that discretionary power, the court found that the school board was not required to establish a high school for blacks whenever it established one for whites. "Certainly [the Board of Education] must be allowed a broad discretion . . . and where it is in its discretion to pass upon facts and determine from them the best interest of the people at large, courts will not control its discretion unless it is manifestly abused, although the court may be of the opinion that the corporation erred upon the facts."[54]

The Georgia Supreme Court drew a clear distinction between the free common schools that were mandated under Section Nine of the statute and the high schools provided for in Section Ten. It found that the high schools differed from the primary schools, where students paid no fees. Both white and black high school students were required to pay tuition, and their schools existed as a result of the board's discretion. The court found that the board had not abused its discretion in discontinuing the high school established for the colored race. "The only complaint is that these

This view of Reynolds Street, where Ware High School once stood, was captured circa 1908.

plaintiffs, being taxpayers, are debarred of the privilege of sending their children to a high school which is not a free school but one where tuition is charged, and that a portion of the school fund, raised by taxation, is appropriated to sustain a white school to which negroes are not admitted."[55] The court allowed the board to consider as a factor in their decision the fact that there were three private sectarian high schools whose tuition was less than Ware's available to the black high school students.[56]

Relative to the alleged violations of the Constitution of the United States and the Fourteenth Amendment, the Georgia Supreme Court found that the point had been argued neither orally nor by brief, with the only mention of it being made at the end of the brief. The court concluded:

> If any authority had been cited, we could from that have determined which paragraph or clause counsel relied upon; but as he has left us in the dark, we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, is violated by the board.[57]

By reversing the order of the trial court the Georgia Supreme Court let stand the board's order for the closing of Ware. When the Georgia Supreme Court returned the case, the lower court, having been reversed, dismissed the petition of the plaintiffs. The plaintiffs then appealed to the Supreme Court of the United States on the basis of the trial court's dismissal of their petition for injunctive relief.

None of the Augusta lawyers originally retained by the plaintiffs were experienced constitutional lawyers. They were men that shared a commonality of status in Augusta: they were all outsiders to the establishment. The black plaintiffs could not afford to obtain the services of more prominent members of the Augusta establishment. Their attempts to gain financial support outside of Augusta met with little success, and an appeal to Booker T. Washington to help with fundraising produced no significant funds. As a result, "the Augustans were forced to rely almost entirely on their own resources."[58] It is also probable that no white lawyer of standing wanted to challenge the decision of the county school board. In addition, although John Ladeveze's brother-in-law Judson Lyons was a lawyer, he was fully engaged in his government position by 1897 and, according to Kousser, his law partner lacked experience.[59]

However, when the case went before the U.S. Supreme Court, the plaintiffs were represented by no less an imposing figure than former Vermont Senator George F. Edmunds. In 1897, Edmunds was in semi-retirement from his law practice and was wintering in Aiken, SC, a resort town fifteen miles from Augusta that was then very popular with rich Yankees. There Robert Harper, the father of plaintiff James S. Harper, approached him about the Ware case. Touched by the blacks' plight, Edmunds took the case without fee.[60]

Edmunds represented the state of Vermont in the Senate from 1866 to 1891. As Chairman of the Judiciary Committee in 1877, he waged a serious attack on the appointment to the Supreme Court of the United States of the future author of the *Cumming* opinion, Justice John Marshall Harlan. This attack grew not so much out of a dislike for Harlan as out of a distrust for Harlan's Republicanism and a desire to deliver a defeat to the recently elected (or selected, depending on one's interpretation of the much-disputed election of 1876) President, Rutherford B. Hayes. Harlan biographer Loren P. Beth describes Edmunds as a stubborn man of rock-like integrity who was one of the ablest constitutional lawyers in Congress. Edmunds twice turned down offers of appointment to the Supreme Court of the United States and was a serious contender for the White House in 1880 and 1884, primarily because of his ability to maneuver cautiously between the

On October 20, 1999, the Georgia Historical Society unveiled a sign marking the location of Ware High School. Pictured from left to right are Cecelia Johnson McGhee and Gwendolyn Johnson Connally, both nieces of John Ladeveze, one of the plaintiffs in *Cumming* and the moving force behind the case. The author, who is Ladeveze's great niece, is to the right of her mother.

two major factions of the Republican party.[61] "He was thought by some to be a Half Breed and by some to be a Stalwart."[62] The independent Mugwumps saw him as a man who could play all sides of the street, a reputation that earned him the name "The Stalwart Sweetheart of the Reformers."[63]

If there is one thing consistently said about Edmunds, it is that he lacked a winning personality. In an age prior to the popular election of members of the Senate, Edmunds was a man who "was not calculated to inspire much popular enthusiasm."[64] More commonly, he was noted for his "lack of amiability and contentious nature."[65] He is described as "flinty,"[66] dour,[67] austere and gruff,[68] and a man possessed of a sharp tongue and a contentious disposition.[69] For all his respectability, "there were skeletons in his closet, and he admitted something of a fondness for spirits, causing the temperance-minded President Hayes to refer to him as a 'confirmed—well, hard drinker.'"[70]

As to his knowledge of the Constitution and his support of equality for black Americans as guaranteed by the Fourteenth Amendment, however, Edmunds was beyond reproach. He was a chief sponsor of the Civil Rights Act of 1875 before and after the death of Charles Sumner. During Sumner's fight of almost twenty years to pass a civil rights law that included "mixed" (integrated) schools, Sumner could always depend on Edmunds. The bill, which eventually passed in 1875 after Sumner's death, originally included a provision that would have required integrated public schools. However, that provision was dropped to make the bill more widely acceptable.[71] According to John Hope Franklin, "Negro members of Congress fought vigorously, if unsuccessfully, to keep the integrated schools provision in the bill because they were convinced that there could be no equality in education in segregated schools."[72] In debates surrounding this issue, Edmunds attacked the argument that segregated schools were constitutional if equal provisions were made for each race, "and amassed a careful array of statistics to prove that the practical effect of segregation was to 'destroy equality of opportunity for Negro children.'"[73]

When the *Civil Rights Cases* came before

the Supreme Court of the United States, Justice Harlan met with Edmunds, who provided the Justice with a list of civil rights legislation enacted by Congress during Reconstruction, as well as the pages of the *Congressional Globe* transcribing the debates over their constitutionality.[74] Despite Edmunds' early opposition to Harlan, the two became friends. Indeed, Edmunds was on such friendly terms with all the members of the Supreme Court that he regularly consulted them when he was unsure whether it would be proper for him as a Senator to accept a retainer from a particular corporation. One wonders if his once intimate relation with the Court made Edmunds, a seventy-one-year-old, semi-retired, hard-drinking former Senator on the downside of his career, overconfident of his ability to sway the Justices in favor of his clients in the *Cumming* matter. [75]

In singing the praises of Edmunds, Kousser asserts that the Augusta plaintiffs had "superlative" counsel.[76] However, this view of Edmunds may have considered the former Senator's overall reputation, rather than his briefs, arguments, and legal strategy in *Cumming*. In this situation, Edmunds was a lawyer who took up a case on appeal. He did not make the record in the trial court, nor did he select the original procedural steps. Like the dressmaker who is called in to complete a garment after someone else has cut the fabric, Edmunds could only work with what he had. In reviewing the record, one wonders if he really understood the nature of the appeal. It appears that his focus was on the bigger picture of the Fourteenth Amendment rather than the actual ruling that went up on appeal.

Even Kousser admits that Edmunds made a fatal error when he chose to appeal *Cumming* as opposed to *Blodgett*, which sought a mandamus and focused the equal protection argument. Edmunds apparently believed that the *Cumming* case sufficiently raised the constitutional questions. As a result, he was not concerned about the form of the proceeding.[77] It is interesting to note that Edmunds left orders that all of his personal papers be burned upon his death, orders which were carried out.[78] Accordingly, no records of why he made this crucial decision exist.

The appeal to the Supreme Court of the United States should have centered on whether or not the trial court properly dismissed the plaintiff's action for injunctive relief, as that was the final appealable order reviewed by the Georgia Supreme Court and the one from which the plaintiffs brought their appeal. However, Edmunds largely ignored this point. As mentioned above, the Georgia Supreme Court said that the plaintiffs had made general reference to the United States Constitution and the Fourteenth Amendment but had failed to cite specific sections, making it impossible for the court to rule on that issue. When Edmunds filed his appeal to the Supreme Court, he made the following assignments of errors, all of which essentially argue a denial of equal protection:

> *First*, That the statute of the State of Georgia, as construed by the Supreme Court of Georgia, giving a discretion to the said county board of education to establish and maintain high schools for white persons and to discontinue and refuse to maintain high schools for persons of the negro race, was, and is, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof.
>
> *Second,* That the said court decided and held that the Constitution of the United States was not violated by the action of the said board in establishing and maintaining public high schools for the education of white persons exclusively, and in refusing to establish and maintain high school for the education of persons similarly situated of the negro race.
>
> *Third,* In deciding and holding that persons of the negro race could,

> consistently with the Constitution of the United States, be by the laws or authorities of Georgia, taxed, and the money derived from their taxation be appropriated to the establishment and maintenance of high schools for white persons, while pursuant to the same law the said board, at the same time, refused to establish and maintain high schools for the education of persons of the negro race.
>
> *Fourth,* That the said Superior Court erred in dismissing the complaint of the plaintiff in error.

In less than seventeen pages—compared to a twenty-three-page brief filed by the Board of Education[79]—Edmunds argued the general proposition that if the whites have a high school, the blacks have a right to the same facilities under equal protection clause. He argued that the decision of the board was not a reasonable exercise of their discretion and constituted arbitrary denial of the equal protection of the laws. Rather than cite a large number of cases in support of his equal protection argument, Edmunds stated that "[i]t is believed that all the numerous decisions of this court upon this and analogous subjects are agreeable to the foregoing statement. It is unnecessary to refer to more than a very few of them."[80] As a result, he cited only five Supreme Court of the United States cases.[81]

Edmunds failed to cite any state or federal court cases and Kousser concedes that this decision was "probably a mistake."[82] To support this, he asserts that Edmunds' tactical error lay in not citing the two leading federal cases on schools, *U.S. v. Buntin* and *Claybrook v. Owensboro.*[83] However, both cases assume the validity of separate schools, and help the plaintiffs only so far as that they find that blacks were entitled to separate schools. In *Buntin,* the court left schools up to the discretion of the states and implied broad discretion on the part of the states in making decisions relative to classification of students. Similarly, while there is a finding in *Claybrook* that blacks are entitled to separate but equal schools, the court also found regarding equal protection that "this does not mean absolute equality in distributing the benefits of taxation. This is impracticable; but it does mean the distribution of the benefits upon some fair and equal classification or basis."[84]

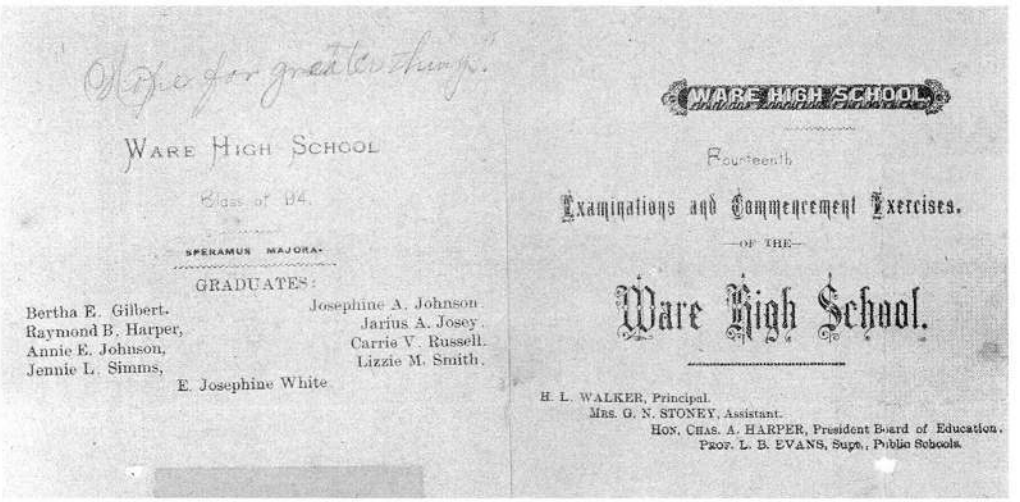
While Edmunds dealt with generalities, counsel for the school board dealt with specifics, handling each issue methodically. Before reaching the plaintiffs' assignments of error, the board argued that the case could not proceed because the tax collector was no longer a party. The action was for an injunction against the tax collector. How could the cause of action proceed without this necessary party? The board further argued that the issue of a violation of the Fourteenth Amendment had not been properly raised in the trial court and therefore was void, and that there was no showing of an "evil intent" on the board's part, such intent being a necessary element in an action in equity. Counsel for the board admitted that there might have been an error in judgment, but questioned whether the Supreme Court was required to step in, decide such questions, and review each decision of a school board. Thus systematically attacking each assignment of error, the Board of Education filed a far more comprehensive brief than that of the plaintiffs.

Justice John Marshall Harlan, the Kentuckian who had once owned slaves, wrote the opinion of the Court in the case. Harlan biographer Tinsley E. Yarbrough agrees with Kousser that Harlan's papers include no files on the *Cumming* case and few references to it.[85] As a result, historians and legal scholars can only speculate on Harlan's intent in his opinion. In light of Harlan's dissent in the *Civil Rights Cases* and *Plessy,* in which he voiced the opinion that the Fourteenth Amendment guaranteed those rights sets forth in the Bill of Rights to black Americans, his decision in *Cumming* is admittedly an anomaly.[86] As Linda Przybyszewski writes, "[f]or

historians looking to Harlan as the prophet of the 1954 *Brown v. Board of Education* decision, *Cumming* is a disappointment."[87] Harlan's seeming abandonment of his earlier position relative to the Fourteenth Amendment seems even more ironic in light of his later dissent in the *Berea College Case* in 1908, where he once again criticized his colleagues for their failure to support the equality of blacks.[88] For all the recent praise that he has received for his pro-black stance, Harlan has been equally castigated for his refusal in the *Cumming* case to deal squarely with the issue of school desegregation.[89] However, those leveling such attacks assume that the question of school desegregation was actually before the Court, when in fact it was not.

Speaking for a unanimous Court in the *Cumming* case, Justice Harlan made clear that the issue of segregation was not a factor in the case. "Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate and grammar schools, in the management of which the rule as to the separation of the races is enforced."[90] Harlan may well have felt that the board's decision was economically sound and not racially motivated, especially in light of Booker T. Washington's pronouncement, discussed above, regarding educating the masses of blacks at a lower level. In addition, the demand of the plaintiffs that the board be enjoined from using funds for the support of the white high schools may have struck Harlan as a solution which would harm the educational opportunities for the white children without providing any benefits to the blacks.

Further, it must not be overlooked that the Board of Education continued to argue to the Supreme Court of the United States that the closing of Ware would not in fact deny black students an opportunity for a high school education, because of the three private high schools available in Augusta. The school board supported two private, religiously based high schools with public funds. In addition, black students could attend Paine Institute, Walker Baptist Institute, or Haines Normal and Industrial Institute. Though not publicly supported, they charged lower tuition than did Ware High School.[91] While admitting that the schools were under sectarian control and had no connection with the public school system, the board argued that the schools were open to the public generally and that any child of sufficient scholarship and moral character could enter them, whatever his or her religious be-


Hope for greater things.

WARE HIGH SCHOOL

Class of '94.

SPERAMUS MAJORA.

GRADUATES:

Bertha E. Gilbert.
Raymond B. Harper,
Annie E. Johnson,
Jennie L. Simms,
Josephine A. Johnson.
Jarius A. Josey.
Carrie V. Russell.
Lizzie M. Smith.
E. Josephine White.

WARE HIGH SCHOOL.

Fourteenth

Examinations and Commencement Exercises.

—OF THE—

Ware High School.

H. L. WALKER, Principal.
MRS. G. N. STONEY, Assistant.
HON. CHAS. A. HARPER, President Board of Education.
PROF. L. B. EVANS, Supt. Public Schools.

This commencement pamphlet commemorating the graduation of the nine students graduating from Ware High School in 1894 is one of the few existing artifacts from the school.

lief. In fact, the report of the school board committee found that the private schools, though religiously based, were not sectarian in their teaching.[92]

Given all of the above, in an age when public funds and religious schools were closely connected—as shown by the situation in Augusta—the Court's decision not to second-guess the Richmond County Board of Education in its decision relative to the placement of students is consistent with late nineteenth-century thinking. Feeling that the decision was justified under the financial circumstances of the time and unwilling to impose the federal government's opinion on the states, Harlan found no violation of the Fourteenth Amendment.

In commenting on the Board's decision, Harlan said that "[it] was in the interest of the greater number of colored children, leaving the smaller number to obtain a high school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the board."[93] He went on to say that the Court might have been forced to answer different questions if the plaintiffs had instituted a proceeding demanding that the Board of Education establish and maintain a high school for Negro children, rather than insisting on the negative action of enjoining the support of a high school for white children. Whatever Harlan's view of segregation, he could not render a ruling directly on the issue in the *Cumming Case* because segregation *per se* was not made an issue in that case. Instead, the plaintiffs made the negative demand of withholding the support of the high schools with no beneficial results for the black students.

Kousser, who says that Harlan's opinion in *Cumming* "raises serious questions about [his] devotion to civil rights," divides those who have written on the subject of Harlan's rationale in *Cumming* into five categories: (1) those who say Harlan was a strict constructionist and would only rule on issues that were directly raised in pleadings and arguments; (2) those who view the decision in the Supreme Court as the result of poor lawyering on the part of Edmunds and of his error in not appealing *Blodgett*, which would have allowed for the action in mandamus; (3) those who feel that the Justices accepted the argument of the school board that it was better to educate the greater number of black students rather than provide for the elite, and further that it was absurd to close the white school; (4) those who say that Harlan was in fact attempting to undermine the separate but equal doctrine by denying the Court the right to look into exercises of state "police power"; and (5) those who would ignore *Cumming* as a case decided on an off day by Harlan.[94]

Both Yarbrough and Beth, writing after Kousser's analysis, fall within the purview of those who feel that Harlan did not have the proper case before him in order to rule against school segregation, even though Beth calls the decision "disingenuous" in light of Harlan's other dissents. Beth argues that "[r]eal relief [to the plaintiffs in *Cumming*] could only come by going entirely outside the framework of the case as presented in order to issue a mandamus-like order for the school board to maintain high schools for both races [and both sexes] even at the cost of raising its school tax rate. This was a type of action that the Supreme Court never used until the 1950s."[95] Yarbrough feels that Harlan was reluctant to have the Court and the federal government interfere with the states' management of education.[96]

In 1956 Justice Felix Frankfurter engaged in a lively debate with Harlan's grandson, Justice John Marshall Harlan II, over the subject of *Cumming*. Frankfurter believed that "Harlan I would have sustained [school] segregation had the issue squarely come before the Court in his day." This opinion was based on Frankfurter's belief that a judge who considered segregated education unconstitutional could hardly have written the Court's opinion in the *Cumming* case. Harlan II responded that he believed that his grandfather "would have

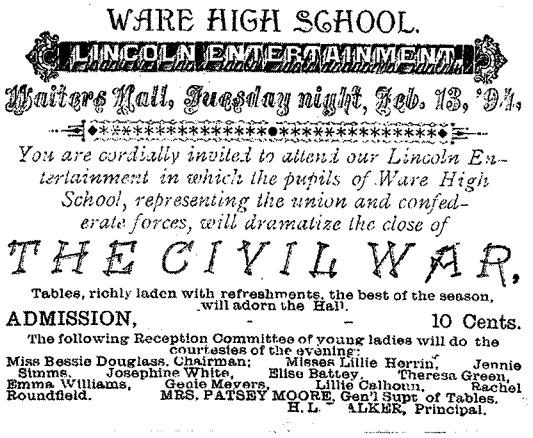
been against segregation." However, Frankfurter concluded that Harlan I's failure to refer at all to school segregation (in the *Cumming* case) or to use *Plessy* as a platform for attacking segregation laws generally comprised conclusive evidence that Harlan I did not consider segregated public education unconstitutional.[97]

In a 1999 work on Harlan, Przybyszewski attempts to look behind Harlan's decisions.[98] Through a study of Harlan's judicial career, and with the use of previously neglected sources, she tries to explain Harlan's transformation from a slaveholder to a defender of black rights. She also attempts to explain the limitations of that transformation. Przybyszewski argues that when trying to determine Harlan's feelings on the issue of integrated public schools, there is an assumption that Harlan thought of public education in the same way that he thought of public accommodations. Instead, she postulates, Harlan moved public accommodations for blacks into the category of civil rights but did not make the same leap for public schools. "Harlan seems to have had trouble extracting public schooling from the category of social rights. Perhaps he did not come out clearly against single-race schooling because it was a way to preserve racial identity—in other words, not for the racist reason that a separate and unequal system of education would keep blacks down but for the racialist reason that schooling was a far more intimate activity than riding a streetcar and could lead to friendship and marriage."[99] Przybyszewski also astutely observes that Harlan's reputation was thrust upon him by later generations: only after the decision in *Brown v. Board of Education* did scholars go scrambling to study him. She points out that although the ". . . 1953 *Encyclopedia of American History* did not even mention Harlan's dissents on civil rights in its short biography, Harlan made it onto a list of great judges in 1958 on the weight of those dissents. Harlan has appeared on such lists ever since."[100]

From the date of the decision in 1899, the Supreme Court of the United States did not cite *Cumming* again until 1927, in the case of *Gong Lum v. Rice*.[101] Like *Cumming, Gong Lum* was not a frontal attack on segregated schools. It was an action by a Chinese-American student who alleged a denial of equal protection of the law by virtue of her classification as a member of the colored race and her demand for admission to a white school. Relying on *Cumming,* the Court in *Gong Lum* reaffirmed the right and power of the state to regulate the method of providing for the education of its youth at public expense, a proposition set forth by Justice Harlan.

In *Plessy v. Ferguson*, the Supreme Court of the United States faced ruling on the issue of separate accommodations on railroad cars. In the majority opinion, the Court found that the separation of the races did not necessarily imply the inferiority of either race to the other. As justification for the separation of the races, the Court then cited the long line of cases that relate the legal precedence of the history of separate schools for white and black students.[102] Relying on cases that predate the Fourteenth Amendment, the Court acknowledged the power of the state to make decisions relative to classification of students by race. The Court then justified the power of the state, based on this power, to separate persons by race on railroad cars. Ironically, once the Supreme Court of the United States used the segregation of schools to justify the racial segregation of railroads, the federal and state courts used the racial segregation of railroads to give legal precedence to the segregation of schools.

In this post–*Brown v. Board of Education*[103] era, it is easy to criticize the ruling in *Cumming* and Harlan's decision. Without a complete understanding of the procedural defects of the litigation and the actual issues that came before the Court, one can fall into the same trap as does historian Richard Kluger, who goes so far as to accuse Harlan of "grievous pettifoggery" as a result of his ruling in *Cumming*.[104] Because the ruling in the case



WARE HIGH SCHOOL.

LINCOLN ENTERTAINMENT

Waiters Hall, Tuesday night, Feb. 13, '94,

You are cordially invited to attend our Lincoln Entertainment in which the pupils of Ware High School, representing the union and confederate forces, will dramatize the close of

THE CIVIL WAR,

Tables, richly laden with refreshments, the best of the season, will adorn the Hall.

ADMISSION, - - 10 Cents.

The following Reception Committee of young ladies will do the courtesies of the evening:

Miss Bessie Douglass, Chairman; Misses Lillie Herrin, Jennie Simms, Josephine White, Elise Bettey, Theresa Green, Emma Williams, Gegie Meyers, Lillie Calhoun, Rachel Roundfield.

MRS. PATSEY MOORE, Gen'l Supt. of Tables.

H. L. WALKER, Principal.

This invitation to a play at Ware High School dramatizing the close of the Civil War also featured "tables, richly laden with refreshments, the best of the season" and a "Reception Committee of young ladies [to] do the courtesies of the evening."

ultimately resulted in the loss of the publicly supported black high school, the case came erroneously to stand for the proposition that segregated schools were sanctioned by the Supreme Court, a position that had long been sanctioned by state courts.[105] Why did no member of the Court see the situation in *Cumming* as a violation of the separate but equal doctrine?[106] No member recognized it because the issue was not properly raised: the manner in which the issue of the closing of Ware High School came before the Court and Edmunds' failure to refute the specific arguments of the school board left the Justices with few options.

Racial segregation in schools has a long history in the United States; it goes back to the mid-1830s, when Americans showed their violent opposition to the attendance of white and black students in the same classroom in the case of Prudence Crandall. In 1849 the Supreme Court of Massachusetts, in *Roberts v. The City of Boston*,[107] ruled in favor of segregated schools, even in light of the state's constitution and Charles Sumner's eloquent arguments. In 1866 the Congress of the United States provided for segregated schools in the District of Columbia, and a provision that would have required integration of public schools was taken out of the Civil Rights Act of 1875. While it is easy to look back now and castigate judges and legislatures of the past, it must be recognized that America was a segregated country well into the 1960s. Indeed, it fought two world wars with a segregated army, and our national pastime was not integrated until 1947. Even after the Supreme Court's ruling in *Brown,* federal troops had to be brought in to integrate Little Rock schools in 1957; in 1962 James E. Meredith needed federal marshals in order to enter the University of Mississippi, and in 1963 Alabama Governor George Wallace made his historic "stand in the school house door." How, then, do we think that the Supreme Court would have ruled otherwise in 1899? Courts reflect the society in which they exist, and the society of 1899 was moving, not toward integration, but away from it.

Joseph W. Cumming, James S. Harper, and John C. Ladeveze could hardly have foreseen the legacy that would be created by their demand that Ware High School should be reinstated. After all, they did not attack the fact that the school board was all white; neither did they attack the fact that the schools were segregated, nor did they demand that their children attend the all white high school. However, their demands brought the issue of education to the Supreme Court of the United States for the first time, and the resulting decision was adopted by courts all over the nation as a justification for what the society wanted: segregated schools.

> The Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men . . . But when the terms of the Constitution admit of more than one construction, and when previous decisions have left the true construction so far open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the time?[108]

ENDNOTES

[1]*J.W. Cumming, James S. Harper, and John C. Ladeveze v. Board of Education of Richmond County, State of Georgia,* 175 U.S. 528, 44 L. Ed. 262, 20 S. Ct. 197 (1899), hereinafter referred to as *Cumming.* John C. Ladeveze, one of the plaintiffs in *Cumming* and the moving force in this litigation, was my great uncle—the brother of my maternal grandmother, Cecelia Ladeveze Johnson. James S. Harper, another plaintiff, was a cousin of the Ladeveze family and therefore a relative of mine by blood. Shortly after the conclusion of this litigation, John C. Ladeveze and his wife Georgia Newton Ladeveze left Augusta, GA. During their move to Los Angeles, CA, they jettisoned their African-American heritage and passed for white, abandoning family and friends. As a result, the grandchildren and great grandchildren of John C. Ladeveze are more than likely oblivious to their grandfather's name in the annals of the Supreme Court of the United States or to the fact that their heritage includes persons of color.

[2]*Board of Education etc. v. Cumming et al,* 103 Ga 641, 29 SE 488.

[3]*Plessy v. Ferguson,* 163 U.S. 537, 559.

[4]J. Morgan Kousser, "Separate but *Not* Equal: The Supreme Court's First Decision on Discrimination in Schools," 46 *Journal of Southern History* (1980), 17–44. Kousser contends that *Cumming* is "[t]he leading case on educational discrimination for four decades." Conceding the existence of *Cumming*, Law Professor Dennis J. Hutchinson asserts that the Supreme Court first dealt directly with the issue of racial segregation in education in the 1938 case of *Missouri ex rel. Gaines v. Canada* 305 U.S. 337 (1938); Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958," 68 *Georgetown Law Journal* (1979), 1, 4.

[5]*Hopkins v. Richards,* 117 Va 692,724 (1915); *Bond v. Tji Fung,* 148 Miss 462, 464 (1927); *Lee v. State,* 164 Md. 550, 443 (1933).

[6]*McFarland v. Goins,* 96 Miss. 67, 76 (1909); *State of Missouri v. Board of Education of St. Louis,* 361 Mo 86, 89 (1950).

[7]*Gong Lum v. Rice,* 275 U.S. 78 (1927); *Trustees of Pleasant Grove v. Bagsby* 237 S.W. 2nd 750, 754 (1950); *State ex rel Hawkins v. Board of Control of Florida,* 47 So2nd 608, 614 (1950).

[8]A query of *Findlaw-Internet Legal Resources* reflects that *Cumming* was only cited by the U.S. Supreme Court three times between 1899 and the 1954 decision of *Brown v. Board of Education,* 347 U.S. 483 (1954). It was cited in *Gong Lum v. Rice,* 275 U.S. 78 (1927), *Colgate v. Harvey,* 296 U.S. 404 (1935), and *State of Missouri ex rel. Gaines v. Canada,* 305 U.S. 337. (1938). Since *Brown* the case has been cited two more times, in *Gompers v. Chase,* 404 U.S. 1237 (1971), and *Cannon v. University of Chicago,* 441 U.S. 677 (1979).

[9]Kousser, "Separate but *Not* Equal."

[10]Kousser also used *Cumming* as an introduction to his discussion of the development of litigation involving racial discrimination in schools, contending that blacks did in fact use the court system to challenge segregated schools in the late nineteenth century. J. Morgan Kousser, **Dead End: The Development of Nineteenth-Century Litigation on Racial Discrimination in School,** Oxford: Clarendon Press, 1986.

[11]*Plessy v. Ferguson,* 163 U.S. 537 (1896).

[12]*Berea College v. Com. of Kentucky,* 211 U.S. 45 (1908).

[13]Loren Miller, **The Petitioners—The Story of the Supreme Court of the United States and the Negro,** New York: Pantheon Books, 1966, 214.

[14]James D. Anderson, **The Education of Blacks in the South 1860–1935,** Chapel Hill: The University of North Carolina Press, 1988, 188; Edward J. Cashin, **Old Springfield—Race and Religion in Augusta, Georgia,** Augusta, GA: The Springfield Village Park Foundation, Inc., 1995, 65; Kousser, "Separate but *Not* Equal," 22.

[15]Cashin, **Old Springfield,** 63.

[16]Leroy Davis, **A Clashing of the Soul—John Hope and the Dilemma of African American Leadership and Black Higher Education in the Early Twentieth Century,** Athens: The University Of Georgia Press, 1998, 29. All accounts agree that White was the son of a white man and an Indian woman who may have had some traces of African blood. In **The Story of John Hope** (New York: The Macmillan Co., 1948, 54–55), Ridgely Torrence depicts White's association with the black community by his marriage to a slave woman. Torrence claims that White essentially gave up his freedom to "live in her master's house, thus identifying himself with the Negro race and causing himself to be regarded as a colored man although he remained free and continued his affairs." Edward Cashin, however, claims that family tradition says

that White's Cherokee Indian mother was married to a black man. She was alleged to have been kidnapped by a white man and taken to Ohio, where she conceived a son by her kidnapper. When she returned to her black husband with the son, he was forever identified with the black community. Cashin, **Old Springfield**, 14.

[17]Davis, **A Clashing of the Soul**, 29.

[18]John Hope Franklin, "Jim Crow Goes to School: The Genesis of Legal Segregation in Southern Schools," *South Atlantic Quarterly* 58 (1959): 225, 226–227.

[19]"An Act to Regulate Public Instruction in the County of Richmond," approved August 23, 1872, by the Legislature of the State of Georgia. The full text of the statute is provided in the "Briefs for the Plaintiffs in Error" filed in the Supreme Court of the United States, 18–26.

[20]Cashin, **Old Springfield**, 64.

[21]Kousser, "Separate but *Not* Equal," 22.

[22]*Sec.9. And be it further enacted,* That the county board of education, under the advice and assistance of the trustees in each ward or school district, shall make all necessary arrangements for the instruction of the white and colored youth in separate schools; they shall provide the same facilities for each, both as regards school-houses and fixtures, attainments and abilities of teachers, length of term time, and all other matters appertaining to education, but in no case shall white and colored children be taught together in the same school. "An Act to Regulate Public Instruction."

[23]*Sec. 10. And be it further enacted,* That the county board of education may establish schools of higher grade, at such points in the county as the interests and convenience of the people may require, which schools shall be under the special management of the board at large, who shall have full power, in respect to such schools, to employ, pay, and dismiss teachers, to build, repair, and furnish the schoolhouse or houses, purchase or lease sites therefor, or rent suitable rooms, and make all other necessary provisions relative to such schools as they may deem proper; the funds for such purpose shall be deducted ratably from the quota apportioned to the respective school districts. And the county board of education shall have full power and authority to charge such sums for tuition and incidental expenses in said schools of high grades as the board, from time to time, may fix and determine. "An Act to Regulate Public Instruction." (The last sentence was added as an amendment, February 22, 1877.)

[24]Kousser, "Separate but *Not* Equal," 20.

[25]Davis, **A Clashing Of The Soul**, 29. Like White, Wright was active in Republican politics, and just prior to coming to Augusta was elected to serve as a delegate to the Republican National Convention. Elizabeth R. Haynes, **The Black Boy of Atlanta** (Boston, 1952), 67; Anderson, **The Education of Blacks in the South**, 29.

[26]Anderson, **The Education of Blacks in the South**, 29–30 and 122. Wright left Ware in the mid-1880s to become president of Georgia State Industrial College (Savannah State), where he continued to emphasize academic education and training in selected skilled trades. He was replaced by H. L. Walker, who organized the Negro State Teachers' Association and served as its president for a decade. Kousser, "Separate but *Not* Equal," 27.

[27]Cashin, **Old Springfield**, 65.

[28]Through Ware's leadership, the legislature of the State of Georgia granted a charter to the fledgling Atlanta University, and Ware served as its first president. Horace Mann Bond, **The Education of the Negro in the American Social Order**, New York: Octagon Books, 1970 (originally published 1934), 359.

[29]Anderson, **The Education of Blacks in the South**, 191–192.

[30]Kousser, "Separate but *Not* Equal," 22.

[31]Kousser, "Separate but *Not* Equal," 23.

[32]Kousser, "Separate but *Not* Equal," 28.

[33]Lyons was an Augusta lawyer who served as a delegate to the Republican National Convention in 1896, where he cast his vote for William McKinley as the Republican presidential candidate. His support for McKinley was later rewarded with an appointment as register of the United States Treasury, the highest political post traditionally open to a black.

[34]John C. Ladeveze and James S. Harpers were cousins. Lyons and Ladeveze were brothers-in-law, both having married sisters of John Hope, who would go on to be the first black president of Morehouse College. White and Hope were the closest of friends. Cumming was a deacon of the Union Baptist Church of Augusta, of which John Ladeveze was one of the primary organizers. Cumming was also the stepfather-in-law of H. L. Walker, Ware's principal at the time of the litigation. In addition, the Hopes, Whites and Ladevezes all lived in close proximity. *See* Davis, **A Clashing of the Soul**, 28; Cashin, **Old Springfield**, 57–73.

[35]John Hope was the son of James Hope, a white Augusta businessman, and Mary Frances (Fanny) Taylor, a woman of color. Taylor had previously been in a relationship with Hope's friend and business associate, George Newton, with whom she had two children. Newton was a prominent white Augusta doctor who served as president of the Augusta Medical College until his relationship with Taylor became public. *See* Davis, **A Clashing of the Soul**, 2–16; Torrence, **The Story of John Hope**, 22–34. John Ladeveze and James Harper were the nephews of Mary Bouyer McKinley, a free woman of color, who had been in a longtime relationship with John Carrie, a white man who was a native of France. After Carrie's death, his heirs sued one Henry H. Cumming, a white man who was a legatee in Carrie's will. The heirs claimed that Cumming and the other legatee, Alexander Dugas, were legatees solely for the benefit of Mary Bouyer, whose race prevented her from inheriting. *See Carrie et al. v. Cumm-*

ing et al., 26 Ga. 690 (1858). It is also interesting to note that the defendant in this case has the same name as the black plaintiff in *Cumming v. Richmond County Board.*

[36]*In re Slaughter-House Cases*, 83 U.S. 36 (1872).

[37]*U.S. v. Cruikshank*, 92 U.S. 542 (1875).

[38]*Civil Rights Cases*, 109 U.S. 3 (1883).

[39]*Plessy v. Ferguson,* 163 U.S. 537 (1896).

[40]*Williams v. Mississippi*, 170 U.S. 213 (1898).

[41]C. Vann Woodward, **The Strange Career of Jim Crow**, second revised edition, New York: Oxford University Press, 1966, 71.

[42]Kousser, "Separate but *Not* Equal," 43.

[43]Albert T. Blaustein and Clarence Clyde Ferguson, Jr., **Desegregation and the Law: The Meaning and Effect of the School Segregation Case**, New Brunswick, NJ: Vintage Press, 1957, 95.

[44]John Hope Franklin and Alfred A. Moss Jr., **From Slavery to Freedom: A History of Negro Americans**, seventh edition, New York: McGraw-Hill Inc., 1994, 272.

[45]August Meier, **Negro Thought in America, 1880–1915: Racial Ideologies in the Age of Booker T. Washington**, Ann Arbor: The University of Michigan Press, 1963, 85.

[46]Board of Education's Supreme Court Brief, p. 12.

[47]At the time of the closing of Ware, Richmond County supported Tubman High School for women, which was opened and operated primarily due to Mrs. Emily Tubman's gift of the building for the school. The board also gave support to Hephzibah School, which had been established by the Baptist denomination and to which the board made an appropriation.

[48]*Board of Education v. Cumming,* 108 Ga. Reports 641 (1898).

[49]"Everyone appears to have assumed from the first that the board, if enjoined, would reestablish Ware, and Gahahl's [attorney for the board] brief, 15 1- 16, Supreme Court File, conceded as much." Kousser, "Separate but *Not* Equal," 38, note 50.

[50]*See* Kousser, "Separate but *Not* Equal," 29, note 30, which gives the details of the *Blodgett* case and points out that Blodgett was the brother-in-law of John Ladeveze. Griffin ultimately married one of James Harper's daughters.

[51]In the Supreme Court briefs, the Board of Education argued that they had not established either Tubman High or the other Baptist school. Those schools were already established by religious organizations and the board merely gave financial support.

[52]This did not prevent him from later becoming chairman of the State Democratic Executive Committee. Kousser, "Separate but *Not* Equal," 31.

[53]*Board of Education etc. v. Cumming et al.,* 108 Ga. Reports 641, 643.

[54]*Ibid.*, 645–646.

[55]*Ibid.*, 647–648

[56]According to Kousser, it is possible that Lucy Laney, a black woman who was the principal of Haines Institute, one of the church-supported black high schools that stood to gain in attendance with the closing of Ware, secretly went to the board and argued for Ware's suspension. The fact that she did not sign the petition in support of Ware adds credibility to this hypothesis, as does other evidence discovered by Kousser. Laney provided an affidavit as a part of the record for the Supreme Court of the United States case, which appears on page 32 of the transcript. She states in the affidavit that "She wants it to appear that she is not a volunteer in giving." She further states that the annual tuition for the eight-month term at Haines Industrial School was $8 not including books, less than the tuition at Ware. Kousser, "Separate but *Not* Equal."

[57]*Board of Education v. Cumming,* 108 Ga. Reports, 641, 647.

[58]Kousser, "Separate but *Not* Equal," 33, note 37.

[59]The United States Census Bureau indicates that there were only thirty-three black lawyers in the State of Georgia in 1900, the first having been admitted in 1871. J. Clay Smith, **Emancipation: The Making of the Black Lawyer 1844–1944**, Philadelphia: University of Philadelphia Press, 1993, 624, 611. The **Augusta City Directory, 1898**, whose statistics were gathered in 1897, shows only two black lawyers, Lyons and his partner Henry M. Porter. **The Augusta City Directory, 1898**, 610, 815.

[60]Kousser, "Separate but *Not* Equal," 33.

[61]Loren P. Beth, **John Marshall Harlan: The Last Whig Justice**, Lexington: The University Of Kentucky Press, 1992, 125–126.

[62]Thomas C. Reeves, **Gentleman Boss: The Life of Chester Alan Arthur**, Newtown: American Political Biography Press, 1975, 372.

[63]H. Wayne Morgan, **From Hayes to McKinley: National Party Politics, 1877–1899**, Syracuse, NY: Syracuse University Press, 1969, 73.

[64]*Ibid.*

[65]Beth, **Harlan: The Last Whig Justice**, 125, footnote 18.

[66]Morgan, **From Hayes to McKinley**, 73.

[67]Reeves, **Gentleman Boss**, 165.

[68]Justus D. Doenceck, **The Presidencies of James A. Garfield and Chester A. Arthur**, Lawrence: The Regents Press of Kansas, 1981, 19.

[69]Richard E. Welch, Jr., "George Edmunds of Vermont: Republican Half-Breed," *Vermont History* 36 (Spring 1968), 64–73, 64.

[70]Morgan, **From Hayes to McKinley**, 74.

[71]Donald W. Jackson, **Even the Children of Strangers: Equality under the U.S. Constitution**, Lawrence: University Press of Kansas, 1992, 48. In March 1867, Charles Sumner of Massachusetts, who had served as counsel for the plaintiffs in the case of *Roberts v. City of Boston Schools*, proposed an amendment to the Second Reconstruction Act to "establish public schools open to all with-

out distinction of race or color." This amendment was the start of Sumner's eight-year campaign for federal legislation to abolish racial segregation generally and in particular to prohibit segregation in the nation's public schools. The campaign culminated, with frustration and substantial failure, in the enactment of the Civil Rights Act of 1875. Alfred H. Kelly, "The Congressional Controversy over School Segregation, 1867–1875," vol. LXIV, no. 2, *The American Historical Review* (April 1959), 537.

[72]Franklin, "Jim Crow Goes to School," 225, 231.

[73]Alfred H. Kelly, "The Congressional Controversy Over School Segregation, 1867–1875," 1959 *The American Historical Review*, vol. 64, 537–63, 555.

[74]Tinsley E. Yarbrough, **Judicial Enigma: The First Justice Harlan**, New York: Oxford University Press, 1995, 146–147.

[75]"A week after the decision in *Cumming* came down, George Edmunds provided the coda: 'I was grieved to see in the newspapers that the Supreme Court had defeated my poor colored clients . . . in their aspirations and efforts for equal rights in public education." John R. Howard, **The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown**, Albany: State University of New York Press, 1999, 155.

[76]Kousser, "Separate but *Not* Equal," 33.

[77]Cumming appears to have taken little part in the lawsuit and was listed as the first plaintiff purely for alphabetic reasons. Kousser, "Separate but *Not* Equal," 28. John Ladeveze was the major proponent of Ware and raised the money to provide the financial support for the appeal. As a result, there may have been some pressure to pursue his case as opposed to Blodgett's. In addition, the trial judge did not give a full opinion in *Blodgett*, while there was a full record of deposition, briefs and decisions in *Cumming*. "Probably more importantly, the Georgia Supreme Court had ruled that the 1872 statute granted the Board complete discretion in governing high schools, and a mandamus, at least according to the traditional view, could not control a discretionary act." Kousser, "Separate but *Not* Equal," 28, 30.

There could have been some animosity between John Ladeveze and the Blodgetts. Mary Jane Ladeveze, the sister of John Ladeveze, married the son of Albert Blodgett. Family tradition has it that the family was not happy over the marriage, feeling that Blodgett was not on the same social level as the Ladeveze family.

[78]Richard E. Welch Jr., "George Edmunds of Vermont: Republican Half-Breed." *Vermont History* 36 (Spring 1968), 64.

[79]The opposing brief was nineteen pages plus a four-page supplemental brief. A review of the briefs also shows that the printers for the Edmunds' pleading used much larger print than that of the Board of Education.

[80]Board of Education's Supreme Court Brief, p. 12.

[81]*Chicago, Burlington, Railroad v. Chicago,* 166 U.S. 226; *Gulf, RR. v. Ellis*, 165 U.S. 154; *Yick Wo v. Hopkins,* 118 U.S. 356; *Plessy v. Ferguson*, 163 U.S. 537; *Strauder v. West Virginia*, 100 U.S. 303.

[82]Kousser, "Separate but *Not* Equal," 35.

[83]*U.S. v. Buntin,* 10 F. 730 (1882); *Claybrook v. Owensboro,* 16 F. 297 (1883).

[84]*Ibid.*, 302.

[85]Yarbrough, **Judicial Enigma**, note 137, 257; Kousser, Separate but *Not* Equal, 40.

[86]Adding further to the paradox is the recent revelation that Justice Harlan had a half-brother who was black. Writing in 1992 and 1993 respectively, Harlan's recent biographers Loren P. Beth and Tinsley E. Yarbrough both discuss Robert James Harlan, a mulatto slave born to Mary Harlan in 1816. Although Beth concedes that Robert could have been the son of the Justice's grandfather, James Harlan, it is more likely that he was the son of the Justice's father James, who would have been sixteen years old in 1816. The evidence appears convincing as to the blood relationship and the close family ties that existed between the white Harlans and the black branch of the family even into the 1950s. Beth, **Harlan: The Last Whig Justice**, 12–13, 235; Yarbrough, **Judicial Enigma**, 10–14. *See also* James E. Gordon, "Did the First Justice Harlan Have a Black Brother?" 15 *Western New England Law Review* (1993), 159–238.

[87]Linda Przybyszewski, **The Republic According to John Marshall Harlan**, Chapel Hill: The University of North Carolina Press, 1999, 99.

[88]In *Berea College,* 211 U.S. 45 (1908), a majority of the Court upheld a Kentucky law that required the separation of the races in a private college. In his dissent, Harlan was furious because the Court had avoided the main question at issue: whether the legislature of a state may make it a crime for a public college to give instruction to white and black students. Harlan fully believed that the Kentucky law denied the rights of liberty and property guaranteed by the Fourteenth Amendment and pointed out the absurdity of the lower court's ruling. If the lower court were correct, a state could make it a crime for white and black persons to frequent the same marketplace or appear in the same assemblage of citizens.

[89]Richard Kluger, **Simple Justice—The History of *Brown v. Board of Education* and Blacks: America's Struggle for Equality**, New York: Alfred A. Knopf, 1975, 102–103. Kluger accuses Harlan of "grievous pettifoggery." Webster's Dictionary defines a pettifogger as a lawyer whose methods are petty, underhanded or disreputable, a shyster. Kluger concludes his chapter on *Cumming* by saying, "Even [the black man's] sole demonstrated friend among the Justices [of the Supreme Court of the United States, namely Harlan] was an unreliable champion."

[90]*Cumming v. Richmond Board of Education,* 175 U.S. 528, 544.

[91]An affidavit in the court file from Lucy C. Laney, principal of the Haines Industrial School, shows that the children of Albert S. Blodgett, Jerry M. Griffin (the plaintiffs in the *Blodgett Case)* and J. W. Cumming were attending Haines Institute. *See* **Supreme Court Record**, 32. There is no indication that John C. Ladeveze's daughter Anna B. Ladeveze was in attendance at Haines.

[92]*See* affidavits filed in the U.S. Supreme Court in support of the brief of the school board. In addition, "The Report of the Committee on Ware High School"—made July 10, 1897 and a part of the Supreme Court pleadings—states that "Your committee observes the fact that there is no lack of high schools for negro children in the city. There is the Haines industrial school, the Walker Baptist Institute, and the Paine Institute, all designated for the higher education of boys and girls. While these are denominational schools, yet the fees they charge are moderate, and it is not in evidence that their teaching is sectarian." In addition to the support it received from the Walker Baptist Association, Walker High School also received $500 per year from John D. Rockefeller (spelled Rockfellow in the pleadings) through the American Baptist Home Mission Society.

[93]*Cumming v. Richmond County Board,* 175 U.S. 528, 544.

[94]Kousser, "Separate but *Not* Equal," 40–42.

[95]Beth, **Harlan: The Last Whig Justice**, 235.

[96]Yarbrough, **Judicial Enigma**, 161.

[97]Beth, **Harlan: The Last Whig Justice**, 234–235; Yarbrough, **Judicial Enigma**, 161.

[98]Przybyszewski, **The Republic**.

[99]Przybyszewski, **The Republic**, 101.

[100]Przybyszewski, **The Republic**, 8.

[101]*Gong Lum v. Rice*, 275 U.S. 78 (1927).

[102]*Plessy v. Ferguson,* 163 U.S. 537 (1896), 544.

[103]*Brown v. Board of Education,* 347 U.S. 483 (1954).

[104]Kluger, **Simple Justice**, 103.

[105]*Roberts v. Boston*, 5 Cush. 198 (1849); *State v. McCann,* 21 Ohio St., 210 (1871); *Lehew v. Brummell,* 103 Mo. 546 (1890); *Ward v. Flood*, 48 Cal. 36 (1874); *People v. Gallagher,* 93 N.Y. 438 (1883). For a complete list of all cases on racial discrimination in schools from 1834 to 1903, *see* Kousser, **Dead End**.

[106]Donald Jackson raises this question in **Even the Children of Strangers**, 60.

[107]*Roberts v. City of Boston,* 59 Mass. 198 (1849).

[108]James Bryce, **The American Commonwealth**, vol. I, New York: The Macmillan Company, 1911, 274.

Plessy versus *Lochner:* The *Berea College* Case

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Legal scholars and historians have often claimed to find intellectual affinities between the U.S. Supreme Court's notorious opinions in *Plessy v. Ferguson*[2] and *Lochner v. New York*.[3] In *Plessy*, the Court upheld a law requiring private railroads to enforce segregation, while in *Lochner* the Court invalidated a maximum hours law for bakers.

Bruce Ackerman asserts that *Plessy* had its intellectual roots "in the laissez-faire theories expressed one decade later in cases like *Lochner*."[4] In support of his thesis, Ackerman relies on the *Plessy* Court's statement that if the two races are to mingle, it must be "the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[5] Brook Thomas also blames the *Plessy* ruling on laissez-faire ideology. He argues that laissez-faire theory led the Court to seek to encourage the "natural" forces of segregation.[6]

Owen Fiss, meanwhile, contends that the Supreme Court upheld the segregation statute at issue in *Plessy* because it "codified and strengthened existing social practices." The Court objected to the statute at issue in *Lochner*, meanwhile, because that law "tried to reverse social practices that were driven by market competition."[7] Cass Sunstein makes the similar argument that *Lochner* and *Plessy* are consistent in that both "relied on a conception of neutrality taking existing distributions as the starting point for analysis."[8] Derrick Bell finds that the decisions are congruous because they both "protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*)."[9]

Recently, several commentators have persuasively challenged the purported affinities between *Plessy* and *Lochner*. Michael Klarman, for example, asserts that "[t]he outcome in *Plessy* is mainly attributable to the virulent racism of the Gilded Age, not to the era's skepticism of activist government."[10] Richard Epstein, meanwhile, makes the bolder revi-

sionist argument that the holdings and reasoning of *Plessy* and *Lochner* are at odds. According to Epstein, "[t]he statute sustained in *Plessy* was flatly inconsistent with laissez-faire principles.... By no stretch do *Plessy* and *Lochner* represent different applications of a common jurisprudence. *Plessy* represented the expansionist view of the police power that *Lochner* repudiated."[11] Mark Tushnet also argues that *Plessy* and *Lochner* were jurisprudentially at odds, because *Plessy* was a statist opinion while *Lochner* reflected a far more libertarian viewpoint.[12]

Finally, I have argued that *Lochner* represented a triumph of "traditional" jurisprudence. This jurisprudence required courts to enforce the limitations on government power enshrined by the Constitution's Framers and ratifiers, regardless of public opinion, short-lived enthusiasms, and social science evidence.[13] By contrast, *Plessy* relied at least in part on racist social science, public opinion favoring segregation, and a negation of the Fourteenth Amendment's clear distinction between state and private action. Consistent with Epstein and Tushnet's observations, I also note that *Plessy* reflected a view that the results of unregulated market processes are somehow unnatural and should therefore be corrected by state action, a view not reflected in *Lochner*.[14]

Just three years after it decided *Lochner*, the Supreme Court confronted the conflict between libertarian and traditionalist Lochnerism and statist and sociological Plessyism in *Berea College v. Kentucky*.[15] *Berea College* involved a private, integrated college's constitutional challenge to a Kentucky law requiring segregation in private schools. If *Lochner* and *Plessy* were intellectually entwined, one would expect that the state would have relied on both opinions to support the constitutionality of the segregation law, while the college would try to assert that neither opinion applied. Instead, Berea College challenged the law on constitutional grounds, relying on *Lochner* and allied doctrines in arguing that the law violated the rights of liberty and property guaranteed by the Fourteenth Amendment. Kentucky, meanwhile, relied on *Plessy* and the purported public interest in preventing miscegenation—supported by contemporary social science evidence—in defending the law's constitutionality. Ultimately, the Supreme Court dodged the conflict between *Lochner* and *Plessy* and upheld the law on non-constitutional grounds, over a Lochnerian dissent by Justice Harlan.

I. Background: The History of Berea College

Reverend John G. Fee, an abolitionist, founded Berea College in 1855. From the very beginning, the college admitted African Americans. The second bylaw of its constitution stated that the college "shall be under an influence strictly Christian, and as such opposed to sectarianism, slaveholding, caste, and every other wrong institution or practice."[16] Berea's founders saw its mission as serving white and African-American students on equal terms, a vision they were able to realize after the Civil War. From 1866 to 1893, African Americans usually constituted a slight majority of Berea's students. Thanks to the religious commitments of its founders, presidents, and supporters, Berea College stood as a unique example of interracial harmony in the postwar South.[17]

In what turned out to be a fateful failing, Berea College never secured a charter from the legislature endorsing, or at least explicitly tolerating, its integrationist practices. Instead, the college incorporated itself under a general act. The act merely required the signatures of ten Kentucky citizens and the filing of papers with a county clerk.[18] While "[c]o-education of the races was the clear intent" of the college's incorporators, "it was nowhere expressly stated."[19] In 1870, the trustees voted to take steps to secure a special charter from the legislature. Eventually, the trustees determined that the legislature was not prepared to

John Gregg Fee (1816–1901), an abolitionist, founded Berea College in 1855. It was the nation's first institution of higher learning established with the specific purpose of educating black and white students together. The second bylaw of its constitution stated that the college (pictured below) "shall be under an influence strictly Christian, and as such opposed to sectarianism, slaveholding, caste, and every other wrong institution or practice."

grant such a charter because of the college's controversial racial policies.[20]

By the late 1880s, the egalitarian sentiment that motivated the founders of Berea College had diminished substantially, especially in the former abolitionist stronghold of New England. As a result, contributions to the college waned. In 1892, William Goodell Frost assumed the college presidency. Lacking his predecessor's commitment to racial equality and facing a financial crisis, Frost decided to shift Berea's primary mission from integrated education to educating poor Appalachian whites and reconciling the North and the South. Indeed, one scholar credits Frost and his fund-raising campaigns with "inventing" Appalachia as a familiar concept.[21] Fundraising revenue increased markedly, as did the number of white students. While African-American enrollment at Berea remained stable, white enrollment more than quadrupled by 1903. For the first time, the vast majority of students at Berea College were white.

As the percentage of black students at Berea declined, Frost forbade interracial dating, discouraged social interaction between

black and white students, segregated the school's dorms, dining halls and extracurricular clubs, and fired Berea's only black faculty member.[22] These actions appear to have been motivated by a combination of personal prejudice,[23] a desire to avoid tempting the state to regulate the college, and the perceived need to assign African Americans to an inferior role at the college in order to attract white students and donors. Nevertheless, Frost fully intended to continue interracial education at Berea College, albeit at a ratio of seven white students for every black instead of the approximate one to one ratio that had existed before he became president.[24]

As segregation laws spread throughout the South in the 1890s, Berea's trustees became concerned about the college's legal security. The college treasurer's June 1896 report to the trustees concluded that the college should "enlarge its charted privileges." Until it does, he added, "we are holding property with no assurance of protection."[25] Apparently, however, no one followed up on this suggestion.[26]

II. The Day Law

In 1902, a Kentucky legislator proposed a bill to ban interracial education in Kentucky. Led by Frost, who threatened to move the college out of Kentucky if the bill passed, opponents managed to derail the measure. However, the college's victory proved ephemeral. In 1904, Kentucky State Representative Carl Day introduced a bill into the legislature that prohibited African-American and white students from attending the same institution, public or private. The bill was clearly aimed at Berea, the only institution of higher learning in Kentucky that accepted African Americans other than the Negroes-only Kentucky State Industrial College.[27]

The Day bill was a politically entrepreneurial venture by Representative Day, few if any of whose constituents in rural Breathitt County had any contact with distant Berea College. The bill nevertheless represented very smart politics, as opposition to any hint of "social equality" between the races had become a popular political platform throughout the South. Dominant white opinion in Kentucky was reflected in the *Louisville Courier-Journal*, which criticized Berea for allowing "white and colored girls and boys [to] associate together in class-rooms, dining halls, in dormitories and on playgrounds, as well as in social entertainment."[28] According to one source, Day decided to introduce the bill after President Theodore Roosevelt shocked and appalled Southern whites by dining with Booker T. Washington at the White House.[29] Another source states that Day witnessed a light-skinned African-American female Berea student give a friendly kiss to another African-American female student, and became incensed at what appeared to him to be intimate contact between African Americans and whites.[30]

Commitment to interracial education at Berea College lingered. Frost lobbied the legislature against the bill, bringing with him a petition supporting the college signed by 80% of the registered white voters of the college's county.[31] Even white students who had not been friendly to black students opposed the Day bill.[32] However, the Day bill was unstoppable in the election year of 1904. The *New York Evening Post* stated that "any man who voted in opposition would have the 'nigger question' brought up against him in all his future career."[33] Even legislators personally opposed to the law felt obligated by political considerations to vote for it.[34] Some legislators expressed concern that the law violated Berea's property rights, but political expediency overcame those concerns.[35] As one legislator told Frost:

> We understand that this proposed law is an outrage. The state has never contributed the support of Berea College and it has no right to interfere in its affairs. I want you to un-

> derstand that I have no sympathy with this law; but the facts are these: the law is going to pass. Now for me to oppose it would make it necessary for me to discuss the Nigger question in every political speech as long as I live. It would wreck my political future and so I shall be obliged to stay away when the matter comes up, or vote for the bill.[36]

Only five state senators and an equal number of representatives voted against the bill.[37]

Section 1 of the Day Law prohibited any person, corporation, or association of persons to maintain or operate any "school, college or institution where persons of the white and negro races are both received as pupils for instruction." Section 2 prohibited individuals from teaching in any such school. Section 3 made it illegal "for any white person to attend any school or institution where negroes are received as pupils or receive instruction," and vice versa. Section 4 prohibited private schools from maintaining separate branches for white and African-American students unless those branches were at least twenty-five miles apart.

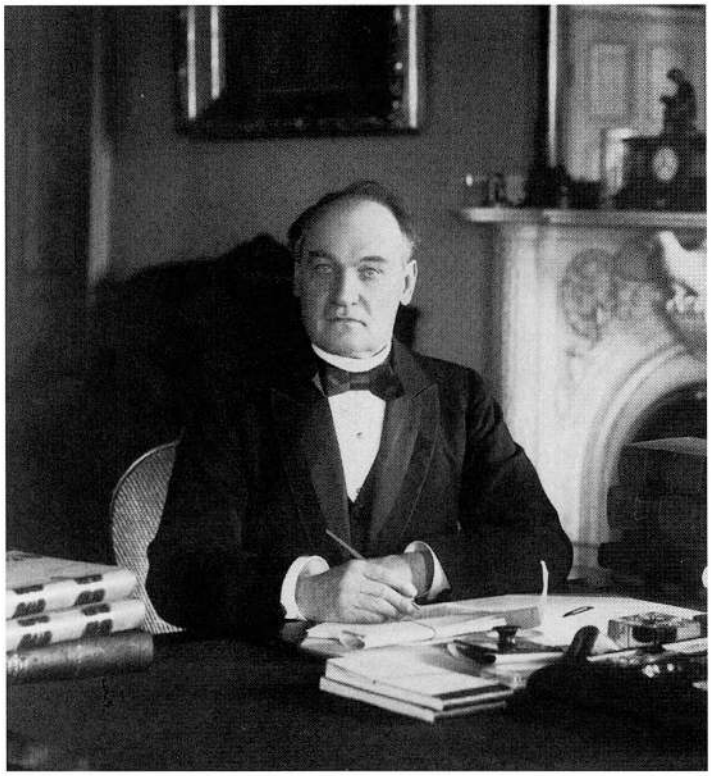
III. Litigation Before the Kentucky Courts

Berea College hired three eminent attorneys to challenge the law: John G. Carlisle, former speaker of the United States House of Representatives; Curtis F. Burnham, a former Kentucky state senator; and Guy F. Mallon, a prominent Cincinnati attorney. The attorneys set up a test case. On September 13, 1904, A. Brock, a teacher at the college, was presented with two students, one African-American and one white, and was told to teach them in violation of the Day Law. Berea College was indicted under section 1 of the law. A jury in the circuit court of Madison County convicted the College, and the judge issued a fine of $1,000, as required by the Day Law.

The College then asked the judge to set aside the verdict. It argued that the law violated the constitutional rights of the trustees of the college to establish and maintain a private college for worthy purposes; of teachers to earn their living in pursuit of a lawful calling; of students to prepare themselves to earn a living by seeking an education; of anyone who wished to come to Berea College and engage in the right to associate with an interracial group; and of the college, by rendering its donations conditioned on interracial education subject to forfeiture.[38] These rights, Berea argued, were protected by the Kentucky Constitution, and the Fourteenth Amendment's Privileges and Immunities, Due Process, and/or Equal Protection clauses.[39]

The court rejected all of these arguments. As long as African Americans and whites were not taught together, the court observed, teachers could still teach, students could still go to school, and trustees could still maintain schools. In *Plessy v. Ferguson*, the court noted, the Supreme Court held that segregation laws are constitutional so long as they are "reasonable" and "not for the annoyance or oppression of a particular class." The only question, then, was the reasonableness of the legislature's belief that allowing African Americans and whites to associate intimately would be inimical and detrimental to the public peace and morals.[40] If this belief was reasonable, the statute came within the police power. Kentucky required segregation in public schools and in public transportation, and prohibited interracial marriage. All of these regulations, according to the court, were unquestionably reasonable and proper and within the scope of the police power. And if the state could forbid race-mixing in all of those contexts, the court continued, why could it not prohibit its citizens from violating state policy at a private college?[41]

The court stated that Berea's strongest argument was that, while many courts had held that prohibiting enforced separation of the races is inimical to the general welfare and



Berea College hired three eminent attorneys to challenge the law banning integrated classes: John G. Carlisle (pictured), former speaker of the United States House of Representatives; Curtis F. Burnham, a former Kentucky state senator; and Guy F. Mallon, a prominent Cincinnati attorney. The attorneys set up a test case: On September 13, 1904, A. Brock, a teacher at the college, was presented with two students, one African American and one white, and told to teach them.

can be banned consistent with the state's police power, no court had ever upheld a law that punished the voluntary association of the two races in a purely private enterprise. The court rejected that argument, however, arguing that "[n]o well informed person in any section of the country would deny" that segregation in all areas of social life "is sound" and a "laudable desideratum." In fact, Thomas Jefferson, one of the earliest advocates of emancipation, "unreservedly expressed his disbelief that the two races could mingle in harmony under co-equal conditions of freedom."[42]

The court concluded by expressing the judge's "personal opinion" that if its opinion was upheld, segregation would prove to be "a blessing to Berea College, and to the colored as well as to the white youth of Kentucky."[43] White youth would continue to be educated there, and be free of the prejudice faced by Berea College graduates because of its racially tolerant policies. Meanwhile, the trustees of the College could open a new campus for African-American students, which Kentuckians would generously support because integration would no longer be an issue. Thus, the legislature was really doing Kentucky's African-American students a favor, "prompted by . . . the purest and best motives."[44]

Berea College appealed to the state's highest court, the Kentucky Court of Appeals. The college argued that the Day Law violated the state Bill of Rights because it

> destroys the rights of the teachers and pupils of Berea College to enjoy their liberties and the right of seeking and pursuing their safety and happiness. It denies the right to worship God according to the dictates of their own consciences by attending and participating in non-sectarian religious exercises in a school or institution of their own choice. It denies to the trustees, the teachers and all oth-

> ers connected with the institution the right to freely communicate their thoughts and opinions, and it denies to the institution itself and to its assistants and employees of every grade the right of acquiring and protecting property and the right to follow their usual and innocent occupations.[45]

The College attempted to distinguish other cases that had upheld segregation laws, such as *Plessy v. Ferguson*, on the ground that those laws prohibited what amounted to *involuntary* association in public places, such as trains, while the Day Law prohibited purely voluntary integration.

However, the Kentucky Court of Appeals upheld the Day Law, with only one judge dissenting. The court stated that all of the rights invoked by the college were subject to the police power. The question, then, was whether "it is a fair exercise of the power to restrain the two races from voluntarily associating together in a private school."[46] The court first reasoned that the law was a valid exercise of the state's well-established power to prohibit miscegenation. No one questions the validity of anti-miscegenation laws, the court explained, because the result of interracial marriage is "to destroy the purity of blood and identity of each [race]." Even if prejudice motivated the law, that would still not make it invalid because prejudice is "nature's guard to prevent the amalgamation of the races."[47] "In a less civilized society," the court continued, "the stronger race would probably annihilate the weaker race." In civilized America, however, "nature's edict as to the preservation of raced identity" is fulfilled by regulating "their necessary intercourse as to preserve each in its integrity." The court also found that the Day Law was valid because it prevented the violence that would inevitably result from integration of the races because of natural race antipathy.[48]

The court rejected Berea College's attempt to distinguish its case from those involving involuntary association. The court found that the rights of private property and private association could not overcome the state's right to exercise its police power to enforce segregation. True to the Progressive spirit of the times, the court gave short shrift to autonomy claims by private institutions against the force of the state:

> We cannot agree that the ground of distinction noted [i.e., voluntary association] could form a proper demarkation [*sic*] between the point where the [police] power might be exercised, and the one where it might not be. . . . All this legislation was aimed at something deeper and more important than the matter of choice. Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power.[49]

The court also rebuffed Berea's claim that the Day Law violated the due process and equal protection clauses of the U.S. Constitution. The law did not deprive African Americans of equal protection because the law "applies equally to all races." Meanwhile, the right to teach white and black children together in a private school "is not a property right," and therefore the law did not offend the due process clause. Moreover, because Berea was a corporation created by the state "[i]ts rights to teach is [*sic*] such as the State sees fit to give it."[50]

The court did invalidate Section 4 of the Day Law, which banned a school from teaching whites and African Americans separately in branches located less than twenty-five miles apart. The court held that this provision was unreasonable, given that the state itself taught both races in separate schools within very short distances of each other. The court held that "if the same school taught the differ-

ent races at different time, though at the same place or at different places at the same time, it would not be unlawful."[51]

IV. Litigation Before the U.S. Supreme Court

At this point, Berea College president Frost—who had already started raising funds for a new, segregated black college—was ready to give up. Even if the U.S. Supreme Court ultimately invalidated the Day Law, he believed that Kentucky politicians would find a way to prevent Berea from returning to integrated education. Frost's pessimism was strengthened by the generally poor racial climate in the rest of the United States. In well-publicized remarks, the president of Harvard urged Frost to follow his instincts and yield to the Day Law:

> Perhaps if there were as many Negroes here as there, we might think it better for them to be in separate schools. At present Harvard has about five thousand white students and about thirty of the colored race. The latter are hidden in the great mass and are not noticeable. If they were equal in numbers or in a majority, we might deem a separation necessary.[52]

Frost stepped up his efforts to establish a separate college in Kentucky for African Americans.

Nevertheless, Berea College's trustees ultimately decided to appeal to the U.S. Supreme Court. In its brief, Berea focused on the argument that the statute was not within the state's police power. "The Constitution makes no distinction between the different races or different classes of the people," Berea argued, and any such distinction "must be done by the legislature in the exercise of the police power."[53] In order for the Court to sustain the statute, Berea contended, "the court must know judicially, outside of the statute and outside of the indictment, that the operation and maintenance of such a school are detrimental to the public peace, health, or safety, or it must be conceded that the legislative judgment upon that subject is conclusive."[54] Berea argued that "[t]he legislature is not the final judge of the extent of its own power; for if it were, constitutional limitations would be useless," and that, given Kentucky's efforts to educate African-American children, the Court could not judicially know that Berea was a harmful institution.[55]

Berea conceded that courts had uniformly upheld segregation statutes applying to public buildings and common carriers. Berea emphasized, however, that the regulated entities in those cases, as public or quasi-public institutions, had no general right to be free of regulation by the government. However, "[t]he right of the citizen to choose and follow an innocent occupation is both a personal and a property right," and as a private school Berea "stands upon exactly the same footing as any other private business."[56] Berea asked rhetorically whether the legislature could "impose a penalty upon a merchant, or a farmer, or a manufacturer for employing persons of the white and colored races to work together in the same room or field," an idea Berea deemed "absurd."[57]

To support Berea's claimed right to be free from interference by the state in pursuing its business, the brief cited and quoted from what many today would consider a rogue's gallery of cases limiting the government's ability to regulate private businesses, including *Allgeyer v. Louisiana*, *Lochner v. New York*, *Ritchie v. People*, and *In re Jacobs*.[58] The brief included an especially lengthy quote from *Lochner*.[59]

Having established its general right to be free from regulation, Berea argued that the Day Law could not be upheld as a reasonable exercise of the police power. Berea acknowledged that certain segregation laws had been held constitutional. But, as in its lower court brief, Berea distinguished *Plessy* and other segregation cases on the ground that the laws

in question in those cases had the purpose of preventing whites from involuntarily associating with African Americans in trains and other public places which one could hardly avoid. No white student, however, need come in contact with African Americans at Berea College, as they could easily attend another college that was not integrated.[60]

Once the Court recognized that any association between whites and African Americans at Berea College was voluntary, Berea's argument continued, the Day Law could not be justified under the police power:

> [N]or can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation unless it is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary.[61]

Berea noted that Justice Harlan warned in dissent in *Plessy* that the decision could lead to extreme results, such as allowing state-enforced segregation in public spaces such as courtrooms, streetcars, and public assemblages. However, even when presenting his parade of horribles, Harlan never imagined that legislatures would attempt to interfere with purely voluntary association between the races on purely private property.[62] The statute could not be justified on anti-miscegenation grounds, Berea added. No one claimed that the school preached social equality between the races, or that "social equality or amalgamation has in fact resulted in the locality where the college is located, or at any other place in the State."[63]

Berea's brief initially seems to end on page 29, where the attorneys for the college request relief and their signatures appear. However, for unknown reasons, a page 30 was added to deal with the following language in the Kentucky Court of Appeals' opinion:

> Besides, appellant, as a corporation created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. We do not think the act is in conflict with the federal Constitution.

Berea stated that the "court below appeared to think the validity of this act might be sustained upon the ground that it was an amendment or repeal of the charter of the college."[64] It noted that "the trustees did not acquire the right to maintain the school by any grant from the State." The right received from the charter was merely the right to "be a corporate body and to conduct its business as such." Even if the state had sought to repeal the charter, the only effect "would have been to dissolve the corporation, leaving the trustees and those associated with them entirely free to maintain and operate the school as it had been conducted for nearly half a century."[65]

Kentucky's brief focused almost entirely on the argument that the Day Law was within the police power because it was part of a broader scheme of laws enacted to prevent undue social interaction between African Americans and whites and thereby prevent miscegenation. The brief contained a combination of Progressive and statist sentiment and racist pseudo-science. The brief's statism is readily apparent: "The welfare of the State and community is paramount to any right or privilege of the individual citizen," Kentucky argued, and "[t]he rights of the citizen are guaranteed, subject to the welfare of the State."[66]

Kentucky also pointed out that no one was being denied an education by the statute, nor was anyone prevented from donating money for the education of whites, African

Americans, or both races. All that was prohibited was the coeducation of the races. Thus, "[u]nless white pupils are guaranteed the right to voluntary associate [*sic*] with the pupils of the colored race, and vice versa, the act is not in conflict with, nor repugnant to the 14th Amendment."[67]

Relying on racist assumptions, Kentucky expressly disputed Berea's contention that the voluntariness or involuntariness of interracial interaction was relevant. "The fallacy in this argument," Kentucky contended, "lies in the assumption that the whole of the white race has an antipathy toward the colored race, and vice versa."[68] In fact, Kentucky acknowledged, there are members of each race that "had mutual desire to associate with the other race in such public schools and on the common carriers," yet they were "forced to separate" by legislation.[69] Thus, Kentucky continued, "[w]e must look deeper for the philosophy and reason upon which the courts" had sustained segregation legislation.[70]

According to Kentucky, the reason these laws came within the police power was "in order to maintain the purity of blood and avoid an amalgamation. This is also the object of the Statute in question."[71] Kentucky relied on racist evolutionary theory to support its case:

> If accepted science teaches anything at all, it teaches that the heights of being in civilized man have been reached along one path and one only—the path of selection, of the preservation of favored individuals and of favored races. . . . It is idle to talk of education and civilization and the like, as corrective or compensatory agencies. All are weak and beggarly as over against the mightiness of heredity; the omnipotence of the transmitted germ plasma.[72]

Kentucky argued further that "color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated."[73]

Kentucky maintained that, if social equality is established in a school by allowing white and black children to sit, eat, recite, study, and sleep together, "mutual attachment will follow as surely as the day does the night." First the weaker members of each race will succumb, and finally all will, "resulting in the destruction or blotting out of the individuality and indentity [*sic*] of each race." The state had passed the Day Law "[t]o guard the rights of the generations yet to be; to preserve the identity of the races, and to maintain the purity of blood."[74]

Kentucky spent significant energy attempting to persuade the Court to take judicial notice that African Americans are mentally inferior to whites, and mulattoes even less intelligent. "This is not the result of education," argued Kentucky, "but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race."[75] To bolster its case, Kentucky cited two studies that purported to show that African Americans had smaller brains than whites, and that African Americans with some white lineage had even smaller brains, thus showing the dangers of miscegenation.[76]

V. The Supreme Court Opinion

Given the arguments of the College and the state, the Court faced a stark choice between the libertarian principles of *Lochner* and the statism and sociological jurisprudence of *Plessy*. In the end, the Court chose to evade the dilemma by upholding the law as an amendment to Berea's corporate charter, even though the law was not phrased like an amendment, because its effect was to amend the charter.[77] By relying on this non-constitutional rationale, the Court avoided the need to confront the conflict between *Lochner* and *Plessy*.[78] Because the corporate charter rationale was rather weak, it seems logical to con-

Students at Berea College posed for the camera in 1899, nearly a decade before its constitutional challenge of a Kentucky law requiring segregation in private schools was heard before the Supreme Court. The Justices would uphold the law, but not on constitutional grounds.

clude that the Court's evasion was intentional.[79]

Berea was vulnerable to the charter argument because, as noted previously, its "charter" consisted solely of articles of incorporation, obtained simply by filing papers with a county clerk and obtaining the signatures of ten Kentucky citizens. The articles of incorporation obtained by Berea in the late 1860s thus differed from more specific charters that institutions such as colleges sometimes obtained directly from the government. If Berea had been given a specific right to operate an interracial institution, it could have argued that this right had become a vested property right and could not be changed.[80] In fact, however, it had received no such specific grant.

Nor could Berea argue that, because Kentucky had failed to explicitly prohibit interracial education in the charter, it had implicitly tolerated the practice. In addressing the corporate charter issue, the Supreme Court asserted that when a state creates a corporation, it may withhold powers which it could not deny to an individual.[81] Given that the state segregated whites and African Americans in the public schools system, the Court stated, "It is not at all unreasonable to believe that the legislature, although advised beforehand of the constitutional question, might have prohibited all organizations and corporations under its control from teaching white and colored children together, and thus made at least uniform official action."[82]

Moreover, Kentucky, like most states, had reserved in its constitution the right to amend all corporate charters.[83] As substantial prior Supreme Court precedent held,[84] because Berea College was established under state charter, the state could regulate it in any way it chose as long as it did not violate the original wording of the charter—"the education of all persons who may attend."[85] Writing for the Court, Justice Brewer pointed out that

the college could still educate all persons, if African Americans and whites were separated.[86] Thus, the Day Law did not "defeat or substantially impair the object of the [charter] grant."[87]

The Court's reasoning that the Day Law was simply a charter amendment seems a bit disingenuous, because the law's prohibition on interracial coeducation was in no way limited to corporations: it also prohibited individuals and unincorporated associations from engaging in interracial coeducation. Moreover, as Berea argued at oral argument, the state legislature had obviously not considered the law to be a charter amendment, because the fourth section of the law prohibited a school from educating the two races in the same institution, even in different branches, if the branches were not at least twenty-five miles apart. Section 4 was not an amendment but a clear violation of the charter, since it prevented the college from educating "all persons who may attend." The Court responded that this provision had been invalidated by the Kentucky Court of Appeals, and that the Supreme Court need only concern itself "with the inquiry whether the first section can be upheld as coming within the power of a State over its own corporate creatures."[88] The Court then held that the Act was separable, without explaining why.

In his dissent, Justice Harlan[89] first disputed the notion that the section of the Day Law dealing with corporations was separable from the rest of the statute. Harlan contended that the majority necessarily must have assumed that the Kentucky legislature differentiated between the effects of integrated educational institutions run by private associations and integrated educational institutions run by corporations. In fact, Harlan argued, the "manifest purpose" of the Day Law "was to prevent the association of white and colored persons in the same school," regardless of whether the school was organized as a corporation. Indeed, the Day Law was entitled an act "to prohibit white and colored persons from attending the same school." Thus, Harlan argued, the various provisions of the law were inseparable, and the Court could not "properly forebear to consider the validity of the provisions that refer to teachers who do not represent corporations."

Moreover, it was clear to Harlan that the Kentucky Court of Appeals did not uphold the Day Law provisions dealing with corporations as an amendment to Berea College's charter. After all, Harlan noted, the Kentucky Court of Appeals had invalidated Section 4—the provision that prohibited Berea from educating African-American and white students within twenty-five miles of each other—as unreasonable and oppressive. Yet if that court had regarded the state's authority over its corporations as being sufficient to sustain the statute, there was no reason for it to have invalidated section 4, or to have discussed "the general power of the state to forbid the teaching of the two races at the same time."[90] Harlan added that the Day Law on its face does not "purport to amend the charter of any particular corporation," but applies to all individuals, association or corporations that educate African Americans and whites together.[91] Thus, any mention of the power of the state over corporations in the court of appeals' opinion was mere dictum.

Harlan added that once the charter issue was put aside, the statute as a whole was "an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action." According to Harlan, the right to impart instruction is both a property right and a liberty right under the Fourteenth Amendment that could not be infringed if the instruction was not by nature harmful to public morals or a threat to public safety. Citing *Allgeyer v. Louisiana* and the Lochnerian opinion he authored earlier in 1908 in *Adair v. United States*[92] (another case typically found in the modern rogue's gallery of *Lochner*-era cases), Harlan noted that the Supreme Court "has more than once said that the liberty guaranteed by the Fourteenth Amend-

Cooking and woodworking classes at Berea College were segregated by sex but not by color. These photographs were two of ten prints displayed at the Paris Universal Exposition in 1900 in an exhibit on race in America.

ment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.'"[93] Besides the rights of the teachers, Harlan argued, the students themselves had a right to voluntarily sit together in a private institution to receive "instruction which is not in its nature harmful or dangerous to the public."[94]

Harlan contended that, if Kentucky could criminalize interracial education in private schools, it could also forbid interracial church Sunday schools, or even integrated church services. He acknowledged that some would argue that religious education is different because "no government, in this county, can lay unholy hands on the religious faith of the people."[95] In fact, however, the right to impart and receive instruction is entitled to the same degree of constitutional protection under the Fourteenth Amendment as the right to "enjoy one's religious belief."[96]

Harlan added a brief and impassioned equal protection argument: "Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?"[97] Even Harlan, however, limited his equal protection observations to private institutions. The question "of regulations prescribed for public schools" was not presented, and Harlan declined to discuss his views on the matter, though he implied that he might look more favorably on the constitutionality of public school segregation.[98]

VI. The Reaction

The result in *Berea College* received unanimous support from law review authors who chose to comment on it. The law review commentary reflects the strong influences Progressivism and racism exerted on the legal academy by this time. The *Virginia Law Register* hailed the opinion for destroying a "freak institution" where "negroes and whites were educated together without distinction of race."[99] A *Harvard Law Review* note stated that, given that the government clearly has the right to prohibit miscegenation, "to prohibit joint education is not much more of a step."[100] An article by Andrew Bruce in the *Central Law Journal* argued that the Day Law appropriately defended "race purity and race virility."[101] Bruce added that "the mingling of the races in the past on terms of social intimacy has invariably led to illicit intercourse and to intermarriage, and that the results have not been satisfactory to either race."[102]

According to Bruce, the Day Law "was essentially a police regulation, adopted for the purpose of protecting the morals and the general welfare of the people of the state," and therefore constitutional.[103] Bruce rejected the libertarian argument that "private donors and benefactors should be allowed to do with their money as they please. Even private benefaction cannot be made the means of subverting the public policy of a state."[104] Bruce also denied that segregation laws intended to prevent "social intimacy" constituted class legislation, the *bête noir* of Lochnerian jurisprudence.[105] According to Bruce, opponents of miscegenation were "equally afraid of the white seducer of the black" as of "the black rapist of the white."[106] The *Journal* article got to the heart of why the South could not tolerate institutions like Berea College: "it is impossible to maintain a public policy of separation, if you allow it to be violated whenever private charity desires to change the rule."[107]

While clearly pleasing to racists, the *Berea College* opinion also delighted those who feared that *Lochner* would prevent state governments from regulating the economy. The *Virginia Law Register* editorialized that the *Berea College* opinion was a "shining star."[108] The *Register* stated that it applauded the decision "not so much for the set back it gives the Negrophile, but for the salutary doctrine laid down as to the right of a State to con-

trol its creation, the corporations."[109] According to the *Register*, the opinion, if followed in the future, ensured that "the so-called dangers of corporate aggression will be easily met."[110] *Law Notes* also praised the *Berea College* Court for reining in "corporate aggression."[111]

A few years later, Charles Warren cited *Berea College* while defending the Court from its Progressive critics. Warren pointed out that the Court upheld most of the regulations that came before it, including "negro-segregation laws," by giving wide scope to the police power.[112] Warren called this judicial blind eye to various economic regulations "wise policy."[113] Years after that, Warren criticized Harlan's attempt to expand the constitutional definition of "liberty" in his *Berea College* dissent.[114]

VII. *Berea* and Segregation Law

In the wake of *Berea College*, one treatise author approvingly noted in 1912 that "[t]here seems to be no limit to which a State may go in requiring the separation of the races."[115] In fact, however, while the opinion was interpreted as a blow to integrationists, it actually represented a step away from *Plessy*, which was explicitly racist and seemed to hold that any "reasonable" segregation law passed constitutional muster. The *Berea College* Court did not endorse the racism of the Kentucky Court of Appeals opinion or of *Plessy*, and did not find that the segregation statute came within the police power. Moreover, although the opinion upheld the segregation ordinance at issue, its holding only applied to corporations with no vested right to conduct an integrated school. The Court hinted that the segregation law would have been unconstitutional as beyond the police power had it been applied to an individual or to an unincorporated business.[116] The narrowness of the Court's holding may explain why Justice Holmes, always eager to expand the scope of the police power, concurred in the judgment rather than joining the majority opinion.

That opinion, while disheartening to civil rights advocates in its result, encouraged legal attacks on state enforcement of segregation against private parties.[117] Perhaps that was the intent of Justice Brewer, a strong proponent of laissez-faire and a liberal on racial issues for his day.[118] Brewer consistently wrote opinions in cases involving African-American rights that reaffirmed that African Americans were entitled to constitutional protection, but that avoided ruling on the constitutional substance of the case before the Court, probably because he believed that his colleagues and the country at large were not prepared to respect African-American rights at that time.[119]

Most important in hindsight, *Berea College* left room for an attack on residential segregation laws, which the Supreme Court invalidated on Lochnerian grounds less than a decade later in *Buchanan v. Warley*.[120] *Buchanan* prevented the United States, or at least the urban South, from sliding down the slippery slope toward South African–style apartheid.[121]

VIII. Who Lost Berea College?

While the Supreme Court can be justifiably criticized for ducking the main issue in *Berea College*—whether the constitutional protection of liberty of contract and property rights recognized in *Lochner* trumped the purported state interest in segregation—the ultimate loss of integrated education at Berea owed less to the Court's opinion and more to Frost and the school's trustees' unwillingness to expend further resources to challenge the Day Law.

As discussed in its brief, Berea College could have unincorporated itself and financed a new challenge by teachers at the college to force the Court to confront the police power issue. The Day Law deprived the teachers of their right to earn a living as they saw fit. As Berea pointed out in its brief and Harlan in his dissent, the right to earn a living was both a liberty and a property right under Court prece-

dent. Kentucky's response would have been that the law was a reasonable exercise of the police power, because it tended to prevent miscegenation. However, the Court rejected exactly that rationale for interfering with property rights in *Buchanan v. Warley*, relying instead on Lochnerian reasoning.

Moreover, even if the trustees had not wanted to take the relatively drastic step of unincorporating Berea, they could have seized a golden opportunity that presented itself to reassert its Lochnerian argument and reintegrate it. In 1906, Frost began planning in earnest to build a new technical and vocational school for African Americans in Kentucky, but not in the town of Berea. He provided a grant of $400,000 to found the Lincoln Institute.[122] The trustees eventually selected Shelby County as the home for the Institute. Local whites opposed this move, and their state legislator, John Holland, introduced a bill designed to prevent the trustees from building the Institute. The bill, which passed over the governor's veto, prohibited Lincoln Institute from locating in Shelby County unless it could muster three quarters of the vote in a local referendum.[123] The trustees challenged the law, and emerged victorious at the trial level. The case was then appealed to the Kentucky Court of Appeals, which also ruled in favor of the trustees.[124]

The court rejected the notion that it could uphold the anti–Lincoln Institute bill as an amendment to the Institute's charter. In doing so, the court stated that the Day Law had not been upheld in its *Berea College* opinion because it was an amendment to the college's charter. The court acknowledged that the Supreme Court of the United States had affirmed the opinion for that reason. However, the court added, "that doctrine was repudiated by our own court on another branch of the case [the twenty-five-mile rule] which was decided in favor of the college, and therefore not appealed from. If that principle had prevailed in our court, then the Day act would have been upheld in both branches."[125] Thus, with the Supreme Court's rationale in *Berea College* rejected, Berea could have filed a new challenge to the Day Law on Lochnerian grounds. Instead, its trustees failed to act, and nothing happened.

Besides the state of Kentucky, then, the ultimate villains in the Berea College saga are not the Justices of the Supreme Court but Berea's trustees, who were all too ready to give up on interracial education. Indeed, even under the Court's opinion, a corporate Berea could have founded a new campus near the old one and kept educating African Americans, albeit in segregated classes. Instead, Berea chose to raise money to found the Lincoln Institute hundreds of miles away. Perhaps the trustees felt they had to bow to public opinion; perhaps they had given up the founding ideals of the college. Indeed, both factors seem to have been at work. Either way, the trustees certainly did not live up to the proud legacy of the college's founders. The limits of even relatively liberal whites' willingness to fight for integration when it conflicted with other goals provides another example of why the founding of the NAACP (which successfully litigated the *Buchanan* case) was so important to the cause of civil rights.

Conclusion

Because *Plessy* and *Lochner* were decided within a decade of each other and are two of the most maligned Supreme Court opinions of all time, legal scholars and historians have naturally been inclined to try to find commonalities between the two opinions. The history of the *Berea College* case shows that this anachronistic approach is misguided. *Plessy* and *Lochner* were not cut from the same cloth: in the late 19th and early 20th centuries the statism and racism of *Plessy* went hand in hand, while the skepticism of state power reflected in *Lochner* was a weapon in the battle against state-sponsored segregation. In 1908, just three years after the Court decided *Lochner*, the battle between the ideologies reflected in *Plessy* and

Lochner reached the Supreme Court in *Berea College*. The Court chose to evade the conflict. Compared to *Plessy's* blunt endorsement of racism and state-sponsored segregation, that evasion, while hardly courageous, reflected a change in attitude toward the constitutionality of state-enforced segregation in the private sector—a change that would come to full fruition less than a decade later in *Buchanan v. Warley*.

ENDNOTES

[1]The author presented this article at the American Society for Legal History's Annual Meeting in Toronto, Canada, in October 1999.

[2]163 U.S. 537 (1896).

[3]198 U.S. 45 (1905).

[4]Bruce Ackerman, **We the People** 147 n. * (1992).

[5]*Id.*, quoting *Plessy*, 163 U.S. at 551.

[6]Brook Thomas, **Introduction: The Legal Background in *Plessy v. Ferguson*: A Brief History with Documents,** 1, 34 (Brook Thomas ed. 1997).

[7]Owen Fiss, **History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910**, at 362 (1993).

[8]Cass Sunstein, **The Partial Constitution** 48 (1993).

[9]Derrick Bell, "Does Discrimination Make Economic Sense?: For Some It Did—and Still Does," *Human Rights,* Fall 1988, at 38, 41.

[10]Michael J. Klarman, "Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments," 44 *Stan. L. Rev.* 759, 787 (1992).

[11]Richard A. Epstein, "Lest We Forget: *Buchanan v. Warley* and Constitutional Jurisprudence of the 'Progressive Era,'" 51 *Vand. L. Rev.* 787, 790 (1998).

[12]Mark Tushnet, "*Plessy v. Ferguson* in Libertarian Perspective," 16 *Law & Phil.* 245 (1997).

[13]David E. Bernstein, "Philip Sober Restraining Philip Drunk: *Buchanan v. Warley* in Historical Perspective," 51 *Vand. L. Rev.* 799 (1998).

[14]*Id.*

[15]211 U.S. 45 (1908).

[16]Scott Blakeman, "Night Comes to Berea College: The Day Law and the African-American Reaction," 70 *Filson Club Hist. Q.* 3, 4 (1996).

[17]Jacqueline G. Burnside, "Suspicion Versus Faith: Negro Criticisms of Berea College in the Nineteenth Century," 83 *Reg. Ky. Hist. Soc'y.* 237, 239–40 (1985).

[18]Lee Edward Krehbiel, **From Race to Region: Shifting Priorities at Berea College Under President William Goodell Frost, 1892–1912**, at 133 (Ph.D. Diss. 1997).

[19]*Id.*

[20]Summary of Treasurer's Statement to the Board of Trustees of Berea College for Year Ending June 1, 1896.

[21]Blakeman, *supra* note 16, at 6–7.

[22]*Id.* at 9.

[23]Frost engaged in several gratuitous acts of discrimination, such as barring African Americans from the Church of Christ, Union, which was affiliated with the college. Paul David Nelson, "Experiment in Interracial Education at Berea College," 59 *J. Negro Hist.* 13, 26 (1974).

[24]Blakeman, *supra* note 16, at 8.

[25]Treasurer's Statement, *supra* note 20.

[26]*Id.*

[27]Jennifer Roback, "Rules v. Discretion: *Berea College v. Kentucky,*" 20 *Int'l J. Group Tensions* 47, 51 (1990). Tennessee had recently passed a similar law forcing Maryville College to end its policy of integration. Blakeman, *supra* note 16, at 26 n. 45.

[28]*Quoted in* Richard A. Heckman & Betty J. Hall, "Berea College and the Day Law," 66 *Register Ky. Hist. Soc'y* 35, 42 (1968).

[29]*Id.* at 38.

[30]John A. Hardin, **Fifty Years of Segregation: Black Higher Education in Kentucky, 1904–1954**, at 12 (1997).

[31]Roback, *supra* note 27, at 53 .

[32]Hardin, *supra* note 30, at 16.

[33]Heckman & Hall, *supra* note 28, at 37.

[34]*Id.*

[35]*Id.* at 40.

[36]*Quoted in* Blakeman, *supra* note 16, at 10. *See* also "Voice of the Negro," April 1905, at 224 ("To Damn the Negro in any way is a certain passport to fame in the South." The legislators who opposed the bill "did not have the moral courage to speak and vote as they thought.").

[37]Hardin, *supra* note 30, at 12.

[38]*Commonwealth v. Berea College*, No. 6009 (Madison Cty. Cir. Ct. Feb. 7, 1905).

[39]*Id.*

[40]*Id.*, *Buchanan v. Warley* Record at 6.

[41]*Id.*

[42]*Commonwealth v. Berea College.*

[43]*Id.* at 18–19.

[44]*Id.* at 19.

[45]Quoted in *Berea College v. Commonwealth*, 94 S.W. 623 (1906).

[46]*Berea College v. Commonwealth,* 94 S.W. 623 (1906).

[47]*Id.* at 626.

[48]*Id.*

[49]*Id.*

[50]*Id.* at 629.

[51]*Id.* at 628.

[52]Thomas F. Gossett, **Race: The History of an Idea in America** 285–286 (1963).

[53]Brief of Plaintiff in Error at 9, *Berea College v. Kentucky*, 211 U.S. 45 (1908).
[54]*Id.* at 8.
[55]*Id.* at 9.
[56]*Id.* at 10.
[57]*Id.* at 10.
[58]*Id.* at 11–23.
[59]*Id.* at 19–21.
[60]*Id.* at 25.
[61]*Id.*
[62]*Id.* at 27.
[63]*Id.* at 14.
[64]*Id.* at 30.
[65]*Id.*
[66]*Id.* at 2.
[67]*Id.* at 36; *see also id.* at 38.
[68]*Id.* at 23.
[69]*Id.*
[70]*Id.*
[71]*Id.* at 24.
[72]*Id.*
[73]*Id.*
[74]*Id.* at 39.
[75]*Id.* at 40.
[76]*Id.*
[77]*Id.*
[78]Benno Schmidt, "Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow," 82 *Colum. L. Rev.* 444, 452 (1982).
[79]"This case was loaded with political dynamite, and it probably would not be far amiss to say that the court was glad it could find a way to sidetrade [*sic*] the main issue of the validity of the statute." Charles Magnum, Jr., **The Legal Status of the Negro** 103 (1940).
[80]*See*, e.g., *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).
[81]*Berea College*, 211 U.S. at 54.
[82]*Id.* at 55.
[83]Krehbiel, *supra* note 18, at 133.
[84]In *Tomlinson v. Jessup*, 82 U.S. (15 Wall.) 454 (1872), the Court explained that "[t]he reservation [of power to alter or repeal corporate charters] affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State." *Id.* at 459. In *Holyoke Co. v. Lyman*, 82 U.S. (15 Wall.) 500, 522 (1872), the Court added that vested rights "cannot be destroyed or impaired" under such reserved power. However, "it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted, subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter." *Id.* at 519, 522. The Court endorsed the *Holyoke Co.* language in 1907, 1900, and 1882: *Polk v. Mutual Reserve Fund Life Association of New York*, 207 U.S. 310, 325 (1907); *Looker v. Maynard*, 179 U.S. 46, 52 (1900); *Close v. Glenwood Cemetery*, 107 U.S. 466, 476 (1882).
[85]*Berea*, 211 U.S. at 56. The Court hinted that the law might have been unconstitutional had it been applied to an individual rather than a corporation, but did not consider that question. *Id.* at 54. Despite Berea's direct challenge, the Court did not mention *Lochner* at all.
[86]*Id.* at 57.
[87]*Id.*
[88]*Id.* at 58.
[89]Justice Day also dissented, but neither wrote an opinion nor joined Justice Harlan's dissent.
[90]*Berea College*, 211 U.S. at 66–67 (Harlan, J., dissenting).
[91]*Id.* at 66.
[92]*Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Adair v. United States*, 208 U.S. 161, 173 (1908).
[93]*Berea College*, 211 U.S. at 67–68 (quoting *Allgeyer*, 165 U.S. at 589).
[94]*Id.*
[95]*Id.* at 68.
[96]*Id.*
[97]*Id.* at 69.
[98]*Id.*
[99]Editorial, "The Berea College Case," 13 *Va. L. Reg.* 643 (1908).
[100]Note, "Constitutionality of a Statute Compelling the Color Line in Private Schools," 22 *Harv. L. Rev.* 217, 218 (1909).
[101]Andrew Alexander Bruce, "The Berea College Decision and the Segregation of the Colored Races," 68 *Central L. J.* 137, 142 (1909).
[102]*Id.*
[103]*Id.* at 141.
[104]*Id.* at 91.
[105]*See* Howard Gillman, **The Constitution Besieged** (1993).
[106]Bruce, *supra* note 101, at 141.
[107]*Id.*
[108]Editorial, *supra* note 98, at 644.
[109]*Id.*
[110]*Id.*
[111]Editorial, 12 *Law Notes* 163, 163 (1908).
[112]Charles Warren, "A Bulwark to the State Police Power—The United States Supreme Court," 13 *Colum. L. Rev.* 667, 695 (1913).
[113]*Id.*; *see also* Note, *supra* note 100.
[114]Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 *Harv. L. Rev.* 431, 451 (1926).
[115]Charles W. Collins, **The Fourteenth Amendment and the States** 72 (1912).

[116]*Berea*, 211 U.S. at 54.

[117]David Currie, "The Constitution in the Supreme Court: 1910–1921," 1985 *Duke L. J.* 1111, 1136.

[118]*See* Alexander M. Bickel & Benno C. Schmidt, Jr., **The Judiciary and Responsible Government 1910–21,** at 736 (1985). Justice Brewer did not participate in *Plessy*, even though he was on the Court at that time, so it is hard to gauge his views on the constitutionality of segregation.

[119]*See* J. Gordon Hylton, "The Judge Who Abstained in *Plessy v. Ferguson*: Justice David Brewer and the Problem of Race," 61 *Miss. L. J.* 315 (1991).

[120]245 U.S. 60 (1917).

[121]For elaborations, *see* Bernstein, *supra* note 13; William A. Fischel, "Why Judicial Reversal of Apartheid Made a Difference," 51 *Vand. L. Rev.* 977, 981–84 (1998); A. Leon Higginbotham, Jr., et al., "*De Jure* Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice," 1990 *U. Ill. L. Rev.* 763.

[122]Paul David Nelson, "Experiment in Interracial Education at Berea College," 59 *J. Negro Hist.* 13, 25 (1974); George C. Wright, "The Founding of the Lincoln Institute," 49 *Filson Club History Q.* 57, 62–63 (1975).

[123]Wright, *supra* note 122, at 63.

[124]*Columbia Trust Co. v. Lincoln Institute of Kentucky*, 129 S.W. 113 (Ky. 1910).

[125]*Id.* at 116–17.

Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Too little attention is sometimes directed to those supports that undergird what is valued most. For example, one current of American intellectual life in the nineteenth century sought a society that would run by itself. Despite vast differences among them, architects of experimental utopian communities, laissez-faire economists, and Marxists had at least one thing in common: all anticipated a day when "the state" would shrink into a minimal background role or wither away completely. In contrast, the twentieth century demonstrated not only the endurance but also the power of political institutions. Government was here to stay, often for the better, as illustrated in the United States as much by the Herculean efforts to end the Great Depression or to conquer space as by the routine maintenance of a climate conducive to "the pursuit of happiness."[1] Yet government could also manifest itself with a vengeance, as illustrated by the oppression and carnage wrought by totalitarianism.

Anyone who has thought about why some countries are long on freedom and others short knows that many factors and conditions incline societies toward one and away from the other. Yet two essential elements stand out: limited government and rule of law. The first proclaims that there are certain policies which government may not pursue; the second codifies those restraints independent of those who administer them. The first places some objectives out of reach, and the second sets the ruler apart from the rules. Louis XIV's reputed boast "L'état, c'est moi"[2] is as alien to as it is subversive of both.

In the American system, limited government and the rule of law manifest themselves in the U.S. Constitution and in the judiciary, particularly the Supreme Court. The judiciary is an arm of the national government, to be sure, but thanks to the Constitution it is sufficiently independent of the Congress and the presidency to qualify as one of the devices that "oblige [government] to control itself."[3] Indeed, one of the identifying characteristics

of American government is the long-standing association between the Justices and the Constitution. Even by the early nineteenth century one could say little about one without mentioning the other. The Court has long insisted that limited government would be more form than substance were the judiciary not the custodian of constitutional limitations. In Chief Justice John Marshall's words, popular sovereignty left unchecked by the courts would "subvert the very foundations of all written constitutions" and "reduce to nothing, what we have deemed the greatest improvement on political institutions, a written constitution."[4]

Marshall's words served as a charge not only to his bench but to those Justices who followed. Because the Constitution deals with fundamental subjects such as grants of power, limits on power, and who shall govern, and because the Supreme Court since Marshall's day has continued to take seriously its guardianship of the Constitution, the Court matters politically. One result has been a literature that is impressive not merely for its volume, but for the variety of methods, perspectives, and themes which writers have chosen in order to convey the Court to the land at large. Each of the books surveyed here represents one such approach or a combination of them. All allow readers to see a richly textured institution and what it does.

John R. Howard's aptly titled **The Shifting Wind**[5] is a longitudinal study of the Supreme Court in defining racial equality in the nation, from Reconstruction to *Brown v. Board of Education*[6] and beyond. The book amply demonstrates that, even with concepts of limited government and rule of law firmly in place, "secur[ing] the Blessings of Liberty"[7] for all came neither easily nor quickly. In the author's words, "[t]he Court played a decisive role in molding the relationship between race and rights during that ninety-year period and therefore a decisive role in determining what the country was and what it was to become."[8]

Although the ground of the civil rights story has been traversed many times by others, **The Shifting Wind** makes the journey in a fresh way and offers new insights. The first chapter erects a theoretical perspective through which to view the unfolding drama. This introduction precedes a chapter on debates over the meaning of freedom in the decade after Appomattox. Eight additional chapters proceed chronologically: analysis of a six-year period during which initial civil rights litigation reached the Supreme Court is followed by examination of the Civil Rights Cases,[9] *Plessy v. Ferguson*,[10] the "golden age of segregation," and "the road to *Brown*." A concluding chapter quickly surveys the post-*Brown* landscape. The objective is an understanding of the Court in "the reciprocal relationship between it and the larger social and political worlds of which it is a part."[11] Howard attempts this by drawing from history, constitutional interpretation, and political science.

Five propositions guide Howard's thinking and offer structure and meaning for the reader. First, the "role of the Supreme Court as regards race and rights cannot be understood without grasping the centrality of the idea of race in American thought and culture."[12] That is, Justices come from the culture and are affected by it; their attitudes spring from all that they have been and done prior to going on the bench. Howard might have quoted Judge Benjamin Cardozo's observation made some eleven years before President Hoover placed him on the High Court: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[13]

Howard's first proposition is qualified by the second: "[T]he Court's role in the evolving race story cannot be viewed as a mere reflection of cultural forces, elite wishes, or popular views."[14] That is, constitutional law is not wholly a product of movements. As powerful as intellectual currents can be, cases are still decided by judges who may be at odds with the dominant opinion of the day. "In law,

also, men make a difference. . . . There is no inevitability in history except as men make it,"[15] avowed Felix Frankfurter in the year of his appointment as Associate Justice. In the year that *Brown* came down, Frankfurter acknowledged that one "brings his whole experience, his training, his outlook, his social, intellectual, and moral environment with him when he takes a seat on the supreme bench," but nonetheless added, "a judge worth his salt is in the grip of his function."[16]

Howard's third proposition is a corollary of the second: "The function of the Supreme Court within the framework of the Constitution, the nature of law itself, and the life-time tenure of justices have yielded a decisive, independent role to [the Court] in shaping . . . race relations. . . . "[17] It is not merely that judges' values *may* be at odds with the dominant opinion of the day, but that constitutional firewalls between the Court and the rest of the political system *allow* judges to proceed in unpopular directions.

Whether moving with or against the flow of public opinion, what the Court decides in a particular case is the subject of the fourth proposition: "[T]he Court is, in a sociological sense, a small group, and is subject to small group dynamics."[18] Decisions are collective efforts. Divisions among the Justices may be more fluid than fixed between discussion at Conference and release of opinions, often some months later. "Divisions on the Court and clarity of view and candor of expression to which they give rise, are especially productive of insight. . . . [M]uch life," Frankfurter observed 70 years ago, "may be found to stir beneath even the decorous surface of unanimous opinions."[19]

It is with the fifth proposition that Howard's volume makes a major contribution: The Court's decisions on "race and rights cannot be understood without perceiving how events were viewed by Afro-Americans as they unfolded."[20] Alongside presentation of what the Court was doing and why, **The Shifting Wind** places the perspective of black claimants who had turned to the Court either as a refuge from hostile legislation or for application of congressionally enacted remedies. These claimants had more at stake than just a sense of being pleased or displeased with the outcome of a case. Litigation that failed was discouraging, depressing, and disheartening, making it harder not only to persist in pressing claims but also to devise winning courtroom strategies. Successful litigation uplifted and invigorated, making it easier to do both of these things. Thus, the contrasting psychological effects of the Civil Rights Cases and of *Buchanan v. Warley*[21] were perceived to be far-reaching, especially among civically minded blacks.[22] The first invalidated public accommodation protections in the Civil Rights Act of 1875; the second struck down a racially based 1914 zoning ordinance in Louisville, KY. The fifth proposition raises similarly "fundamental questions about traditional [white] views of judicial stature."[23] From the perspective of black claimants, their supporters, and their followers, Charles Evans Hughes ranked considerably above Oliver Wendell Holmes, just as ex-Confederate soldier Edward Douglass White ranked ahead of Lincoln-appointee Joseph P. Bradley.[24]

The Shifting Wind makes a second important contribution in the attention it gives to cases in the half century after the Civil War that have, sadly, dropped from sight in some recent literature.[25] For example, the book opens with an arresting account of the grisly murder of a black family in Kentucky in 1868. This event became *Blyew v. United States*,[26] which Howard says was the Supreme Court's first civil rights case.[27] It proved to be the harbinger of other decisions that construed the new laws narrowly. The only survivors (and witnesses) of the murder were the two Foster children, one of whom died of injuries soon after making a statement to authorities. Because state law allowed blacks to testify only against other blacks in criminal cases and because the accused perpetrators were white, prosecution was moved to the federal circuit

John R. Howard's book *The Shifting Wind* examines how the Supreme Court defined racial equality in the era between Reconstruction and *Brown v. Board of Education*. Howard describes how victories such as when the Supreme Court struck down a racially based 1914 zoning ordinance in Louisville, KY, had huge psychological benefits for blacks. Pictured is a bird's-eye view of Louisville circa 1910.

court under the Civil Rights Act of 1866. However, two guilty verdicts and sentences of death that ensued were overturned in the Supreme Court because the *defendants* had not been denied their rights because of race.[28] That construction of the Reconstruction statute thus "ignored the underlying unpleasant racial realities" that, Howard explains, "the statute was intended to address."[29]

As another example of a once-forgotten case newly brought to life, chapter four recounts *Pace v. Alabama*,[30] which followed the better-known and civil-rights-friendly *Strauder v. West Virginia*[31] by three years. At issue was an Alabama statute that penalized black-white adultery and fornication more severely than same-race adultery and fornication. Justice Field's opinion for the Court found the heavier sanctions for the mixed-race offenses inoffensive to the Fourteenth Amendment's equal protection clause because the penalties for whites and blacks caught in such affairs were the same. Field's characterization of the statute was correct, and even snared Justice John Marshall Harlan's vote,[32] but it was also true that the penalty varied according to the race of the parties. The issue in *Pace* would return to the Court in different guise in 1967, where the latter point proved dispositive.[33]

By that time Byron R. White was in his sixth year as an Associate Justice on the Supreme Court of the United States, during a period when cases involving racial equality dominated the docket. The Justice, who retired from the High Court in 1993, is the subject of **The Man Who Once Was Whizzer White**[34] by Dennis Hutchinson, White's former law clerk from the 1975 Term and the senior editor of the *Supreme Court Review*. The volume illustrates a second category of judicial literature: biography. And, given the author's apparent objectives and some self-imposed and externally imposed limitations, it does so very well.

White's life to date reads like the American success story that it is. Reared in a family of barely adequate means in the village of Wellington, CO, he was a junior-year Phi Beta Kappa and first in his class at the University of Colorado (a feat he would repeat at Yale Law School), star basketball player, all-American running back, Rhodes Scholar, rushing leader for two years in the National Football League (drawing the highest salary in professional football history), decorated naval officer, law clerk to Chief Justice Fred Vinson, and prominent lawyer and community leader in Denver. When his friend John Kennedy, for whom White had diligently campaigned, was elected

president, the scholar-athlete from the West may have seemed a perfect fit for the "New Frontier." White reluctantly became Deputy Attorney General in the U.S. Department of Justice and, upon the resignation of Justice Charles Whittaker in 1962, accepted appointment as Associate Justice of the Supreme Court.

The Man Who is a skillfully researched, generously documented, highly readable, and even engaging volume that depicts a remarkable life. Readers who skip the "Prologue" and begin instead with the first chapter, however, will not be aware of challenges Hutchinson faced. First, "neither temperament nor conviction suit [*sic*] [Justice White] to public introspection." Second, White is a very private person. Third, White displayed "a reflexive suspicion of intellectuals, especially philosophers and historians" and journalists; "[h]e is notorious among curators and archivists for refusing to be interviewed for oral history collections."[35] Hutchinson speculates that these attitudes stem from twin convictions: disbelief that "someone who has not experienced an event can accurately rehearse it and, worse, pass judgment on its participants;" and belief that, in his subject's words, "[j]udges have an exaggerated view of their role in our polity."[36] After a quarter century of judicial service, White shredded the bulk of his Court papers prior to the 1986 Term. When the author informed White in 1993 of plans to write the book, the Justice counseled Hutchinson that he would be "on [his] own." The subject of the book would play a neutral

When he set out to research the biography that became *The Man Who Was Whizzer White*, Dennis Hutchinson was told by Justice White that he would be "on [his] own." Although Hutchinson was a former clerk of his, White's penchant for privacy and distaste for the limelight did not compel him to participate in interviews or provide archival materials. He did not, however, prevent friends and colleagues from doing so. White is pictured being introduced by President John F. Kennedy at his swearing-in in 1962.

role. The author reports that "no steps" were taken "to inhibit friends or former colleagues and staff members from agreeing to be interviewed for the project." Nonetheless, "it should go without saying that neither Justice White nor his immediate family has provided information in connection with the work. This is not to say that they could not have helped, even archivally."[37] Together, these actions, attitudes, and traits make a difference for an author and for how the subject will be remembered. "White's inherent modesty and distaste for the limelight made invisible or obscure the evidence that would make him less enigmatic."[38]

For the pre-Court years, the author's own labors more than compensate for the absence of the assistance that he surely would have preferred. The reader learns, for example, that young Byron

> worked odd jobs while he was in school—unloading lumber from train or truck, shoveling coal from boxcar to bin, sweeping out the bank building, or swinging a sledgehammer as a summer section hand on the C&S [Colorado & Southern Railroad]. It is no accident that he grew from a skinny, 103-pound freshman in high school to a powerful 175-pound senior. The unrelenting beet work built stamina and determination as well as physical strength.[39]

The "beet work" refers to that done on twenty-five acres of land that White and his brother Sam rented and then "contracted to bring in the acreage's beet crop," with classmates hired to work alongside them. White and the others took up cigarette smoking to combat the mosquitoes that gathered in the beet fields, a habit he did not abandon until 1973.[40]

Hutchinson gives considerable attention to the relationship that developed between White and John F. Kennedy, whom White first met in England. It turns out that White was the principal author of the intelligence report entitled "Sinking of PT 109 and Subsequent Rescue of Survivors" (declassified in 1959), which Hutchinson describes "[a]t best [as] uneven."[41] It played down probable irresponsibility on Kennedy's part (his boat was "the *only* patrol craft ever hit by a Japanese destroyer during the Pacific war"[42]) and played up the post-collision plight of the survivors, when Kennedy displayed heroism.

The relationship between White and Kennedy continued through the campaign of 1960, in which White organized "Citizens for Kennedy" (later "Citizens for Kennedy and Johnson") in the face of opposition from Democratic party officials in Colorado who generally supported Adlai Stevenson or someone else. White's subsequent service as Deputy Attorney General entailed intense work on both prospective judicial nominees and the inhospitable reception accorded "freedom riders" in some Southern states. With the former, "his impact on judicial appointments was . . . enormous,"[43] especially because the Omnibus Judgeship Act of 1961 had created seventy-three new district and appeals court positions, pushing the total number of vacancies above 100. With the latter, "White was Robert Kennedy's point man in Alabama." For Hutchinson, both parts of the job command "close attention, particularly for what they reveal about the political context in which the Department of Justice operated and how Robert Kennedy and White negotiated that world."[44]

As rich as these pages are, White's pre-Court years amount to less than half of his professional life. Apart from sports writers and enthusiasts, few today would know of Whizzer[45] White had he not also been Justice White. And he held that title during one of the most constitutionally significant and politically turbulent eras in Supreme Court history. One measure of that appraisal is the number of serious constitutional questions that emerged during his tenure that were not prominent on the docket prior to 1962. The list reads like

headings from a syllabus in a contemporary course on constitutional law: representational issues (such as legislative apportionment, gerrymandering and majority-minority districts), privacy and abortion, the death penalty, gender discrimination, public financial assistance to sectarian schools, affirmative action, school busing, close supervision of local law enforcement, the legislative veto, and campaign finance. Decisions on these topics have been far-reaching. With White sometimes in the majority and sometimes not, the Court changed the public sense of what was possible by the deceptively simple device of declaring what was or was not allowable.

Yet accounts of White as a Justice consume not quite 100 pages in a volume that contains 475 pages of text (not counting the notes, bibliography, and index). To be sure, two concluding chapters taking up thirty-six additional pages combined contain assessments and appraisals, but a reader expecting a comprehensive *judicial* biography will be disappointed. Hutchinson follows a chapter on White as a leading dissenter in the Warren Court with three chapters focusing on three Terms: 1971, 1981, and 1991. Perhaps for this reason, Hutchinson subtitled his book "*A Portrait* of Justice Byron R. White" (emphasis added).

One suspects that the author had three choices. Given the unavailability of White's papers and faced with a Justice-as-subject who —perhaps as an incrementalist—did not pin an articulate jurisprudence to his robe, Hutchinson might have conceived of this book as volume one, with the Court years to receive attention at a later time in a second volume. Many would agree that Justice White has led a two-volume life. Alternatively, Hutchinson might have extended this volume to include a fuller treatment of White as a Justice by drawing even more than he did on the available judicial papers of others. Finally, Hutchinson could have done what he did. Overall, **The Man Who** is an important book, conveying more about White—who served longer than all but nine other members of the Court—than any other published secondary source.

Edited by Scott Gerber, **Seriatim**[46] represents a hybrid of the approaches Howard and Hutchinson used to study the Court. Depicting the eleven years of the Supreme Court before Marshall, **Seriatim** is a longitudinal account like Howard's, but the latter differs in Howard's century-long sweep and single-issue concern. Except for an introductory overview by the editor, **Seriatim** is also biographical like Hutchinson's book. The ten chapters following the introduction are biographical essays (one of them also contributed by Gerber) about ten of the Justices appointed prior to Marshall. Those who do not make the cut include the lesser-known Thomas Johnson of Maryland, who served about fourteen months, and Alfred Moore of North Carolina, who served fewer than four years. John Rutledge's bifurcated tenures, first as Associate Justice and then as an unconfirmed Chief Justice, are treated in one essay. The ten authors represented between the book's covers come from the disciplines of history, law, and political science and represent "a diversity of methodological (as well as ideological) viewpoints."[47] The essays are well researched and generally lively. As Stephen Presser's essay on Justice Samuel Chase confesses, "No one, I figured, when I *was* young, . . . could have been as bad as Chase was then made out to be."[48] Later, Presser says of Chase that "if he didn't exist, the Jeffersonians might have had to invent him, or find his attributes in somebody else. . . ."[49]

Seriatim aspires "to move research on the American Founding in new directions"[50] in order "to put an end to the claim to unequivocal domination by Marshall on early American jurisprudence." Acknowledging that "Marshall was . . . a force in American law and politics," the book seeks to achieve its objective—"dispelling the myth of Marshall's apotheosis"[51]—in at least two ways: by rescuing the pre-Marshall Court from obscurity, and by elevating estimates of the stature and accomplishments of those who served. Thus

In his new book, *Seriatim*, which analyzes the work of the pre-Marshall Court, Scott Gerber compares Justice William Cushing to former vice president Dan Quayle.

the book seeks to highlight "the important contributions to American law made by the early justices, both on circuit, where most of their judicial business was conducted, and before they arrived at the highest court in the land, where their respective efforts in the founding of the American regime were tremendous."[52] One also glimpses what an early nineteenth-century Supreme Court might have been if, for instance, John Jay had accepted President John Adams's entreaty to return to the bench in December 1800.

Despite **Seriatim**'s claim that the Washington and Adams appointees were accomplished people, some have suffered the effects of caricature, similar perhaps to the second Justice Johnson's explanation of Marshall's authorship of so many opinions and his apparent dominance of the Court at the time of Johnson's appointment: "[T]he answer was he is willing to take the trouble and it is a mark of respect to him. I soon however found out the real cause. Cushing was incompetent. Chase could not be got to think or write—Patterson [*sic*] was a slow man and willingly declined the trouble, and the other two judges [Marshall and Washington] are commonly estimated as one judge."[53] By one estimate, the period before Marshall had the "quality of a play's opening moments with minor characters exchanging trivialities while they and the audience await the appearance of the star."[54]

In contrast, Gerber is quick to point out that the early Justices displayed "impressive credentials and active involvement in America's founding." Of the ten Justices under study in **Seriatim**, "three signed the Declaration of Independence, six were members of the Federal Convention of 1787, and six were prominent members of their state ratifying conventions. . . . [S]even served in the Continental Congress, eight had held prior judicial posts, and all served in state governments in some capacity. Two, Oliver Ellsworth and William Paterson, cowrote the Judiciary Act of 1789, which helped to shape the institution of the Court."[55] Details of these and other achievements enrich the essays. Indeed, if one measures solely by prior attainments, it might be difficult to find another eleven-year period in Supreme Court history parading equally meritorious appointments. Even so, Gerber's essay on "Deconstructing William Cushing" indicates the magnitude of the challenge: the subtitle of the first heading is "The Dan Quayle of the Early American Republic."[56]

If the early Court's relative obscurity and/or inconsequence cannot be attributed to mediocre appointments, neither do the **Seriatim** contributors believe that its third-fiddle place is justified by a mediocre judicial record, even though that has been one of the most enduring themes in American legal literature. According to one recent history, "the

outstanding aspect of the Court's work during its first decade was its relative unimportance."[57] Another account refers to the Court of that day as a "relatively feeble institution."[58] For a third, "[i]t is hard for a student of judicial review to avoid feeling that American constitutional history from 1789 to 1801 was marking time."[59]

This is a perception that the Supreme Court Historical Society's **Documentary History** project, multivolume and in progress, has begun to weaken,[60] and it is surely a perceived imbalance in the literature that **Seriatim** wants to correct.[61] If there is a collective theme that binds the book's ten biographical essays together, it is the foundations that the pre-Marshall Justices laid for judicial review, with respect to both state and federal laws. They "understood the concept of judicial review, . . . they argued for it, and . . . they practiced it. There is also abundant evidence that Marshall was both fully aware of and substantially influenced by these early precedents."[62] Professor Corwin must have had that point in mind in his 1919 volume on Marshall. Acknowledging that the pre-Marshall Court's work "has, for all but special students, fallen into something like obscurity," he added that "these early labors are by no means insignificant, especially since they pointed the way to some of Marshall's most striking decisions."[63]

What sets **Seriatim** apart is not the importance its contributors claim for the early Court but the evidence they amass to support that claim. **Seriatim** depicts the pre-Marshall Justices as active jurists, although much more so *individually* than together in the Supreme Court. One suspects that this diffuseness may be a major cause of the interpretations of this period that **Seriatim** rejects. The book is thus aptly titled. In contrast to developments following Marshall's arrival, the early Justices' judicial and other achievements tended to occur "in series" or "severally" rather than collectively, and were therefore less identified with the Supreme Court. Divided government after 1800 and the advent of political parties probably necessitated independence and institutional unity.

Justices of the pre-Marshall Court and those who followed them comprise the focus of David Atkinson's **Leaving the Bench**.[64] The volume is partly biographical, in that most of the pages recount the Justices' health histories, and partly institutional, in that those histories affect the workings of the Court. Like no other book, **Leaving the Bench** is packed with anecdotes, details, and perspectives on ailments, declines, retirements, and demises.[65]

Beginning with "The Antebellum Court, 1789–1864" and concluding with "The Contemporary Period, 1969–1998," the five chapters and 155 pages that form the central part of the book present those last days in the order in which each Justice left the bench. As one would expect, treatment is uneven; this happens not because of a Justice's stature or reputation, but because more is known about some Justices than others and because some health histories have been more complex than others. Thus Justice Peter V. Daniel receives only six lines, while the entry on Chief Justice Roger B. Taney consumes almost five pages. Atkinson reports on Chief Justice Melville Fuller in one page[66] and Justice William Moody in about two. There are but nine lines about Chief Justice Charles Evans Hughes but more than three pages on Justice Charles E. Whittaker.[67]

One appendix usefully re-explores the controversy over one of the most famous incidents in Supreme Court lore, Justice Stephen J. Field's role in Justice Robert C. Grier's retirement. Grier apparently was the first Justice to have been nudged from the bench by one or more colleagues, an effort in which Field may have had a hand. Years later, when some of the Brethren thought that it was time for Field to go and mentioned Grier's departure, he is supposed to have remarked, "Yes! And a dirtier day's work I never did in my life!"[68] A second appendix displays the average age and average tenure of the Justices year by year

Leaving the Bench, **by David Atkinson, deals with the impact of mental and physical infirmities on the work of the Supreme Court. Atkinson discusses the conditions under which each Justice retired, how he came to decide it was time to step down, and his eventual demise. Pictured is Chief Justice Warren E. Burger's casket being carried up the steps of the Supreme Court as the Justices line up to pay him their final respects.**

from 1789 through 1998. A third appendix reports the gravesites and cemeteries where the Justices are interred. No Justice has yet been buried west of Boulder, Colorado, and five Justices (Louis D. Brandeis, John H. Clarke, Abe Fortas, Felix Frankfurter, and Wiley B. Rutledge) were cremated.[69]

At first glance, "a book of endings"[70] might seem to appeal only to college professors trying to spice up their lectures, to Supreme Court aficionados, or to those attracted to the macabre. It will indeed do so, but **Leaving the Bench** has a broader purpose and should have a broader attraction. Beneath the ample factual detail lies Atkinson's concern about the impact of mental and physical infirmities on the Court's work, and in the concluding chapter he discusses various remedies for the difficulties that arise.

At the heart of the problem is the distinction the Constitution makes between the tenures of Presidents, representatives, and senators on the one hand and of Justices on the other. Elected officials serve for fixed terms, and the electorate may replace them at the next election. President Washington's tradition that a President should not be elected more than twice held until 1941, and a decade later the Twenty-Second Amendment made that tradition part of the law of the land. Even presidential disability has been addressed by the Twenty-Fifth Amendment. But the Justices serve "during good Behaviour"[71]—meaning, in practice, for life or until they choose to leave the bench. There are no fixed terms or term limits to face and no elections to lose. Forced removal, attempted but never successful, comes only through impeachment.

Providing for no removal short of impeachment was no oversight on the part of the Framers. As Alexander Hamilton explained in number 79 of *The Federalist*,

> The want of a provision for removing the judges on account of inability has been a subject of complaint. . . . [S]uch a provision would either not be practised upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.[72]

So, except for death, leaving the bench remains a Justice's own decision, even though Court history points to instances after Grier's exit when that decision was helped along by other Justices.[73] Atkinson's account shows that more than a few Justices held on too long. Unlike the Energizer bunny, they may have officially occupied a seat but did not always keep going and going. "[T]he old men of the court seldom died and never retired," William Howard Taft apparently mused as he coveted Chief Justice Edward Douglass White's chair.[74]

The record reveals at least eight reasons why Supreme Court Justices do not leave voluntarily: (1) financial considerations; (2) party or ideology; (3) determination to stay; (4) sense of indispensability; (5) concern about loss of status; (6) belief they can still do the work; (7) not knowing what else to do; and (8) family pressure to stay in office. Improved retirement remuneration, especially since 1937, has largely neutralized the first, and the opportunities for senior status and a selective workload in the lower courts has done the same for the seventh. Atkinson believes that the others "remain very much in play."[75] "Even if I'm only half alive," remarked Justice William O. Douglas, "I can still cast a liberal vote."[76]

In grappling with remedies for this problem, Atkinson outlines the advantages of a fixed term and a mandatory retirement age, both of which would require a constitutional amendment. Both play the odds that infirmities are far more likely to develop after a certain number of years or past a certain age. Neither allows for the exceptional person who remains mentally and physically fit beyond those points, just as neither takes into account the possibility of an infirmity that occurs within the fixed term or well before the set retirement age.[77]

Apparently more attractive to Atkinson are three other remedies—one external, one institutional, and one personal. The first recognizes "the public interest in and concern for the health of each justice" and advises the Court to be "more forthcoming about the topic."[78] The second calls for "delimit[ing] the role of law clerks,"[79] whom Justice Douglas once described disparagingly as the "junior Supreme Court."[80] The generous support staff that each Justice enjoys not only allows a Justice to transfer to clerks work (such as the writing of opinions) that early Justices performed themselves, but also "insulat[es] a justice from peer group criticism. If the work of a disabled justice's office continues as if nothing is wrong, it becomes arguably more difficult to focus concern within the Court about what actually may be a very serious situation."[81]

The third solution invites the Justices to create an expectation within the Court, to be impressed upon every new Justice, that they each retire while they are still active and in good health. This seems to have been the pattern within the past fifteen years, except for Justice Thurgood Marshall. Where that norm breaks down, Atkinson would accept a statutory variation of President Franklin Roosevelt's infamous "Court-packing plan." "If seventy-five was substituted for seventy as the age for the appointment of additional mem-

bers, and if the proposal included a cap of eleven rather than fifteen," the plan might be viewed nonideologically and not be seen as an "institutional threat."[82] A Bench of eleven, he notes, would be only one Justice larger than the Bench of ten during the War Between the States. His assumption, one suspects, is that once the process to nominate an additional Justice got underway, the Justice with the statute-triggering age would get the message and feel compelled to step down.

Infirmities on the Bench matter not only because they may impact negatively on the work of the Supreme Court, but also because they may impact negatively on the public's perception of the High Court. This is cause for concern because, in contrast to the Congress and the presidency, the Court's power and position in the political system depend very heavily on intangibles such as its image and moral authority. This dependency arises from what has been termed the Court's "triple debility": (1) its ambivalent authority, in that the constitutional underpinnings of the Court's role as chief interpreter of the nation's fundamental law are equivocal; (2) its antidemocratic function, in that judicial review assumes the authority of an unelected branch to invalidate decisions made by elected branches; and (3) its operational and structural aloofness, in that the Justices do the bulk of their work away from the public eye, shun publicity that politicians typically crave, and issue constitutional decisions that cannot be altered through the procedures ordinarily used to change public policy.[83] Thus, events time and again have demonstrated the accuracy of Justice David Souter's assessment: "The power of the Court is the power of trust earned—the trust of the American people."[84]

The public image of the Court and its Justices is the subject of **The Priestly Tribe** by Barbara Perry.[85] The title derives from Judge Jerome Frank's allusion to judges as "a priestly tribe" in the context of his dissection of "The Cult of the Robe."[86] At heart, Perry's book is a study of the bases of institutional legitimacy and grows out of a fellowship during the 1994 Term that enabled the author "to observe and analyze the Court's image during my tenure in the Office of the Administrative Assistant to the Chief Justice. The 1998 publication of **Closed Chambers**, a scathing indictment of the Court's inner workings . . . , only reinforced my view that the story of the Supreme Court's public image had to be told in order to understand how it has survived such assaults throughout its history."[87]

Perry organizes her study around a series of queries. First, what are the primary images and symbols of the Court and how they have changed over the past two centuries? Second, how does the Court, actively or passively, convey these symbols to the public, and what are the roles of the Justices and other officials of the Court in the transmission process? Third, what are the public impressions of the Court, and how have they manifested themselves over time? Fourth, what are the links between images and judicial legitimacy, and will increased public familiarity with, and media access to, the Court enhance or diminish that legitimacy?[88]

Five chapters followed by a conclusion explore these questions. Perry begins with a case study on the power of images during the New Deal, especially during the fight over the Court-packing plan in 1937, "when the priestly tribe . . . escaped the most direct attack ever on its independence."[89] The fact that it was 1935 when the Court first acquired its own building links the first chapter with the second, which centers around the connection between images of the Court and how it presents itself institutionally, from physical facilities ("Potato Hole" to "Marble Palace") and offices (such as the Public Information Office and the Curator's Office) to the Supreme Court Historical Society. The institutional dimension is closely joined to the more individual question in the third chapter of how the Justices present themselves ("High Priests or 'Nine Scorpions'"?). Presentations of the Court in various media ("Defrocking the Priests?") and public percep-

In Barbara Perry's *The Priestly Tribe*, she examines how the Supreme Court's physical facilities, the Justices' attire, the ban on television in the Courtroom, and other institutional matters shape the Court's public image.

tions of the Court ("Do the Justices Wear Clothes?") consume chapters four and five.[90]

Perry's conclusions about the desirability of increased media access to the Court (and hence greater public familiarity with it) may surprise some readers. While she believes that small adjustments should be made, such as avoiding handing down six or seven (or more) decisions on the same day, she has switched from an advocate to an opponent of television in the Courtroom. If the Court already enjoys more public prestige than those branches where media coverage is rampant, what is there to be gained by mimicking them? Apparently agreeing with former Senator William Cohen's belief that "the sense of majesty and mystique has been stripped away from Congress as a result of C-SPAN," she worries

that greater "familiarity could simply breed contempt. . . . The very fact that the Supreme Court operates beyond the white heat of television lights is in itself symbolic."[91] As Justice Kennedy has said, that in turn "underscores for the public that we are different from the political branches."[92] This may have been the essence of Chief Justice Hughes's remark, before the advent of regular television programming,[93] at the cornerstone laying for the Supreme Court Building in 1932: "[W]e find in this building a testimonial to an imperishable ideal of liberty under law."[94]

The Supreme Court is inextricably bound up with symbols. Each of the books surveyed here has, in distinctly different ways, made this bond apparent. Each illustrates the Court's role in making those twin pillars of limited government and rule of law a reality.

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

ATKINSON, DAVID N. **Leaving the Bench: Supreme Court Justices at the End** (Lawrence: University Press of Kansas, 1999). Pp. xiii, 248. ISBN: 0–7006–0946–6 (cloth).

GERBER, SCOTT DOUGLAS, ed. **Seriatim: The Supreme Court Before John Marshall** (New York: New York University Press, 1998). Pp. xi, 362. ISBN: 0–8147–3114–7 (cloth).

HOWARD, JOHN R. **The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to *Brown*** (Albany: State University of New York Press, 1999). Pp. vii, 393. ISBN: 0–7914–4090–7 (paper).

HUTCHINSON, DENNIS J. **The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White** (New York: The Free Press, 1998). Pp. 577. ISBN: 0–684–82794–8 (cloth).

PERRY, BARBARA A. **The Priestly Tribe: The Supreme Court's Image in the American Mind** (Westport, CT: Praeger, 1999). Pp. xiv, 169. ISBN: 0–275–96599–6 (paper).

ENDNOTES

[1]Declaration of Independence (1776).

[2]"The state is myself," or "I am the state." R. R. Palmer, **A History of the Modern World** 158 (2nd ed., 1960). The attributed remark was made before Parlement in 1651.

[3]*The Federalist*, No. 51.

[4]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

[5]John R. Howard, **The Shifting Wind** (1999), hereafter cited as Howard.

[6]347 U.S. 483 (1954).

[7]U.S. Constitution, Preamble.

[8]Howard, 7.

[9]109 U.S. 3 (1883).

[10]163 U.S. 537 (1896).

[11]Howard, 8.

[12]*Id.*, 8.

[13]Benjamin Cardozo, **The Nature of the Judicial Process** 168 (1921).

[14]Howard, 8.

[15]Felix Frankfurter, **Mr. Justice Holmes and the Supreme Court** (1939), 9.

[16]Felix Frankfurter, "Some Observations on the Nature of the Judicial Process of Supreme Court Litigation," 98 *Proceedings of the American Philosophical Society* 233, 238 (1954).

[17]Howard, 8–9.

[18]*Id.*, 9.

[19]Felix Frankfurter, **The Commerce Clause** 9 (1937).

[20]Howard, 9.

[21]245 U.S. 60 (1917).

[22]In Howard, compare pages 131–133 with pages 191–192.

[23]*Id.*, 26.

[24]Justice Bradley's middle initial stood for nothing. He "adopted it in his youth, perhaps in tribute to his father, whose name was Philo." Jonathan Lurie, "Joseph P. Bradley," in Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1978–1993** 201 (1993).

[25]For example, *see* Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development** (7th ed., 1991), in

which neither of the names of the cases discussed in this and the following paragraph appear in the "Table of Cases." *Id.*, vol. 2, A115–A132.

[26]80 U.S. (13 Wallace) 581 (1872).

[27]Howard, 4.

[28]*Id.*, 5.

[29]*Id.*, 7. With its strengths, however, the volume has its weaknesses. For example, amid the account of the appeal in *Blyew,* Howard inexplicably inserts a paragraph on case selection in the Supreme Court. "The . . . Supreme Court sets its own docket in that it determines which cases it will hear and which cases it will not hear. . . . [C]ertiorari may not be granted." Howard, 4. Significant control of the docket by the Court of course became possible only well after 1872. Also, documentation seems thin in places. For example, compare the detailed and vivid account of the Grant Parish massacre in Louisiana on pages 93–104 with the sources cited on page 359. If there were other sources on which the author relied, reference to them would assist others interested in the same subject. A revision of the book will want to correct the printer's error in note 16 on page 367, where a series of words, perhaps an entire line, is missing.

[30]106 U.S. 583 (1883). *See* Howard, 134–135.

[31]100 U.S. 303 (1880). This murder case involved a challenge to a state law limiting jury service to whites.

[32]Harlan would shortly write a vigorous lone dissent in the Civil Rights Cases, as he would do thirteen years later in *Plessy v. Ferguson,* which also involved a race-based statute applying equally to blacks and whites.

[33]*Loving v. Virginia,* 388 U.S. 1 (1967). This case was an attack on Virginia's ban on black-white marriages.

[34]Justice White's athletic prowess as a college student earned him a nickname—"Whizzer"—that he disliked but could not shake. The "was" in the title derives from a question ("Say, aren't you Whizzer White?") posed to him by a Washington waitress in 1961, to which White answered "I was." Dennis J. Hutchinson, **The Man Who Once Was Whizzer White** 1 (1998), hereafter cited as Hutchinson.

[35]*Id.*, 2, 5.

[36]*Id.*, 5, 7.

[37]*Id.*, 5–6.

[38]*Id.*, 7.

[39]*Id.*, 18.

[40]*Id.*

[41]*Id.*, 177.

[42]Here Hutchinson quotes Michael T. Isenberg, a naval historian, from the latter's book, **Shield of the Republic** 751 (1993). In the remainder of the quoted passage, Isenberg writes: "That particular night, Kennedy's command was part of a three-boat picket line that was *expecting* Japanese destroyers. When the collision came at 0200 on August 2 [1943], two of Kennedy's men were asleep, and two were lying on deck. Visibility was almost one mile. Kennedy was radioed about a bow wake heading toward him; he gave no response. . . . Within the navy the loss of PT-109 was something of a scandal. 'Kennedy had the most maneuverable vessel in the world,' recalled one PT squadron leader. 'All that power and yet this knight in white armor managed to have his PT boat rammed by a destroyer. Everybody in the fleet laughed about that.'" Hutchinson, 175–176, quoting Isenberg. Emphasis in both quotes is in the original.

[43]Hutchinson, 300.

[44]*Id.*, 272.

[45]Senator James Eastland of Mississippi once mistakenly addressed White as "Buzzer" when White paid the Senator a courtesy call. *Id.*, 291.

[46]Scott Douglas Gerber, ed., **Seriatim** (1998), hereafter cited as Gerber.

[47]*Id.*, 12.

[48]*Id.*, 260; emphasis in the original.

[49]*Id.*, 283.

[50]*Id.*

[51]*Id.*, 7.

[52]*Id.*, 6.

[53]William Johnson to Thomas Jefferson, December 10, 1822, quoted in Donald G. Morgan, **Justice William Johnson** 181–182 (1954).

[54]Robert G. McCloskey, **The American Supreme Court** 30 (1960).

[55]Gerber, 4–5.

[56]*Id.*, 97.

[57]Bernard Schwartz, **A History of the Supreme Court** 33 (1993).

[58]George Lee Haskins and Herbert A. Johnson, **Foundations of Power: John Marshall, 1801–1815** 7 (1981).

[59]McCloskey, **The American Supreme Court** 30.

[60]Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States 1789–1800**, six volumes to date (1985–). The sixth volume, **Cases: 1790–1795**, was published in 1998.

[61]*See* also William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995). Casto contributed the essay (chapter 10) on Chief Justice Ellsworth for **Seriatim.**

[62]Gerber, 11.

[63]Edward S. Corwin, **John Marshall and the Constitution** 17–18 (1919).

[64]David N. Atkinson, **Leaving the Bench** (1999), hereafter cited as Atkinson.

[65]The book is current through Justice Lewis F. Powell's death in 1998 and Justice Harry A. Blackmun's retirement in 1994, but not the latter's death in 1999. As one would expect with a study covering spanning 200 years and about half as many individuals, Professor Atkinson's research tapped into hundreds of sources.

[66]Reporter of Decisions Charles Henry Butler offered his

own account of Fuller's death. *See* D. Grier Stephenson, Jr., "Charles Henry Butler on the Death of Chief Justice Fuller," 47 *New York State Bar Journal* 471 (1975).

[67]*See* Atkinson, 37, 39–45, 79–82, 88–89, 127–132. Page counts exclude the full-page portrait of Taney and the full-page photographs of Moody and Whittaker.

[68]Charles Evans Hughes, **The Supreme Court of the United States** 76 (1928). *See* also Charles Alan Wright, "Authenticity of 'A Dirtier Day's Work' Quote in Question," 13 *Supreme Court Historical Society Quarterly* 6 (Winter 1990), and Atkinson, 183–187.

[69]Atkinson, 194.

[70]*Id.*, ix.

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

[72]Hamilton failed to mention the problem insanity might cause were it to arise *after* appointment to the bench.

[73]Readers of **Leaving the Bench** will want to consult Appendix B in Hutchinson's **The Man Who**, which reprints a letter dated October 20, 1975, from Justice White to Chief Justice Warren Burger (with copies to all other Justices except Justice Douglas). "I should like to register my protest," wrote White, "against the decision of the Court not to assign the writing of any opinions to Mr. Justice Douglas. . . . [T]here are one or more Justices who are doubtful about the competence of Mr. Justice Douglas that they would not join any opinion purportedly authored by him. At the very least, they would not hand down any judgment arrived at by a 5–4 vote where Mr. Justice Douglas is in the majority. . . . That decision, made in the absence of Mr. Justice Douglas, was supported by seven Justices. It is clear that the ground for the action was the assumed incompetence of the justice." White then reminded the Brethren that "nowhere" does the Constitution "provide[] that a Justice's colleagues may deprive him of his office by refusing to permit him to function as a Justice. . . . If the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action." Hutchinson, 463, 465.

[74]Henry F. Pringle, **The Life and Times of William Howard Taft**, II, 956 (1939). Taft wrote: "[A]s a man comes to the actual retirement, after he is seventy years of age, he seems to regard it as an admission of weakness, a singing of the *Nunc Dimittis*, and he satisfies himself with many reasons why the time has not come." Quoted in *id.*, 957.

[75]Atkinson, 7–8.

[76]Quoted in James F. Simon, **Independent Journey** 451 (1980).

[77]Atkinson, 170–175.

[78]*Id.*, 178.

[79]*Id.*

[80]Quoted in Bernard Schwartz, **Decision: How the Supreme Court Decides Cases** 257 (1996).

[81]Atkinson, 178.

[82]*Id.*, 181. Yet were the statute discretionary, allowing but not requiring the President to appoint an additional Justice when a sitting Justice elected to remain on the Court after age 75, claims of ideology at work could hardly be avoided.

[83]That is, constitutional holdings can be changed only by the Court itself or by formal amendment of the Constitution. *See* Donald Grier Stephenson, Jr., **Campaigns and the Court: The United States Supreme Court in Presidential Elections** 23, 234 (1999).

[84]York Associates Television, Inc. (producer), *The Supreme Court of the United States* (video, 1997).

[85]Barbara A. Perry, **The Priestly Tribe** (1999), hereafter cited as Perry. The foreword is by Abner J. Mikva, Retired Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit. *See id.*, ix–xi.

[86]Jerome Frank, **Courts on Trial: Myth and Reality in American Justice** 256 (1949). The subtitle to **The Priestly Tribe, The Supreme Court's Image in the American Mind**, derives from **The Jefferson Image in the American Mind** (1960) by Merrill D. Peterson.

[87]Perry, 3–4. Perry refers to a book by Edward Lazarus, once a clerk to Justice Blackmun, which was published in 1998. It is testimony to the Court's special place in the political system today that contemporary "Washington insider" or "kiss-and-tell" styled books tend to be controversial *only* when they are about the Supreme Court. **The Priestly Tribe** should be read in connection with Elliot E. Slotnick and Jennifer A. Segal, **Television News and the Supreme Court: All the News That's Fit to Air?** (1998).

[88]Perry, 3.

[89]*Id.*, 20.

[90]*Id.*, 25, 47, 85, 121.

[91]*Id.*, 153, 155.

[92]Quoted in *id.*, 155.

[93]D. Grier Stephenson, Jr., et al., **American Government** 387, Table 11.4 (2d ed., 1992).

[94]"Hoover Lays Supreme Court Cornerstone," *New York Times*, October 14, 1932, 1, 8.

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