Introduction

Melvin I. Urofsky
Chairman, Board of Editors

This issue of the *Journal* contains a rather diverse set of articles. One of them, by Frank Wagner, derives from the 2000 lecture series called "The Art of the Written Word" that the Society is sponsoring at the Court. These lectures explore the literary side of the Court, one not often examined. Frank Wagner, the Reporter of Decisions, traces the role of the Reporter through history and describes his current duties.

As it turned out, we also received an article from Judge Jon Newman on a literary subject. His article recounts problems he faced when trying to hunt down a correct citation for an old case. Those of us who now face three different reporter citations for nearly every case may never confront such a problem, but scholars—and jurists—working in earlier eras do so routinely.

We are also pleased to offer the winning entry of the Hughes-Gossett Student Essay Prize. For those of you unfamiliar with this award, let me say a few words. For a number of years, the Society has awarded the annual Hughes-Gossett Prize to the best article submitted to the *Journal*. Several years ago, the Publications Committee approved the offering of a second Hughes-Gossett Prize. This would go to an article written while the author was a student in college, graduate school, or law school. In doing this, we are tracking what many other scholarly societies do as a way of encouraging younger scholars, and we have been very pleased with the results. Our winners have indeed come from colleges, graduate schools, and law schools, and from all over the country. This year's winner, Jeffrey Anderson, wrote his prize essay while a master's student at the University of Virginia, under the direction of Professor Charles McCurdy.

These pages also offer a glimpse into one of the forthcoming volumes of **The Oliver Wendell Holmes, Jr. Devise History of the Supreme Court**. Professor William Wiecek of Syracuse University Law School is writing the volume on the Stone and Vinson Courts, and we are delighted that he has agreed to publish in the *Journal* an excerpt from that volume about the infamous Willie Francis case.

This issue also offers us an excerpt from the Society's latest publication, **Supreme Court Decisions and Women's Rights: Milestones to Equality** (CQ Press, 2001), a reference book for high school and college students. The editor of that work, Clare Cushman, who also serves as the *Journal*'s managing editor, has contributed an essay examining the history of women advocates before the Supreme Court. The *Journal*'s version has been somewhat modified to feature full documentation as well as some corrections and additional material.

Finally, you will find a book review by yours truly of Lucas A. Powe Jr.'s new look at the Warren Court. By placing Supreme Court decisions in a larger societal context, Powe has restored my faith in political science.

As usual, the variety of history about the Court continues to fascinate scholars and, we hope, our readers as well.

Citators Beware: Stylistic Variations in Different Publishers' Versions of Early Supreme Court Opinions

JON O. NEWMAN

It has been generally known that early Supreme Court opinions as published in the **United States Reports** do not always accurately reflect the words of the Justices' opinions.[1] Of far less moment, but nevertheless an historical curiosity that should interest judges and lawyers who cite these opinions, is the fact that slight variations exist among the published versions of the same opinions, depending upon the identity of the publisher. The variations I have noticed are all only stylistic. However, it is possible that some variations, yet to be noticed, are substantive. The annotator of one version of the early reports, no less an authority than Associate Justice Curtis, acknowledged that his annotated set of the early reports has "correct[ed] such errors of press, or of citation, as a careful examination of the text has disclosed."[2]

I. Discovering the Variations

I first became aware of this curious aspect of Supreme Court history when I was alerted to a minor discrepancy between two published versions of *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852). In preparing an opinion for a panel of the Second Circuit in *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996), I cited a passage from *Ferreira*. When the draft opinion was circulated to the panel, one of Judge Kearse's characteristically meticulous law clerks, Rochelle Shoretz, called to my attention what she thought was an error in my rendering of the quotation from *Ferreira*. I had not capitalized "constitution," and she thought the Supreme Court's opinion had done so. The word appears on page 48 of volume 13 of Howard's **Reports** (originally cited as "13 How.", later cited as "13 How. (54 U.S.)", and more recently as "54 U.S. (13 How.)").[3] I checked volume 54 of the **United States Reports** (13 Howard) in my chambers and confirmed my version ("constitution"). She checked hers and confirmed her version ("Constitution"). I then asked what the title page of her volume revealed and learned that her volume 54 (13 Howard) was published by

The Banks Law Publishing Company in 1903; my volume 54 (13 Howard), embossed "53–54" on the spine, was published by Little, Brown, and Company in 1870.

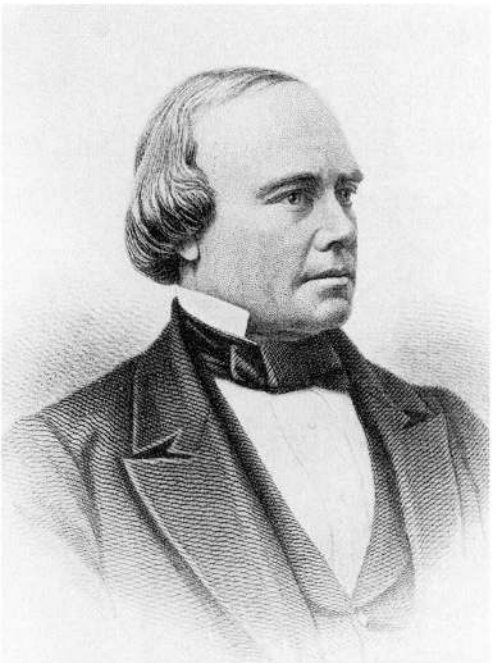
I subsequently learned more about the provenance of the two volumes she and I were using in our efforts to cite to *Ferreira*. Both volumes are, in some sense, reprints of 13 Howard. Her volume is the second edition of 13 Benjamin C. Howard, **Reports of Cases Argued and Adjudged in the Supreme Court of the United States**, published by The Banks Law Publishing Company in 1903. Howard was one of the official reporters of Supreme Court decisions. The second edition of 13 Howard, as published by Banks in 1903, reflects on the title page that it has been "edited, with notes and references to later decisions" by Stewart Rapalje, identified as "author of the 'Federal Reference Digest,' etc." I have not ascertained whether the stylistic preferences in the 1903 Banks edition are those of the Supreme Court Justices who authored the opinions; of Howard, the reporter; of Rapalje, the subsequent annotator; or of the editorial staff of The Banks Publishing Company.

My volume of 13 Howard is the fifth edition of 19 Benjamin R. Curtis, **Reports of Decisions in the Supreme Court of the United States**, published by Little, Brown, and Company in 1870.[4] Curtis was an Associate Justice of the Supreme Court. The 1870 Little, Brown version of 13 Howard is volume 19 in a series prepared by Justice Curtis, of which my set is the fifth edition.

In his preface to his annotated set of **United States Reports**, Justice Curtis explains his work as follows:

> This work contains the decisions of the Supreme Court of the United States. The opinions of the court are in all cases given, as they have been printed by the authorized Reporters, after correcting such errors of the press, or of citation, as a careful examination of the text has disclosed.
>
> I have endeavored to give in the head notes, the substance of each decision. They are designed to show the points decided by the court, not the dicta or reasoning of the judges.
>
> The statements of the cases have been made as brief as possible. For many years, it has been the habit of all the judges of this court, to set forth in their opinions, the facts of the cases, as the court viewed them, in making their decision. Such a statement, when complete, renders any other superfluous. When not found complete, I have not attempted to restate the whole case, but have supplied, in the report, such facts, or documents, as seemed to me to be wanting.
>
> In some cases, turning upon questions, or complicated states of facts, and not involving any matter of law, I have not thought it necessary to encumber the work with detailed statements of evidence, which no one would find it useful to recur to. These instances, however, are few.
>
> . . .
>
> The desire to make the decisions of the Supreme Court more easily and cheaply accessible, has led me to undertake this work. I cannot hope that it is not in some particulars imperfect. The labors of my office have left me little unbroken leisure to bestow upon it, and I can assure myself of nothing concerning it, but my desire to perform the work with fidelity.
>
> Washington, December 6th, 1854.

Benjamin R. Curtis, "*Preface*" to 1–7 U.S. (1–4 Dall., 1–3 Cranch) 3–4 (Little, Brown, 1st ed. 1855). Thus, it seems evident that the stylistic preferences in the 1870 Little, Brown version of 13 Howard are those of Justice



In 1855, Associate Justice Benjamin R. Curtis edited an edition of Supreme Court decisions, published by Little, Brown, and Company, to supplement his meager income. The stylistic preferences evidenced in Curtis's volume were carried over to subsequent Little, Brown editions.

Curtis (or perhaps the editorial staff of Little, Brown).

An advertising circular for Justice Curtis's annotated set of **United States Reports**, prepared by Little, Brown, and Company and dated May 1, 1855, includes the following endorsement:

> WE ASK ATTENTION TO THE FOLLOWING APPROVAL, BY THE MEMBERS OF THE SUPREME COURT OF THE UNITED STATES:—
>
> "We approve the plan of Mr. Justice Curtis's 'Decisions of the Supreme Court of the United States,' and believe that its execution by him will be of much utility to the legal profession, and to our country."

Below the quotation are the names of Chief Justice Taney and Justice Curtis's fellow Associate Justices. This advertising circular explains that Justice Curtis's set of **Reports** would include the then-existing fifty-seven volumes of what the circular called the "Old Series"—i.e., the nominate reports of Reporters Dallas, Cranch, Wheaton, Peters, and Howard—compressed into eighteen volumes, offered at a price of $54.00 for the set, compared to $217.50 for the "Old Series."[5] Curtis's annotated set ultimately included 21 volumes of the nominate reports through 58 U.S. (17 How.), plus a digest issued as a 22d volume.[6]

In preparing my opinion in *Lo Duca* for publication, I thought (incorrectly, as I later learned) that my earlier published version of *Ferreira* was likely more authoritative (and did not want *my* meticulous law clerks to be thought careless in their cite-checking), so I used a lower case "c" in quoting from *Ferreira*, but adopted a new form of citation to alert readers to the particular published version of the Supreme Court opinion that I was citing. Thus, I cited *Ferreira* as "*United States v. Ferreira*, 54 U.S. (13 How.) 40, 14 L.Ed. 40 (1852) (Little Brown & Co. 1870)." *Lo Duca*, 93 F.3d at 1106.[7]

II. A Variety of Variations

That discovery prompted me to examine different publishers' versions of other early Supreme Court opinions, an inquiry that revealed numerous differences in capitalization, punctuation, abbreviation, italicization, and paragraphing. For example, on page 155 of the 1855 Little, Brown version of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "president of the United States" is followed by a comma, "second" and "third" are spelled out, a sentence describing the third section of Article II of the Constitution begins a new paragraph, and, in a quotation from a statute, "the president alone" is followed by a semicolon and "any commission" is followed by no punctuation. However, in the 1903 Banks version of page 155, "president of the United States" is followed by a semicolon, "second"

JUDGE CURTIS'S EDITION

OF THE

Decisions of the Supreme Court of the United States.

LITTLE, BROWN & CO.

LAW AND FOREIGN BOOKSELLERS, BOSTON,

Have in Press, and will shortly Publish,

THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES,

WITH NOTES AND A DIGEST,

BY HON. BENJAMIN R. CURTIS,

One of the Associate Justices of the Court.

IN EIGHTEEN VOLUMES OCTAVO,

COMPRISING THE CASES REPORTED BY DALLAS, 4 VOLS.; CRANCH, 9 VOLS.; WHEATON, 12 VOLS.; PETERS, 16 VOLS.; HOWARD, 16 VOLS. IN ALL, 57 VOLS.

EXTRACT FROM THE PREFACE.

"This work contains the decisions of the Supreme Court of the United States. The opinions of the Court are in all cases given as they have been printed by the authorized reporters, after correcting such errors of the press or of citation as a careful examination of the text has disclosed.

"I have endeavored to give, in the head-notes, the substance of each decision. They are designed to show the points decided by the Court, not the dicta or reasonings of the Judges.

"The statements of the cases have been made as brief as possible. For many years, it has been the habit of all the Judges of this Court to set forth in their opinions the facts of the cases, as the Court viewed them in making their decision. Such a statement, when complete, renders any other superfluous. When not found complete, I have not attempted to restate the whole case, but have supplied, in the report, such facts or documents as seemed to me to be wanting.

"In some cases turning upon questions, or complicated states of fact, and not involving any matter of law, I have not thought it necessary to encumber the work with detailed statements of evidence which no one would find it useful to recur to. These instances, however, are few.

"To each case is appended a note referring to all subsequent decisions in which the case in the text has been mentioned. It will thus be easy to ascertain whether a decision has been overruled, doubted, qualified, explained, or affirmed; and to see what other applications have been made of the same or analogous principles.

"The paging of the authorized reporters has been preserved at the head of each case, and in the margin of each page, for convenience of reference; the reporters being designated by their initials, — D. for Dallas, C. for Cranch, W. for Wheaton, P. for Peters, H. for Howard.

"It is expected that all the decisions of the Court, down to the close of the December Term, 1854, will be embraced in eighteen volumes. To these will be added a Digest of all the decisions."

This advertising circular for Justice Curtis's set of reports was endorsed by Chief Justice Roger Taney and the Associate Justices. The set included a compressed version of the nominate reports of Reporters Dallas, Cranch, Wheaton, Peters, and Howard, and sold for $54.00, as compared to $217.50 for the standard series.

and "third" are rendered "2d" and "3d," the sentence on the third section of Article II does not begin a new paragraph, and, in the statutory quotation, "the president alone" is followed by a comma and "any commission" is followed by a comma.[8] Minor variations of this sort abound in these two versions of *Marbury* and in the published versions of many other early opinions.

Another sort of minor variation, potentially troublesome for careful citators, is an occasional difference in pagination. For example, the 1870 Little, Brown version of *In re Metzger*, 46 U.S. (5 How.) 176 (1847), places the "*" to indicate the start of page 192 in 5 How. after the word "before" in the sentence beginning "It cannot be brought before . . . "; the 1906 Banks version places the "*" in that sentence after the word "brought." Thus, a page cite to 5 How. by a citator using the 1870 Little, Brown version would cite the word "before" as appearing on page 191; a citator using the 1906 Banks version would cite that word as appearing on page 192.

Yet another kind of minor variation is that some versions print the dispositive language of the Court's decision in italics, while other versions use roman type. Compare, e.g., *Marbury*, 5 U.S. (1 Cranch) at 180 (1803) (Little, Brown, 1st ed. 1855) ("*The rule must be discharged.*"), with *Marbury*, 5 U.S. (1 Cranch) at 180 (1803) (Banks, 3d ed. 1903) ("The rule must be discharged.").

Some versions differ significantly with respect to the presentations of counsel and other relevant materials. The Little, Brown versions (of the Curtis compilations) tersely supply only the names of counsel, while the Banks versions usually provide summaries of counsel's arguments and sometimes lower court opinions. For example, the opinion in *In re Metzger*, 46 U.S. (5 How.) 176 (1847) (Little, Brown, 5th ed. 1870) is preceded only by "*Coxe*, for the petitioner. *Clifford*, (attorney-general,) *contrá*." *Id.* at 348 (punctuation and accent in original). However, the report of *Metzger* in the Banks version contains Coxe's petition, the decision of the district court, five pages of Coxe's argument, and five pages of Attorney-General Clifford's argument. *See In re Metzger*, 46 U.S. (5 How.) 175, 176–87 (1847) (Banks, 2d ed. 1906). The 1906 Banks version also includes the Supreme Court's order. *See id.* at 191.

Of more significance is the variation in the footnotes. Using *Metzger* again as an example, the 1870 Little, Brown version supplies footnote citations to the statutes at large—for example, on pages 188 and 189, both of which are omitted in the Banks version. On the other hand—and more significantly—the Banks version contains one extensive substantive footnote, citing to a commentator and other cases (*see Metzger*, 46 U.S. at 188 n.1 (1847) (Banks, 2d ed. 1906)), and one footnote with a case citation, (*see id.* at 189 n.1), neither of which appears in the Little, Brown version. I suspect that the notes in the Little, Brown version were added by Justice Curtis in his capacity as annotator of his set of **Reports**, and those in the Banks version were added by Rapalje in his capacity as annotator of the second edition of 5 Howard.[9]

The different versions reflect minor variations in the signal for footnotes. For example, the significant footnote to the report of *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792) (Little, Brown, 1st ed. 1855), quoting the important "opinions" of three circuit courts on each of which different Justices of the Supreme Court sat,[10] is signaled by "1" in the 1855 Little, Brown version, by "(*a*)" in the 1906 Banks version, and by "†" in the version printed by the Aurora Office in Philadelphia in 1798.[11] The Hart and Wechsler treatise reports that this footnote was "added by the reporter." Richard H. Fallon et al., **Hart and Wechsler's The Federal Courts and The Federal System** 100 (4th ed. 1996).

III. Which Versions Are Authoritative?

Citators aware of the variations among published versions of the early Supreme Court

Libraries, including the Supreme Court Library (pictured), tend to assemble sets of *United States Reports* by acquiring partial sets from various sources and then filling in the missing volumes by ordering reprints from William S. Hein & Co., Inc., in Buffalo, NY, which provides reprints of first editions on acid-resistant paper.

opinions may wonder which version should be regarded as authoritative—or at least most authoritative. I think most students of the subject would regard as the most authoritative the first editions of the "nominate" or "nominative" reports, i.e., those of Dallas, Cranch, Wheaton, Peters, Howard, Black, and Wallace.[12] When current Supreme Court opinions cite to text in opinions in the nominate reports, the text is rendered as it appears in these first editions.[13] Ascertaining whether a published version of the nominate reports is a first or subsequent edition can best be accomplished by comparing the details on the title page of the volume with the extraordinarily helpful "Bibliography of the Early Reports" contained in Morris L. Cohen & Sharon Hamby O'Connor, **A Guide to the Early Reports of the Supreme Court of the United States** 115–217 (1955). The Bibliography sets out for each volume of the nominate reports the publisher and publication date of the first edition, of each subsequent printing of a first edition, and of the first and subsequent printings of each subsequent edition, together with the author of the notes when prepared by someone other than the official reporter.[14]

Locating a first edition of a nominate report might not be an easy task. A complete set exists in the office of the Supreme Court Reporter,[15] in the Faculty Library of the Harvard Law School,[16] and at the offices of William S. Hein & Co., Inc., Buffalo, NY. The Hein Company publishes reprints of the first editions on acid-resistant paper. Although a library could obtain from the Hein Company a full set of the first editions, it is unlikely that many have done so. Libraries, including the Supreme Court Library, tend to assemble sets of **United States Reports** by building upon partial sets acquired from various sources and then filling in the missing volumes, either from other fragmented sets or by ordering reprints of selected volumes from Hein. Of the

seventy-one sets of the **United States Reports** in the chambers of the Justices of the Supreme Court and elsewhere in the Supreme Court building, only the set maintained by the Reporter is a complete set of first editions.[17] A set of **Reports** in the chambers of a judge, the office of a lawyer or law professor, or the library of a law school or a bar association is almost certainly an amalgamation of volumes from various editions and publishers.

Even checking a first edition is not a foolproof method of ascertaining the text as rendered by the early reporters, because on at least one occasion a printing error was noticed in a first edition. When the current Supreme Court Reporter was preparing a ceremonial presentation of *Marbury v. Madison* as reported in the first edition of 1 Cranch, he noticed that, on page 138, line 8 ended " . . . Mr. Adams, the late presi-" and line 9 began "of the United States, . . . " The syllable "dent" was missing. Checking a later edition of 1 Cranch, he noticed that the omission had been corrected.[18]

Conclusion

My advice to citators of opinions in the nominate reports is to cite to a first edition if one can be located, and—in the usual circumstance in which one cannot be located—to add, after the customary citation form, a parenthetical that includes the publisher, the edition, and the publication date. Legal historians would probably prefer that the added parenthetical also include the name of the annotator, but legal publishers (and readers) would probably prefer limiting the parenthetical to just the necessary identifying information (the format I have used in this article). Thus, the next time I have occasion to invoke Chief Justice Marshall's statement, "It is emphatically the province and duty of the judicial department to say what the law is," my citation, using the volume in my chambers, will be: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Little, Brown, 1st ed. 1855).

**Note:* *The writer expresses his gratitude to Morris L. Cohen, Shelley L. Dowling, Maeva Marcus, Diane Simpson, and Frank D. Wagner for their extremely helpful advice in the preparation of this article.*

ENDNOTES

[1]*See*, e.g., Maeva Marcus, "The Supreme Court: The First Ten Years," in Robert S. Peck and Ralph S. Pollock, **The Blessings of Liberty: Bicentennial Lectures at the National Archives** 70–73 (ABA 1988); 5 **The Documentary History of the Supreme Court of the United States, 1789–1800** 164–86, 193–214 (Maeva Marcus ed., 1994). Discrepancies occurred frequently in Dallas' reports of the earliest opinions, as the practice of supplying the Reporter with texts of the opinions did not become regularized until Cranch became the Reporter. *See* William Cranch, "Preface to the First Edition," in 5 U.S. (1 Cranch) iv (Banks, 3d ed. 1903); Craig Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy," 83 *Mich. L. Rev.* 1291, 1298 (1985).

[2]Benjamin R. Curtis, "Preface" to 1–7 U.S. (1–4 Dall., 1–3 Cranch) 3–4 (Little, Brown, 1st ed. 1855).

[3]The current convention of citing the early reports as "__ U.S. (__ [Reporter's name])" began with the ninth edition of **The Bluebook, A Uniform System of Citation** (1954), *see* Gerald T. Dunne, "Proprietor—Sometimes Predators: Early Court Reporters," *in* 1976 *Yearbook of the Supreme Court Historical Society* 71, but over distinguished objection, *see* Letter from Justice Felix Frankfurter to *The Harvard Law Review*, *reprinted in* "With the Editors," 69 *Harv. L. Rev.* v (1955).

[4]On the title page of the 1870 Little, Brown version, the company name is rendered "Little, Brown, and Company." The company name is punctuated differently on the title page of different volumes of the Little, Brown series annotated by Justice Curtis. In this article, I have referred to the publisher as "Little, Brown" or "Little, Brown and Company" and, in citing opinions in a volume of that series, used the punctuation appearing on the title page of the cited volume (omitting "and Company").

[5]I am grateful to Prof. Morris L. Cohen of the Yale Law School for furnishing me with a copy of the Little, Brown advertising circular.

[6]*See* Morris L. Cohen and Sharon Hamby O'Connor, **A Guide to the Early Reports of the Supreme Court of the United States** 230 (1995). The 22 volumes of the sixth edition are sometimes bound in 11 volumes. *See id.*

The Little, Brown advertising circular states that the then-contemplated 18 volumes would include four vol-

umes of the cases reported by Dallas. However, the 1855 Little, Brown version of volume I of the Curtis set, though labeled on the spine "1–7 Dallas 1–4 Cranch 1–3," contains none of the cases in 1 Dallas, all of which are cases decided by courts of Pennsylvania. *See* 1 U.S. (1 Dal.) *passim* (1754–89) (Banks, 4th ed. 1905).

[7]In citing *Ferreira* in *Lo Duca*, I should have retained the comma after "Little" appearing on the title page of the cited volume and omitted "& Co."

[8]Sometimes a version of an early opinion contains a mixture of variations. For example, the version of page 155 of *Marbury* in volume 2 of the Lawyers' Edition of Supreme Court Reports, published by the Lawyers Co-operative Publishing Co. in 1917, contains three of the variations noted above that appear in the 1903 Banks version and three that appear in the 1855 Little, Brown version.

[9]The Office of the Supreme Court Reporter has confirmed that the footnotes in the 1906 Banks version of *Metzger* do not appear in the first edition of 5 Howard, published in 1847.

[10]These "opinions" were letters sent by the members of the three circuit courts to President Washington, two stating and one implying that the Invalid Pensions Act of 1792 was unconstitutional. In only one of the three cases was a claimant (William Hayburn) before the circuit court. *Hayburn's Case* in the Supreme Court was a motion by Edmund Randolph, Attorney General of the United States, asking for issuance of a writ of mandamus ordering the Circuit Court for the District of Pennsylvania to act on Hayburn's petition. Considering only the narrow issue of whether the Attorney General could proceed *ex officio* without specific authorization from the President, the Supreme Court was equally divided and denied the *ex officio* motion for mandamus. *See* Maeva Marcus, "*Hayburn's Case*: A Misinterpretation of Precedent," 1988 *Wis. L. Rev.* 527, 529–38 (1988). The report of *Hayburn's Case* in 2 U.S. (2 Dall.) 409, 410 (1792) (Little, Brown, 1st ed. 1855), briefly recounts the denial of the mandamus petition, the Court's decision to hold under advisement Randolph's subsequent argument that he could proceed directly on behalf of Hayburn, and the fact that the Court never decided the motion because of subsequently enacted legislation. There is no opinion of the Court in *Hayburn's Case*.

[11]The 1798 Aurora version uses old style type, with some instances of "s" appearing as "f."

[12]Beginning with the opinions of the 1875 Term, Supreme Court opinions began to be printed under the auspices of the United States Government, which contracted with commercial publishers. *See* Morris L. Cohen & Sharon Hamby O'Connor, **A Guide to the Early Reports of the Supreme Court of the United States** 3 (1995). Volume 91 of the **United States Reports** was printed in 1876 by Little, Brown. The name of the Reporter, Otto, appears on the spine of this volume, and of Little, Brown volumes through 107 U.S. Starting in 1921, the Government Printing Office began printing **United States Reports**, starting with volume 257. *See id.* at 3 n.4.

[13]Telephone interview with Frank D. Wagner, Reporter of Decisions, Supreme Court of the United States (Mar. 23, 1999).

[14]"Although the early reports were issued with Court approval and there is evidence that William Cranch, the second reporter, had an appointment from the Supreme Court as its reporter, that position did not become official until 1817 when Congress authorized the Court to appoint a reporter, with an annual salary." Cohen & O'Connor, at 2.

[15]Telephone interview with Frank D. Wagner, Reporter of Decisions, Supreme Court of the United States (Mar. 23, 1999).

[16]*See* Cohen & O'Connor, at 115.

[17]Telephone interview with Diane Simpson, Asst. Librarian for Technical Services and Special Collections, Supreme Court of the United States (Mar. 23, 1999).

[18]Telephone interview with Frank D. Wagner, Reporter of Decisions, Supreme Court of the United States (Mar. 23, 1999).

The Role of the Supreme Court Reporter in History

FRANK D. WAGNER

Present Duties of the Reporter

The Reporter of Decisions is one of the four statutory officers of the Supreme Court. The others are the Clerk of the Court—presently, General Bill Suter—the Marshal of the Court, Dale Bosley, and the Librarian, Shelley Dowling.[1] We're called "statutory" officers because our jobs are created by law; our job descriptions are actually included in the United States Code. You can find the Reporter's job described at 28 U.S. C. §673. The Administrative Assistant to the Chief Justice, Sally Rider, is also a statutory officer, but she is appointed by and works primarily for the Chief Justice to assist in the management of the Court facility and the performance of the Chief's nonjudicial responsibilities.[2]

There have been relatively few Reporters in the Court's history, and many of them have stayed for long periods of time. I am the fifteenth Reporter since 1789. To give you some frame of reference on that, there have been sixteen Chief Justices during the same period.[3]

As the Reporter of Decisions, my primary job is to publish the Court's opinions in the Court's official publication, the **United States Reports**. I am also an editor of sorts, but not the type of full-service editor with whom some of you might be familiar. Rather, the Reporter and his staff have been described by the thirteenth Reporter, Henry Putzel, Jr., as "double revolving peripatetic nit-picker[s]."[4] We carefully examine each draft of each opinion to assure the accuracy of its quotations and citations and—to the extent we can—its facts. We also check for any typographical errors, misspellings, grammatical mistakes, and deviations from the Supreme Court's complicated style rules.[5]

We now do this for each case before it is

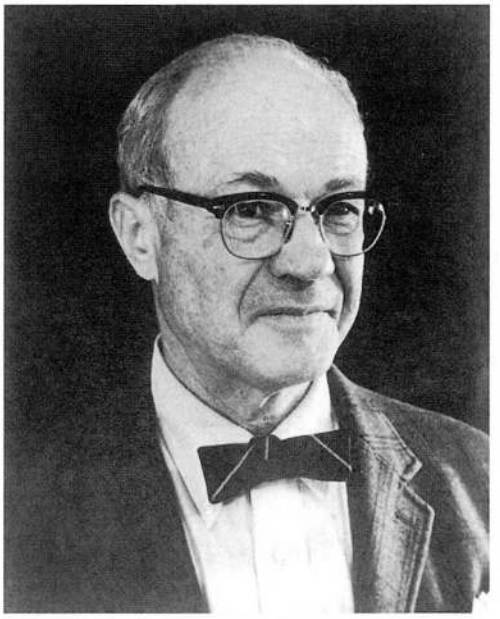
released: that is, one attorney and one paralegal in the Reporter's Office read each and every word of every draft of every opinion. That was not always the case. Prior to October Term 1998, there were only two attorneys in the office, and we rarely had time to read cases for their technical editorial content prior to their issuance. Rather, most prerelease editorial work was accomplished by the paralegals, and full editing for style and content by one of the office attorneys had to await publication of the case in the preliminary print of the **United States Reports**. What prerelease editing we attorneys did was primarily on the majority opinion as a byproduct of the headnoting process.

Needless to say, this led to some unavoidable but annoying inconsistencies in the text of opinions. For example, in 1997, a footnote in a Sixth Circuit panel's slip opinion pointed out inconsistencies in the spelling and punctuation of the phrase "attorney['s] fees" in four of this Court's recent slip opinions. The Sixth Circuit opined, therefore, that this Court was "hopelessly divided" as to the phrase's proper form. I wrote to Judge Danny J. Boggs, the author of the opinion, to point out that the "Supreme Court Style Manual" expressly advises opinion writers to use the phrase "a-t-t-o-r-n-e-y-'-s fees." I also told him that a review of recent **United States Reports** preliminary prints and bound volumes would reveal that the style manual's advice is heeded almost universally[6] in the final versions of opinions. I added that the discrepancies in question resulted largely from the fact that, at the initial slip opinion stage, the Court utilized its limited editorial resources primarily to assure the *accuracy* of the facts, quotations, and citations contained in its opinions, and that it was not until preparation of the official preliminary print that we turned our full attention to stylistic consistency. Judge Boggs graciously revised his footnote to reflect the true state of affairs,[7] but I could not help but think that this whole unfortunate situation could have been avoided if only we had the ability to fully read opinions before their release.

Author Frank Wagner is the current Reporter of Decisions and the fifteenth to hold that title since 1789. The Reporter's primary job is to publish the Court's opinions in its official publication, *United States Reports*.

This and similar occurrences prompted me to ask the Chief Justice, the Conference of Justices, and Congress for an additional attorney on my staff. Our new Assistant Reporter assumed her duties at the beginning of the 1998 Term. I am happy to say that, at the conclusion of the 1999 Term, I felt that for the first time ever we had been able to do everything possible to assure that the slip opinions were as editorially pure as they could be.

As I have just indicated, a lawyer and a paralegal also reread each case again, in full, prior to publication in the preliminary print of the **United States Reports**, and then again a year later when two or three preliminary prints are combined into a bound volume. Each and every change that the Reporter's Office suggests, no matter how trivial, is sent to Chambers for the Justices' approval. They, not we, are the opinions' authors, and they are entitled to have their opinions published exactly as they wish.

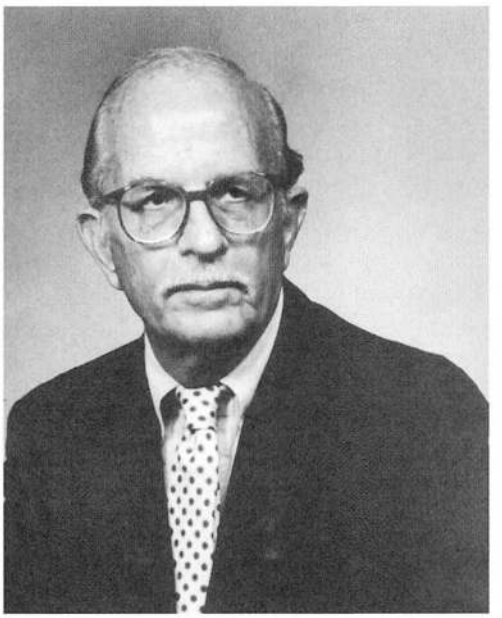


The thirteenth Reporter, Henry Putzel, Jr., (1964–1979), described his staff as "double revolving peripatetic nitpicker[s]."

Again, the Reporter's Office generally concentrates on the technical details, not the big picture. When my predecessor, Henry C. Lind, retired, the Chief Justice praised him highly as having been able to secure the approval of a majority of the Court to spell "marijuana" with a "j" rather than an "h".[8] Another example of what we do can be found framed on the Reporter's Office wall. In the slip version of the opinion for the Court in a case called *Wear v. Kansas*,[9] Justice Oliver Wendell Holmes used the phrase ". . . the principle river of the State is navigable at the capitol of the State. . . . " In doing so, Holmes used the wrong versions of two key words, "p-r-i-n-c-i-p-*l*-*e*" when he meant "p-r-i-n-c-i-p-*a*-*l*" and "c-a-p-i-t-*o*-*l*" when he meant "c-a-p-i-t-*a*-*l*." Reporter Ernest Knaebel caught the mistake and brought it to Justice Holmes' attention. Framed on my wall is the Justice's response. He said: "'principle' of course was a printer's error that I blush to have overlooked. 'Capitol' was deliberate ignorance. . . . I do a double blush. This is one of the few occasions on which I defer to the dictionaries." As Chief Justice Rehnquist has declared: "The Reporter's tasks . . . include the editing of opinions in the sense of attempting to establish consistency as to such matters as the forms of citations, preferred spelling of words, punctuation, and grammar—not an enviable task when dealing with nine separate chambers."[10]

Thus, whenever I am asked whether the Reporter's Office "corrects" substantive errors in opinions, the answer is always no. I think my two lawyers and I are pretty good attorneys, but the Justices themselves are the best in the world. In those handful of instances—I repeat, handful—in which substantive corrections have been made to opinions during my nearly fourteen years on the job, the impetus to do so has almost always come from Chambers.

While we are in frequently-asked-questions mode, there's one such question that I will happily duck. It often happens, usually at cocktail parties, that someone sidles up to me and asks, conspiratorially, "Just between you and me, which Justice is the best writer?" I



When Henry C. Lind retired in 1987, Chief Justice Rehnquist praised him highly for having secured the approval of a majority of the Court to spell "marijuana" with a "j" rather than an "h".

will tell you now what I always tell them: there is very little from which to choose. They are all exceptionally experienced and talented legal writers, and each of them is equally wonderful in his or her own unique and fabulous way!

I have one last word about the editing of opinions. In this modern computer age, editing can sometimes be prospective in effect, not just retroactive. I am referring to what we in the Reporter's Office call our "Cites Retrieval Macro." For many years, Chambers personnel engaged in writing opinions and Reporter's Office employees engaged in checking opinions spent a great deal of time typing, proofreading, editing, and correcting citations to this Court's earlier cases in order to eliminate errors, achieve consistency, and comply with the intricate case-naming rules set forth in the "Supreme Court Style Manual." In 1995, a team of employees led by Deputy Reporter Christine Fallon completed a project that had been underway since the 1970s regime of Reporter Henry Putzel. Specifically, they finished our "Cites Directory," which contains volume-by-volume lists of recommended citation forms for each and every case decided by signed or *per curiam* opinion and reported in the **United States Reports**. We estimate that there are more than 16,000 citations included in our directory. The question then became how best to make that information available to Chambers and our cite checkers. We found the solution in 1996, when a Reporter's Office intern, Derrick Lindery, who was also a law student and an amateur computer whiz, came up with our "Cites Retrieval Macro." The macro allows an opinion writer to automatically import a recommended citation form directly from the Cites Directory lists into an opinion-in-process with a few simple keystrokes, without retyping the case name, and without the possibility of committing a typographical or other error (unless, of course, we input it wrong in the first place). Obviously, this has greatly simplified the process of using and proofreading citations to this Court's prior opinions.

In addition to doing the editorial work necessary to prepare opinions for publication, the Deputy Reporter, Assistant Reporter, and I also write the syllabuses that appear at the beginning of each case. To answer another frequently asked question: yes, each syllabus is carefully checked and approved by the Chambers whose writings it reflects. Technically, the syllabus is the work of the Reporter, not the Court,[11] which led Mr. Putzel to refer to syllabus input from Chambers as "suggestions."[12] I would suggest to you, however, that a Reporter unwilling to accept Chambers "suggestions" would not be a Reporter for very much longer. And indeed, Mr. Putzel conceded that fact, declaring that "[o]f course, the Reporter is going to abide by th[ose] suggestions."[13]

The syllabus approval process actually yields a certain amount of security and comfort for my assistants and me. Since I have been the Reporter, I have twice gotten letters from law professors claiming that a syllabus had misinterpreted the case it summarized. In both instances, I was able to answer that I stood by my syllabus, since it had already been approved by Chambers, but offered to run it by the Justice again, just in case. On each occasion, the syllabus came back from Chambers reapproved without change.

Of course, accuracy is a must for syllabuses, but comprehensiveness is not. A syllabus cannot reflect every point in the case it covers; otherwise, it would be almost as long as the case itself. Mr. Putzel stated it this way:

> [W]e try to make them as brief as we can and the question is always one of judgment: What point is at the nub of the case, and you would have to assume certain things that are not—they may be quite important—but they are not what the case is primarily about. For example, a Justice might start off an opinion by referring to the fact that on a motion to dismiss the complaint the facts are

> taken as stated. Well, if that is just incidentally mentioned, it would not be headnoted, although it could become part of the headnote if it were the central or focal part of the case.[14]

Perhaps the primary factor in the length and comprehensiveness of a particular syllabus is the preference of the Justice who wrote the majority opinion. On the present Court, most Justices prefer syllabuses to be as short as possible. In particular, Justices Stevens and Scalia are acutely attuned to the length of syllabuses and will often request or "suggest" shortening. Justice Ginsburg, on the other hand, has preferred fuller summaries of her cases. She believes that the syllabus is frequently the only information on a case that busy lawyers and judges might read.[15]

As I have indicated, my staff includes two other lawyers, Deputy Reporter Christine L. Fallon and Assistant Reporter Donna Vierra. We employ four paralegal editors: Judy Ronningen, Dan Long, Hervé "Bo" Bocage, and Janet Bullinger. The staff also includes two printing specialists; Publications Officer Lloyd Hysan and his assistant, Michael Luck; and two clerical employees, Secretary Toni Singleton and Clerk/Messenger Verdery Knights. Many of my excellent staff are with us here tonight.

We publish the Court's opinions first as bench and slip opinion pamphlets and later in the preliminary prints and bound volumes of the **United States Reports**. For each Court Term, we issue between three and five 1,200-page volumes, depending on the number of opinions released during the year. In the past few years, the Court has heard between 75 and 100 arguments per Term and has issued a comparable number of opinions. At that rate, we have been publishing only three volumes for the last few Terms. That is a far cry from my first Term here, 1986, when we issued five volumes covering 161 opinions.[16]

I am often asked why the Court is taking so many fewer cases today. I am not sure my answer would be better than or different from anyone else's, or that it would even be correct. I suppose I could speculate about Congress's 1988 repeal of appeals-as-of-right to this Court,[17] or about the other supposed reasons for the change examined endlessly by the pundits. When it comes right down to it, though, it is not my question to try to answer. I have no involvement in that part of the Court's process, and any speculation on the matter on my part would be pure guesswork. When asked recently why the Court has taken far fewer cases for review in recent years, Justice O'Connor responded, "Many are called, but few are chosen."[18] Here, as on most occasions, my best course seems to be to rely on Justice O'Connor as authority.

Regardless of the reasons for taking fewer cases, I believe that the drop-off has had a positive effect on the overall quality of the opinions. Back in the bad old 160-case-per-year days, there were sometimes opinions issued, particularly near the end of the Term, that were never submitted to the Reporter's Office for editorial work. There simply was no time to do so. That is rarely the case today. We now read virtually every opinion, in each of its sometimes many draft versions. More importantly, the nine Chambers now have more time to devote to reading each others' opinions prior to their release. I am not saying that mistakes do not still occasionally happen in slip opinions. They do. However, I can tell you that my office now receives many fewer letters from members of the bar and the public pointing out potential mistakes. Moreover, Deputy Solicitor General Lawrence G. Wallace has told me on several occasions in recent years that the Solicitor General's staff has been finding many fewer errors in the opinions than they once did.

Right now, shortly after the beginning of October Term 2000, we are working on new opinions that will be published in volume 531 U.S. This will be the 531st volume issued since 1789. Our next preliminary print will be

529 U.S., Part 1, covering cases issued through March 29, 2000. The gap between announcement of a case from the bench and its issuance in the official **Reports** has thus shrunk from a high of thirty-four months in December 1994 to the present eight months. The gap resulted primarily from the introductions of new technologies in 1982, when the Court changed from hot lead to computerized printing, and again in 1992, when we switched to a modern word processing system. Ironically, those changes were intended to simplify the opinion-preparation process. Hopefully, those problems are behind us now. For the past few years, the Court's Publications Unit in the Office of Data Systems and my office have been engaged in a catch-up project. If everyone stays healthy and no systems crash—knock on wood!—we should be caught up sometime this Term or next. In any event, the opinions gap does not seem nearly so critical as it once was because each and every opinion issued by the Court is now posted on our new official website, www.supremecourtus.gov, within hours of its announcement from the bench. Opinions are removed from the website only after their publication in a preliminary print of the **United States Reports**. The Court also transmits all of its opinions electronically through our electronic-dissemination project, "Project Hermes," to legal publishers, news organizations, and law schools across the country. Many of those organizations also reprint the opinions or post them on their own websites.

I had the good fortune to supervise, under the direction of the Chief Justice and the Court's Automation Policy Committee, the creation of the Court's new website. Pretty exciting stuff for a fifty-five year old! The website debuted on the Internet on April 17, 2000. It now includes the Court's most recent slip opinions, the full text of bound volumes 502 through 523 U.S., the Court's Automated Docket, its journal for the 1993 Term through the present, its most recent orders, its argument calendar and schedules, oral argument transcripts for the current Term, the Court's Rules, bar admission forms and instructions, visitors' guides and pamphlets, case-handling guides, special notices, press releases and informational items, and some really dynamite photographs from the Court's collection. Now that the website's complete, I am sort of retired from the Internet business. However, I still get to help out occasionally, since Lloyd Hysan has been named the Court's "webmaster."

That is about all I can think to tell you about the Reporter's job as it currently exists. All in all, I guess you could describe the Reporter's present duties as those of a legal editor. That is what I did before I came to the Court: like Reporter Henry Lind before me, I worked for the Lawyer's Co-operative Publishing Company. One of the jobs I held was managing editor of that company's version of the Court's opinions, the **Supreme Court Reports, Lawyers' Edition**. My job is an important one in its way,[19] and it has provided me with wonderful opportunities to meet and interact with some of the best and brightest people of our time.

The Reporter Through History

Of course, the Reporter has not always been the same sort of bureaucratic nobody as is your humble narrator. The early Reporters were independent businessmen, and some of them achieved fame and distinction apart from their work as the publishers of the Court's rulings.[20] For example, Benjamin C. Howard, the fifth Reporter, served four terms in Congress,[21] while Jeremiah S. Black, the sixth Reporter, was appointed U.S. Attorney General and Secretary of State.[22] Alexander Dallas, the very first Reporter, was appointed Madison's Secretary of the Treasury[23] and Secretary of War[24] after he stopped reporting. Incidentally, Dallas' first volume, which is universally considered the first book in the **United States Reports**, consists entirely of cases from Pennsylvania courts and includes not a single ruling by the U.S. Supreme

Court.[25] His next three volumes did contain Supreme Court cases, but also included decisions from Pennsylvania and other states.

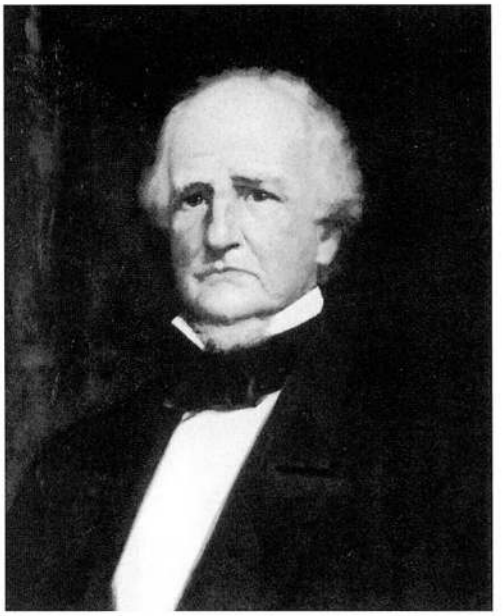
The second Reporter, William Cranch, was the long-time Chief Judge of the District of Columbia Circuit Court[26]; he was also the nephew of President John Adams.[27] Like Dallas, Cranch was a private publisher and a volunteer. The third Reporter, Henry Wheaton, was the first person actually selected by the Court to report its opinions.[28] Beginning in 1816, Wheaton and his successors were appointed public employees. Wheaton was the first to receive a small government salary, $1,000,[29] although he also continued to pay for and sell his **Reports**, keeping any profits.[30] After he stopped reporting, Wheaton became a distinguished scholar[31] and diplomat.[32]

The names of these early Reporters are very important because the Court's **Reports** were named for them. This is true of the first ninety volumes of the **United States Reports**. For example, Wheaton's first volume, published in 1816, is correctly cited as "One Wheaton," even though it is also the fourteenth volume in the **United States Reports** series. Such "nominative" **Reports** are no longer published here at the Court. Although volume 531 U.S., the one on which we are presently working, is also theoretically 53 Wagner—that is, the 53rd volume to be produced during my tenure—no one knows that except me, my wife, and now you. This is because the Court stopped using the Reporter's name on its case books in 1882.

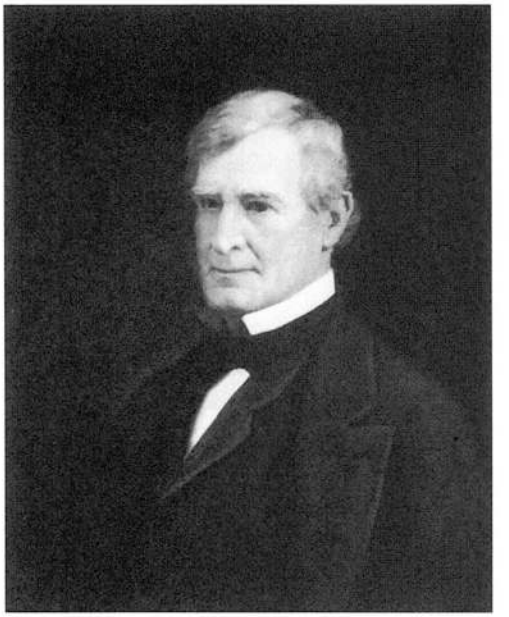
For years, I thought the reason for this change stemmed from the suit between the third Reporter, Wheaton, and the fourth Reporter, Richard Peters, Jr. As I indicated above, the early Reporters were entrepreneurs who made most of their incomes compiling, printing, and selling the rulings of this Court. Wheaton served as Reporter from 1816 through 1827, producing twelve volumes of the Court's **Reports**. Between 1830 and 1834, however, Peters attempted to sell cheap, condensed versions of cases already published by Wheaton and the earlier Reporters.[33] Wheaton sued for copyright infringement,[34] and the case made it all the way to this Court. Peters got to report his own victory because the Court ruled that no Reporter of its decisions has or can ever have any copyright in the written opinions delivered by the Court.[35]

As I said, I once thought that the removal of the Reporters' names from the books was delayed payback for the Reporters' *chutzpah* in trying to claim copyright in the Court's work: "You guys cannot claim ownership of our writings, and, by the way, you cannot name our books after yourselves anymore." Of course, that was not the case. Rather, the Judiciary appropriation of 1874 allotted $25,000 to pay for the printing of the official **Reports**.[36] After that, beginning with volume 91, the legend "**United States Reports**" has appeared on the spines of all the books. The first nonnominative Reporter, William Otto, had his name in a band below that official legend, but after Otto no Reporter's name has ever again appeared on the spines of the **United States Reports**. Of course, we do still get to have our names on the title pages of the volumes.

Another difference between the early **Reports** and those published today is that the early volumes do not necessarily contain the actual words of the Court. Today, the text that will be printed in the **United States Reports** is actually keystroked in Chambers and then carefully preserved by the Court's Publications Unit and reproduced in the official **Reports**. In contrast, in the early years there was no publication apart from that of the Reporters. Opinions were delivered orally from the bench, and it was up to the Reporter to come to Court regularly and to take careful notes.[37] If the Reporter was lucky and in the good graces of a particular Justice, he might be able to borrow the Justice's notes,[38] but the actual text published seems often to have been largely the Reporter's idea of what the Court had said.[39] The results were mixed. Dallas and Cranch were both criticized for inaccuracies in



Benjamin C. Howard (1843–1861), the fifth Reporter, served four terms in Congress after his stint as Reporter.



Jeremiah S. Black (1861–1862), the sixth Reporter, was later appointed U.S. Attorney General and then Secretary of State.

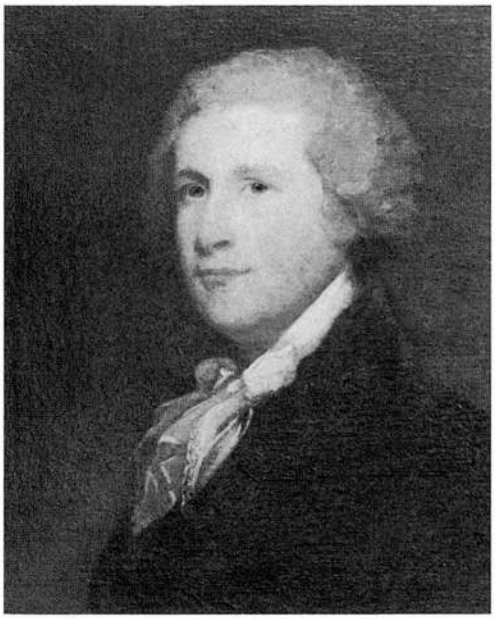
their work,[40] as well as for the long delays that occurred in publishing cases.[41] For example, even though Dallas' fourth volume was published in 1807, it reports state cases decided as early as 1788[42] and reports no U.S. Supreme Court cases decided after the Court's 1800 Term.[43] The present-day eight-month delay between opinion announcement and publication seems to pale by comparison.

Another difference between the modern and the original **Reports** is that the early volumes often summarized the arguments of counsel in great detail. Again, this practice reflected, at least, that the Reporter was often in the Courtroom taking careful notes. And—at least initially—the Court considered the publication of arguments to be very important. When, in 1830, Reporter Richard Peters requested the Court's permission to cease publishing the arguments in order to avoid having to issue a second volume to cover that Term's cases, Chief Justice Marshall responded:

> I believe we [that is, the Justices] all think that the arguments at the bar ought, at least in substance, to appear in the **Reports**. They certainly contribute very much to explain the points really decided by the Court. If this cannot be done in one volume, I should think it advisable to give us two.[44]

Summarizing the parties' arguments survived well into the twentieth century.[45] The practice tapered off and finally ceased during the tenure of Mr. Knaebel, in 1941.[46] Office records do not reveal why this occurred. Neither Henry Putzel nor Henry Lind has any memory of the matter, and even the Court's wonderful research librarians have been unable to come up with a reason why the practice was discontinued. I can only speculate that, as more and more resources became available to attorneys over the years, perusal of the summaries of colleagues' arguments became a much less attractive and relatively unfruitful way of doing legal research.

Perhaps because of the early Reporters' habit of haunting the Courtroom to take careful notes on opinions and arguments, but more likely because of the unfortunate similarity of



After he stopped reporting, Alexander Dallas, the Court's first Reporter (1790–1800), was appointed Secretary of the Treasury by President James Madison. He went on to become Secretary of War.

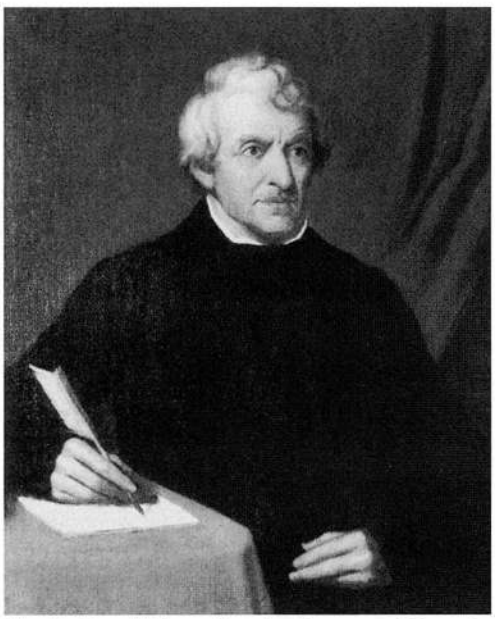
the two positions' names, early Reporters were often mistaken for court reporters. Walter Wyatt, the twelfth Reporter, finally grew so frustrated with this issue of mistaken identity that, on January 21, 1953, he wrote Chief Justice Vinson as follows:

> In order to avoid confusion and some embarrassment it is respectfully requested that in the **United States Reports**, the **Congressional Directory** and other official publications, I be permitted to list my title as Reporter of Decisions instead of merely as Reporter. From time to time I am plagued by letters and personal calls from people who think that I am a stenographic court reporter or who desire either stenographic employment on my staff or to obtain transcripts of oral arguments.[47]

Thereafter, the job has always been listed not as "Reporter," but as "Reporter of Decisions."[48]

Any discussion of the history of Supreme Court Reporters would, of course, be deficient if it did not include a few words on the history of the syllabus. The very first stab at something like a syllabus appears as the very first item in those pages of Dallas' second volume that are devoted to the proceedings of this Court.[49] In an item entitled "Supreme Court of the United States: February Term 1790," Dallas noted that the first John Jay Court met in New York City, that the Justices' commissions were read, and that they were qualified according to law. Dallas then named the Justices, listed the dates of their commissions, and reprinted the rules established by the Court.

Most of the early syllabuses followed this pattern: an enumeration of separate but sometimes related points. Today, we would call such a device headnotes rather than a true syllabus. A good example of such writing can be found in William Cranch's marginal notation for *Marbury v. Madison*.[50] This has been called "the most significant



Like Dallas, William Cranch, the second Reporter (1801–1815), was a private publisher who took on the job as a public service. Cranch was the longtime Chief Judge of the District of Columbia Circuit Court and a nephew of President John Adams.

Henry Wheaton (1816–1827) was the first Reporter hired by the Supreme Court to record its opinions. He received a small government salary of $1,000, but he also continued to pay for and sell his *Reports*, keeping any profits. Wheaton went on to become minister to Denmark.

synopsis by a Reporter of Decisions in **United States Reports**."[51] It is, in fact, extremely well written and concise, consisting of only two narrow columns that summarize the Chief Justice's twenty-seven-page opinion. However, Cranch's writing is simply a bare-bones listing of black-letter points of law, with no attempt to recount the facts of the case or the reasoning of the opinion. The third Reporter, Henry Wheaton, extended the utility of this device significantly. Aided occasionally (but anonymously[52]) by his friend and mentor, Justice Joseph Story, Wheaton included in his **Reports** annotations elucidating particular points in opinions or exploring entire areas of developing law.[53]

However, Wheaton is regarded as the ablest of the early Reporters.[54] His successor, Peters, immediately abandoned Wheaton's inclusion of scholarly notes in his volumes,[55] and subsequent Reporters were not always able to measure up to Wheaton's high standards of scholarship. The precision of Peters' work was quickly called into question.[56] Later, the editors of the *American Law Review* said of John W. Wallace, the seventh Reporter:

> We could fill pages with specimens of bad English, bad taste, and inaccurate statement [in Wallace's **Reports**]. . . . [H]is elaborate and bombastic statements of fact prove that he radically misconceives his office. . . . [N]othing less will suffice, than that Mr. Wallace should cease to be Reporter. If this cannot be, then we demand in behalf of the profession, an entire change in his theory and practice of reporting. He must be more brief, more accurate, and more modest.[57]

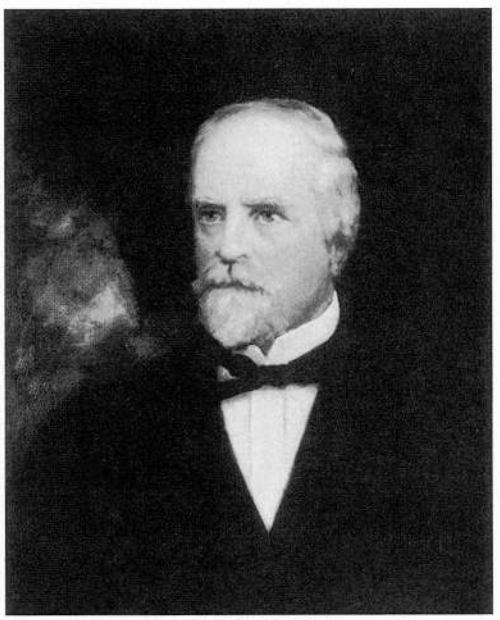
Occasionally, inaccuracies in syllabuses

The fourth Reporter, Richard Peters, Jr. (1828–1843), won his 1834 suit in the Supreme Court permitting him to sell condensed versions of cases recorded by his predecessors. The Court ruled that no Reporter of decisions has copyright in the written opinions delivered by the Court, which are in the public domain.

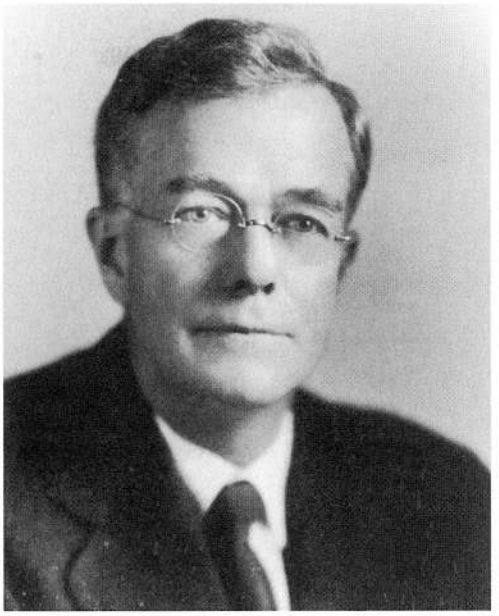
have led to real problems. For example, in the celebrated case of *United States v. Detroit Timber & Lumber Co.*,[58] the federal government attempted to support its case by relying on a point made in a syllabus of an earlier decision, *Hawley v. Diller*.[59] Writing for the Court in *Detroit Timber,* Justice David J. Brewer said that such reliance was misplaced:

> . . . [T]he headnote is not the work of the Court, nor does it state its decision. . . . It is simply the work of the Reporter, gives his understanding of the decision, and is prepared for the convenience of the profession. . . . [F]inally[,] [this] headnote is a misinterpretation of the scope of the *[Hawley]* decision.[60]

Although Justice Brewer thus criticized the work of ninth Reporter J. C. Bancroft Davis, Charles Henry Butler, the tenth Reporter and Davis' successor, did not hesitate to headnote the point in the *Detroit* Timber syllabus.[61] Indeed, that point has become the basis of a statement that, to this day, appears at the top of every slip opinion syllabus:



After William Otto (1875–1883), no Reporter's name has appeared on the spines of the *United States Reports*, although their names do appear on the title pages.



The practice of summarizing the parties' arguments tapered off and finally ceased in 1941, during the tenure of Reporter Ernest Knaebel (1916–1944). No one is sure why this happened.

> . . . The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

The inclusion of that statement in all modern syllabuses has led Justice Ginsburg to declare that *Detroit Timber* is "the most frequently cited of all Supreme Court cases."[62]

Speaking of modern syllabuses, I should tell you what the original case note device has evolved into. Today, the syllabus is basically what a law school student would call a "case brief." Henry Putzel, my predecessor by two, declared that that structure has been in existence for a long time and conforms to a certain set of unwritten rules.[63] The first part of the syllabus sets forth the facts. Although in Mr. Putzel's day the fact paragraph was always

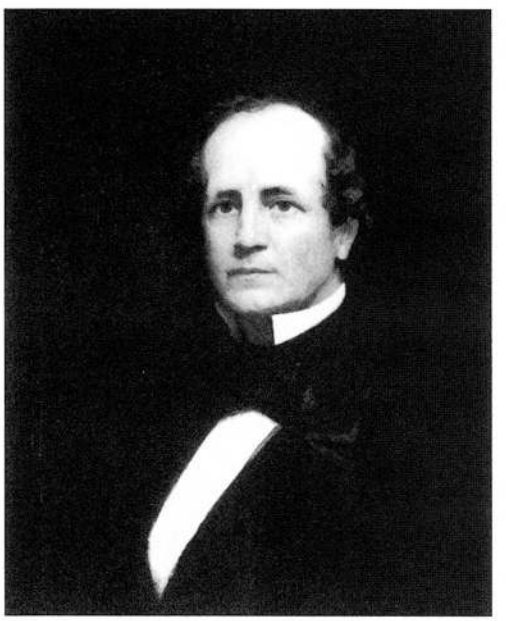
The Reporter's job title was expanded to Reporter of Decisions after Walter Wyatt, the twelfth Reporter (1946–1963), lobbied Chief Justice Fred Vinson in 1953. He complained that he was plagued by letters from people who thought he was a stenographic court reporter.

limited to one paragraph,[64] in recent years we have expanded that to two[65] or even three[66] paragraphs in cases in which the relevant facts are long and complicated.

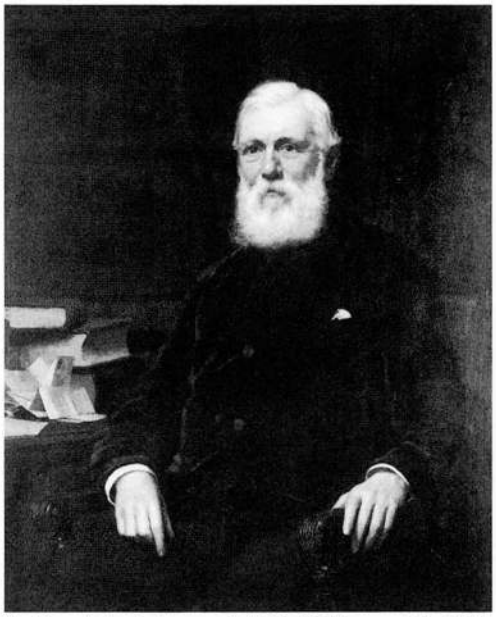
Following the facts in the syllabus comes the *"held"* line, under which the case's holding or holdings are set forth in paragraphs identifying the opinion pages on which the particular points can be found.[67] In a case in which there was but one holding, Mr. Putzel limited any subdivisions to (a), (b), and (c) paragraphs. If there was more than one holding, Mr. Putzel would use arabic numerals for the points decided, and perhaps some lettered paragraphs under those for subholdings, but would not go below that in order "to keep the thing within bounds."[68] In recent years, we have violated that rule in very complicated cases in order to provide the reader with smaller, simpler chunks of exposition on particular subpoints.[69] We have even had to devise a special syllabus form for something never contemplated in Mr. Putzel's time: the recent phenomenon of "split-majority" cases in which the opinion of the Court appears partially in one opinion and partially in another.[70]

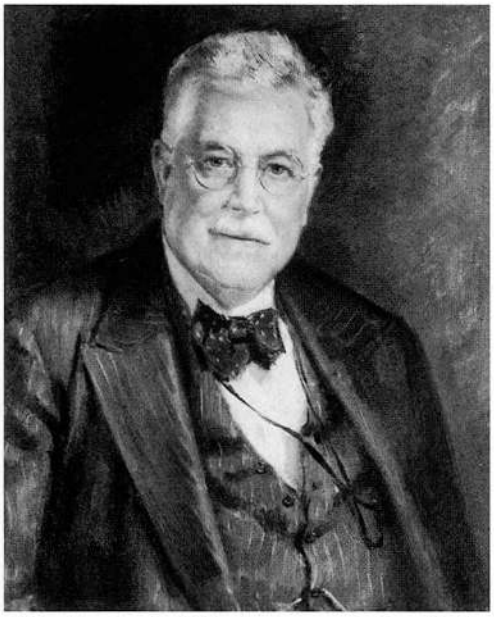
The last portion of the modern syllabus is what we call the "lineup," which is simply the listing of how the Justices voted in the case. The lineup did not appear in syllabuses until 1970.[71] At that time, the Court had acceded to a request from the press to release syllabuses at the same time as the cases they summarized. Prior to that time, syllabuses were included only at the preliminary print stage. According to Henry Putzel, the idea was to provide the press with a road map through very complicated decisions.[72] In a recent phone conversation, Mr. Putzel told me that lineups were added to syllabuses in that same spirit, to let the press and the public know at a glance how each of the Justices had voted.

Ironically, although lineups were created to aid the press, the media are sometimes the



John W. Wallace (1863–1875), the seventh Reporter, has been criticized for his wordiness, poor accuracy, and bombastic style.





In the celebrated case of *United States v. Detroit Timber & Lumber Co.*, the federal government attempted to support its case by relying on a point made in a syllabus of an earlier decision, *Hawley v. Diller*. Writing for the Court in *Detroit Timber*, Justice David J. Brewer said that such reliance was misplaced, because the headnote of the earlier decision was not the work of the Court but the mistaken interpretation of J. C. Bancroft Davis, the ninth Reporter (1883–1902) (left). Charles Henry Butler (1902–1916) (right), Davis's successor, did not hesitate to headnote Brewer's point in the *Detroit Timber* syllabus, and the point is now routinely made at the top of every slip opinion syllabus.

first to complain about very complex lineups. I would suggest that it is not the lineups that are complex, but the cases they reflect. For example, here is the lineup in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*[73]:

> BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III–A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III–B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, *post,* p. 623. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post,* p. 637. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 646. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined, *post,* p. 655.

How could I possibly have said it any clearer than that, I ask you?

I hope this essay has given you some understanding of this little-known but important job that it is my pleasure to hold, and of its place in the Court's history.

ENDNOTES

[1]*See* McGurn, "The Court's Officers," 1979 *S. Ct. Hist. Soc. Yearbook* 87 (hereinafter McGurn).

[2]*See id.* at 92–93.

[3]This number includes John Rutledge, who was nominated by George Washington and served as Chief Justice in 1795, but whose nomination was never confirmed by the Senate. *See* Marcus, "Washington's Appointments to the Supreme Court," 1999 *S. Ct. Hist. Soc. J.* 243, 251–252.

[4]*See* Baier & Putzel, "A Report on the Reporter," 1980 *S. Ct. Hist. Soc. Yearbook* 10, 12 (hereinafter Baier & Putzel). This article consists largely of the text of a television interview that Professor Paul R. Baier, of the Louisiana State University Law Center, conducted with Mr. Putzel.

[5]*See* "Retirements and Appointments,: 479 U.S. xxi (1987).

[6]Justice Ruth Bader Ginsburg does not always follow this rule, preferring "attorneys' fees" in contexts in which there is clearly more than one attorney referred to.

[7]*See Stallworth v. Greater Cleveland Regional Transit Authority*, 105 F. 3d 252, 253, n. 1 (CA6 1997).

[8]*See* "Retirements and Appointments," *supra* note 5 at xxi.

[9]*Wear v. Kansas ex rel. Brewster*, 245 U.S. 154, 158 (1917).

[10]"Retirements and Appointments," *supra* note 5 at xxi.

[11]*United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

[12]Baier & Putzel 12.

[13]*Ibid.*

[14]*Id.*, at 11–12.

[15]Ginsburg, "Communicating and Commenting on the Court's Work," 83 *Geo. L. J.* 2119, 2120 (1995) (hereinafter Ginsburg, "Communicating"); Ginsburg, "Informing the Public about the U.S. Supreme Court's Work," 29 *Loyola U. Chi. L. J.* 275, 276 (1998).

[16]*See* bound volumes 479–483 U.S.

[17]Pub. L. 100–352, 102 Stat. 662. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, n. 4 (1989).

[18]MacLean, "High Court Justice Suggests Circulating 9th Circuit Drafts," *Los Angeles Daily Journal*, Aug. 23, 2000, pp. 1, 8.

[19]When Henry Putzel retired, Chief Justice Burger said: "The work of the Reporter of Decisions is not known to the public but is of great importance to the courts, the legal profession, and to the public." "Retirement of Reporter of Decisions," 440 U.S. v (1979).

[20]*See generally* Dunne, "Early Court Reporters," 1976 *S. Ct. Hist. Soc. Yearbook* 61 (hereinafter Dunne).

[21]Cohen, **A Guide to the Early Reports of the Supreme Court of the United States** 78 (1995).

[22]*Id. at* 90–91.

[23]*See id.* at 63.

[24]*See* McGurn 89.

[25]*See* Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy," 83 *Mich. L. Rev.* 1291, 1296 (1985) (hereinafter Joyce).

[26]Joyce, "*Wheaton v. Peters*: The Untold Story of the Early Reporters," 1985 *S. Ct. Hist. Soc. Yearbook* 35, 41–42 (hereinafter Joyce on *Wheaton*).

[27]*See id.* at 41.

[28]*See* Dunne 64.

[29]Joyce on *Wheaton* 56.

[30]*See* Dunne 64.

[31]*See* Joyce 1314.

[32]*See* Dunne 64.

[33]*See* Joyce on *Wheaton* 61–64.

[34]*See* Joyce 1370–1371.

[35]*Wheaton v. Peters,* 8 Pet. 591, 668 (1834).

[36]*See* Dunne 70.

[37]The first order of the Court requiring that written opinions be filed with the Clerk of the Court can be found at 8 Pet. vii (1834). *See* Dunne 62.

[38]*See* Joyce on *Wheaton* 47.

[39]*See id.* at 40–41.

[40]*See* Joyce 1304–1305, 1309–1310.

[41]*See* Dunne 63; Joyce on *Wheaton* 39, 40, 43–44.

[42]*See, e.g., W. B. v. Latimer,* 4 Dall. i (Err. App. Del. 1788).

[43]*See* Joyce 1301.

[44]3 Pet. vi.

[45]*See* Rosbrook, The Art of Judicial Reporting, 10 Cornell L. Q. 103, 120–121 (1925).

[46]Compare, *e.g., United States v. Teamsters,* 315 U.S. 521 (1942), with *Pearce v. Commissioner,* 315 U.S. 543 (1942).

[47]As quoted in Baier & Putzel 11.

[48]*E.g.*, compare the title pages in 343 U.S. and 344 U.S.

[49]*See* 2 Dall. 399. The first 398 pages of that volume, as well as the entirety of 1 Dall., are devoted to cases decided in the Pennsylvania and Delaware courts.

[50]1 Cranch 137, 138–139 (1803).

[51]Baier & Putzel 13.

[52]*See* Joyce on *Wheaton* 52.

[53]*See id.* at 50–51.

[54]Joyce 1350–1351.

[55]*See* Joyce on *Wheaton* 60.

[56]*See id.* at 60–61.

[57]"Wallace's Reports," 1 *Am. L. Rev.* 229, 237 (1867).

[58]200 U.S. 321 (1906).

[59]178 U.S. 476, 477, 2d par. (1900).

[60]200 U.S. at 337.

[61]*Id.* at 322, 2nd full par.

[62]Memorandum from Justice Ruth Bader Ginsburg to Reporter Frank D. Wagner (July 1, 1996) (on file with author); *see also* Ginsburg, "Communicating," 2120.

[63]Baier & Putzel 12.

[64]*See ibid.*

[65]*See, e.g., Olmstead v. L. C.,* 527 U.S. 581, 581–582 (1999).

[66]*See, e.g., Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 591–592 (1997).

[67]The practice of including opinion page numbers in the syllabus was instituted by the fourth Reporter, Richard Peters, Jr. *See* Preface, 1 Pet. iii–iv (1828). *See* also Joyce on *Wheaton* 60.

[68]*See* Baier & Putzel 12.

[69]*See, e.g., Alden v. Maine,* 527 U.S. 706, 707–710 (1999).

[70]*See, e.g., Republic Nat. Bank of Miami v. United States,* 506 U.S. 80, 80–81 (1992).

[71]For the first slip opinion syllabus, which includes the first voting lineup, *see North Carolina v. Alford,* 400 U.S. 25, 26 (1970).

[72]*See* Baier & Putzel 11.

[73]492 U.S. 573, 577 (1989).

Conscience in the Court, 1931–1946: Religion as Duty and Choice

JEFFREY M. ANDERSON

> That the moral duty to obey the law should be given precedence over all other moral duty is something that the majority judges read into the Constitution. The Constitution says nothing about it, so it can only be imputed to the Constitution because the judges think that that is the way a good citizen should behave.
>
> Frederick Green, 1931[1]

The theological-political problem[2]—the conflict of loyalties to God and state—arises in various manifestations. It arises when people of faith engage in political action on issues ranging from abortion and most-favored-nation status to homelessness and foreign aid. Historic controversies concerning Indian removal, slavery, and temperance revealed tensions between the demands of religious convictions and the duties of political citizenship. The theological-political problem seems to be highlighted during wartime, when the government calls upon its citizens to take up arms in military conflict. Throughout American history, Congress and the courts have considered the unique difficulty posed by religious objection to military service.

The same basic difficulty has been presented in naturalization cases, because federal law requires applicants for citizenship to demonstrate their allegiance to the state and their commitment to its preservation. An applicant for citizenship must demonstrate that he "has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[3] Further, he must take an oath of allegiance, swearing, in part, "to bear arms on behalf of the United States when required by the law."[4] Since 1952, the statute has provided certain exemptions from this particular requirement for bona fide religious objectors.[5] Thus, the law remains to this day concerned with the theological-political problem in the naturalization context.

Consider a recent case. In 1992, a federal district court in Tennessee denied the citizenship petition of Mahmoud Kassas, a Syrian man, on the ground that he was not "attached to the principles of the Constitution."[6] This conclusion followed from Kassas' unwillingness to swear in advance that he would personally bear arms in any future wars. Kassas was a Muslim, and the court found that "he thought he would be condemned to hell" if he killed, or was killed by, another Muslim.[7] The Government argued, and the court agreed, that Kassas could not avail himself of the religious-objector exemptions, because he was opposed to only some wars.[8] Under an earlier Supreme Court ruling, such selective opposition to military activity is insufficient to warrant exemption from the oath.[9]

The court in this case confronted a problem basic to politics for centuries: Someone has to decide what exactly belongs to Caesar. However, the manner in which American courts approach this problem has changed during the course of the twentieth century. In the years leading up to the outbreak of World War II, the Supreme Court decided a series of naturalization cases involving applicants for citizenship who had refused to swear that they would take up arms personally in any future war.[10] The question presented in those cases was whether such applicants could be "attached to the principles of the Constitution" as required by the federal naturalization statute.[11] In three cases between 1929 and 1931, the Court held that such applicants were not so attached, and it denied their petitions for citizenship.[12]

TWO PACIFISTS WIN RIGHT TO CITIZENSHIP

Dr. MacIntosh and Miss Bland, War Nurse, Win Reversal of Citizenship Ban.

BOTH CANADIAN VETERANS

Appeals Court Holds Scruple Against War on Christian Ground Is Justified.

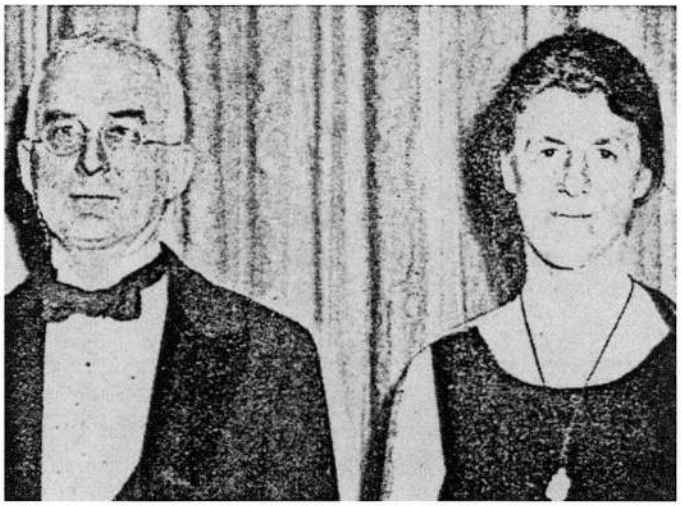
SCHWIMMER CASE DIFFERS

Opinion Calls Woman Pacifist an "Absolute Atheist," With No Sense of Nationalism.

In 1930, Connecticut and New York District Courts upheld the right of Canadians Douglas Macintosh, a Baptist preacher who taught theology at Yale Divinity School, and Marie Bland, a nurse who was the daughter of an Episcopalian minister, to become U.S. citizens despite their religious scruples against bearing arms in wars they considered morally unjust.

Two of these applicants argued that their religious convictions forbade their making blanket assurances that they would bear arms personally in any and all wars in which the United States might engage in the future. Douglas Macintosh was a Baptist preacher who served as a chaplain in World War I. Marie Bland was the daughter of an Episcopalian priest who herself had served as a nurse during the Great War. The Court refused their pleas for accommodation.

Some fifteen years later, and in the wake of the Second World War, the Court seemingly reversed course, granting the application of James Girouard, a Canadian-born Seventh-day Adventist who stated that his religious convictions forbade his bearing arms personally.[13] The Court explicitly overruled



Before they applied for U.S. citizenship, Macintosh (left) and Bland (right) had both served in World War I. Macintosh enlisted as a chaplain in the Canadian Army and Bland served as a nurse in the U.S. Army.

its earlier naturalization decisions[14]; Girouard's case seemed to signal a new way of thinking about religious conviction. Closer examination of the arguments made to, and adopted by, the Court during these years belies that conclusion.

This article argues that the Court's apparent reversal in *Girouard* represented no reversal of attitude toward religious belief. Throughout these cases, the majority understood religious beliefs to be ordinary lifestyle choices rather than uniquely significant expressions of transcendent duty. Part I will describe the ways in which the Court's discussion of religion has always betrayed a contest of assumptions about the essence of religious convictions. Part II will describe the apparent reversal of opinion signaled in *Girouard*. Part III will explain that reversal as resulting from the operation of the principles of reduction and marginality. It will argue that, notwithstanding the importation of duty-based rhetoric from earlier opinions, the Court persisted in its understanding of religion as ordinary choice.

I. The Fundamental Conundrum

The Supreme Court has been reluctant to hazard definitions of "religion."[15] And surely this is a difficult task, fraught with dangers of commission and omission. Yet even if the Justices cannot spell out any multipronged test to define "religion," they can—and do—harbor assumptions about the nature of religion and religious belief that propel their reasoning and rhetoric. One legal scholar has argued that the "fundamental conundrum" of any theory of religious liberty is that it cannot be divorced from the theorist's own understanding of religion.[16]

Charged with the task to fashion a regime that protects free exercise of religion and mediates among contending religious sects, the theorist—or the Justice—must adopt some basic notion about what counts as "religion" or what the nature of a religious obligation might be. In short, "any account of religious freedom will necessarily depend on—and hence will stand or fall along with—more basic background beliefs concerning matters of religion and theology, the proper role of government, and 'human nature.'"[17] The state of the Court's religious-liberty jurisprudence must be attributed, in large part, to the ascendance of certain of those "background beliefs."[18]

A. The Idioms of Duty and Choice

One important question in understanding the essence of religion is whether expression of religious convictions results from ordinary,

autonomous choice or extraordinary, transcendent obligations. The answer to this question likely answers subsequent questions about the limits of state authority over individuals' religious practices. For instance, it is likely that judges who conceive religious beliefs to be no different from other opinions—the result of autonomous choice—will find most governmental interests to be sufficiently important to overcome the right of the individual to exercise his religion freely. The individual can choose another belief at less cost than the majority can make exceptions for every individual dissenter. By contrast, the judge who conceives religion to be more a regime of duties—or beliefs compelled by divine authority—will be more solicitous of the believer's claim for accommodation from the government. Because the believer's duties toward an eternal God are far more consequential than his duties toward the temporal state, this judge would require the state to demonstrate the most serious need for the citizen's obedience.

The modern Court has adopted the idiom of choice, and the result has been the marginalization of the Free Exercise Clause.[19] The most important free-exercise case of the 1990s, *Employment Division, Department of Human Resources of Oregon v. Smith*,[20] represents the culmination of the Court's trend toward ignoring the Clause. Writing for the Court, Justice Antonin Scalia noted that the Court had never relied solely upon the Free Exercise Clause to uphold religious freedom.[21] Rather, the cases that vindicated religious exercise involved "hybrid" claims, where the parties coupled their free-exercise claims with free-speech, free-press, and substantive-due-process claims.[22] Even when the Court had addressed the substance of a free-exercise claim, it had only employed heightened scrutiny to invalidate a narrow range of unemployment compensation decisions.[23] Thus, it was no hard task for the Court in *Smith* to hold that any neutral law that was generally applicable would be presumptively immune from attack under the Free Exercise Clause, regardless of the burden it imposed on religious exercise.[24] This decision shows the extent to which the Court has made a practice of preferring a choice-based understanding of religion to a duty-based understanding.[25]

B. Explaining the Preference for Choice

Political theorist Michael Sandel argues that the modern Court's understanding of religion as the product of ordinary, autonomous choices is grounded in a similar understanding of the individual as a wholly autonomous, "unencumbered" self.[26] On this view, the individual chooses his religious convictions just as he chooses paper or plastic. When he decides whether to express particular convictions, he does so unhindered by any other, more important imperatives. Religious convictions are the product of the individual's unencumbered will.

For modern liberal theory, it follows that government must be neutral on the question of ultimate ends; indeed, for the liberal state, the individual's right to choose his own ends is more important than those ends themselves.[27] The purpose of government, then, is to facilitate free choice: "If we conceive ourselves as free and independent selves, unclaimed by moral ties antecedent to choice, we must be governed by a neutral framework, a framework of rights that refuses to choose among competing purposes and ends."[28] If religion is protected in this kind of regime, it is not protected as a substantive end itself. Rather, "[t]he respect the liberal invokes is not . . . respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one's religion freely."[29]

The alternative duty-based understanding recognizes the encumbrance of divinity upon the will. It denies the liberal premise that individuals select their religious convictions just as they select flavors of ice cream. Rather, it argues that religion is something unique. Be-

cause it contemplates a power higher than that of the state, or even of this world, religion often imposes certain obligations upon the will of the individual believer.

Just as modern debates concerning the role of religion in public life reveal contests between choice-based and duty-based understandings of religion, so did those debates that occurred among the Founding generation. Even James Madison's **Memorial and Remonstrance**, a pièce de résistance for church-state separation, paid tribute to the encumbrance of religious conviction:

> Because We hold it for a fundamental and undeniable truth, "that Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him; this duty is precedent, both in order of time and in degree of obligation, to the claims of civil society.[30]

Madison defined religion as a personal duty to God that no one other than the communicant could satisfy. For that reason, it was for the religious conscience—not the state—to determine how best to please God. The right to religious liberty was the right to act as one's conscience and convictions dictated. Madison did not say that the individual had the right to choose his ends free from any constraint; rather, he spoke the language of encumbrance.

Indeed, many eighteenth-century Americans believed that "[i]t is precisely because belief is not governed by the will that freedom of conscience is inalienable. Even if he would, a person could not give it up."[31] Republican theory understood a clear difference between conscience and choice: "[w]here conscience dictates, choice decides."[32] The republican understanding of religious conviction thus took into account "the dictates of conscience"—the duties and obligations attendant to religious devotion. "Religious liberty addressed the problem of encumbered selves, claimed by duties they cannot renounce, even in the face of civil obligations that may conflict."[33]

While the fundamental question—the nature of religious conviction—remains the same, modern liberal theory has cast aside the sense of encumbrance felt by the Founding generation.[34] As a result, modern liberal theory seeks to protect religious freedom only as it protects autonomous choice.[35] Justice John Paul Stevens expressed this point well when he wrote that religious beliefs are "worthy of respect" only if they are "the product of free and voluntary choice."[36] The ascendance of autonomy in liberal theory has brought with it a preference for understanding religion as one of many possible lifestyle choices.

II. The Apparent Reversal: From *Macintosh* to *Girouard*

The modern legal preference for a choice-based understanding of religion has not gone unchallenged in the Court. The debate concerning the question whether religion is more duty-based or choice-based received serious, if latent, attention in the Court in the years leading up to World War II. In a series of naturalization cases, the Justices articulated different understandings of the nature of reli-

gious belief. By 1946, it seemed that they had discarded the idiom of choice and adopted the idiom of duty.

A. The Legal Context

In June 1906, President Theodore Roosevelt signed into law "An Act To Establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States."[37] This Naturalization Act of 1906 prescribed the manner in which aliens could become citizens of the United States.[38] At least two years prior to his application for citizenship, the alien would declare to the clerk of a federal court his intention to become a citizen. After the two-year period, the alien would file a formal petition for naturalization. In this petition, the alien would aver, *inter alia*, that he was neither an anarchist nor a polygamist, nor "a believer in the practice of polygamy."[39] He would repeat his intention to become a citizen and to dissolve any remaining bonds of loyalty to a foreign power.

A federal district court would then hold a hearing to determine whether the alien had satisfied the requirements of citizenship. According to the Naturalization Act, the alien would be required to swear in open court that he would "support and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[40] The Act further burdened the alien to demonstrate "that during [the five years or more in which he has resided in the United States] he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."[41] This general naturalization regime continued in effect through 1952.[42]

The cases discussed in this part arose when applicants for citizenship qualified their oaths by reserving the right to object to future military service. The lower courts interpreted such reservations or qualifications as evidence of inability to demonstrate attachment to the principles of the Constitution, and they denied the applications. It was taken for granted that naturalization was a subject over which Congress had plenary legislative authority; the question was what Congress meant by the phrase "attached to the principles of the Constitution." In other words, the issue "was not whether Congress might exact a promise to bear arms as a condition of its grant of naturalization. It was simply whether Congress had exacted such a promise."[43]

The question was one of statutory construction. The text of the statute did not explicitly require a promise to defend the Constitution by taking up arms personally. Thus, the question was whether Congress had implicitly required such a commitment. Against a background tradition of limited exemptions from military service, a court must decide: How clearly must Congress speak in order to imply the requirement urged by the Government? Of course, to say that Congress had required that particular promise in order to prove attachment to the principles of the Constitution implicated the principles of the Constitution itself, for it expressly protects the free exercise of religion. Thus, even as they engaged in routine cases of statutory construction, the courts involved in these cases labored in the shadow of First Amendment values.

B. *Macintosh* and *Bland* (1931)

In March 1929, Douglas Macintosh filed his petition for naturalization in the federal district court in Connecticut.[44] Macintosh was a Canadian who first came to the United States in 1904. Three years later, he became an ordained Baptist preacher and returned to his native Canada. In 1909, Macintosh took a position on the faculty at Yale University's divinity school. Macintosh remained in the United States from that time until he enlisted in the Canadian Army for service in World War I. During the war, Macintosh served as a chaplain for the Canadian Army and operated

an American YMCA hut in France. After the war, Macintosh resumed his teaching duties at Yale. By 1930, he was a member of the faculty of the Divinity School, Chaplain of the Graduate School, and Dwight Professor of Theology.

The district court denied Macintosh's application for citizenship. According to that court, Macintosh was "not attached to the principles of the Constitution" because he would not swear in advance his willingness to take up arms on behalf of the United States.[45] Macintosh had explained that he would be willing to participate in war activities,[46] and his record of service in the recent war confirmed that pledge. Macintosh assured the district court that "he was ready to give to the United States, in return for citizenship, all the allegiance he had ever given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God."[47] He would take the oath of loyalty, but he would reserve the right to judge the morality of any future war that might demand his service.[48] This position Macintosh believed to be in accord with "the moral principles of Christianity."[49]

The case of Marie Bland followed a similar course.[50] Bland was also a native Canadian, the daughter of an Episcopalian minister. At least since 1914, Bland worked as a nurse in New York City. After the war, she worked for the United States government, caring for shell-shocked American servicemen in France. In May 1929, Bland filed her petition for naturalization in the federal district court for the Southern District of New York. When asked whether she would bear arms on behalf of the United States, Bland offered a simple caveat: "as far as my conscience as a Christian will allow."[51] According to the now-familiar pattern, the district court denied her application on the ground that she was not sufficiently "attached to the principles of the Constitution."[52]

A panel of the Second Circuit—composed of Judges Learned Hand, Martin Manton, and Thomas Swan—reversed the decision of the district court in both cases.[53] Historical evidence demonstrated that objection to war on religious grounds had always been respected by state and national legislatures alike.[54] "[T]he actual operation of the principles of the Constitution" showed that citizens could refuse to bear arms when their religious scruples forbade them to do so.[55] Judge Manton, writing in *Bland*, focused on Congress's historic practice of providing limited exemptions from military service for religious objectors.[56] Judge Manton summed up the legislative custom this way:

> We have, as the necessities of wars required, drafted our male citizens to perform active military services. . . . But at no time was this duty to bear arms permitted to interfere with the principles of religious freedom or conviction. The government has consistently regarded the citizens' religious convictions in its laws.[57]

This custom was predicated on a belief that religion was simply not within the ken of government authority. Because religious convictions were beyond the reach of any government, citizenship could not be conditioned upon the harmony of specific religious beliefs with specific political objectives. "The rights of conscience are unalienable, which the citizen need not surrender and which the government or society cannot take away."[58]

1. THE ARGUMENTS

The government appealed the Second Circuit's decision, and the Supreme Court granted certiorari.[59] Throughout its brief to the Court, the Government argued that the religious motivation for Macintosh's reservation was irrelevant.[60] Since naturalization was a statutory privilege, applicants must comply with every requirement of the Naturalization Act.[61] Since the duty of a citizen to bear arms in war was a fundamental principle of the

Constitution, anyone who would not commit to comply with that duty was necessarily not attached to the principles of the Constitution and thus not in compliance with the statute.[62] The reason for noncompliance was immaterial.[63]

Thus, the Government argued that both cases were controlled by *United States v. Schwimmer*,[64] a 1929 case in which the Supreme Court denied the application of a Hungarian-born linguist who refused to pledge her willingness to take up arms in war.[65] Schwimmer was an atheist whose thoroughgoing pacifism precluded her from swearing to take up arms.[66] The Court denied her application, largely for the reason that she was not just an idle pacifist; rather, she made a career of writing and lecturing to others about the virtues of the pacifist ideology.[67]

According to the Government, *Macintosh* was no different from *Schwimmer*: In each case, the applicant for citizenship "reserved freedom to refuse to comply with the constitutional authority of Congress and of the President in case of war."[68] Any distinction between religious-conscientious objection and atheist-conscientious objection was irrelevant.[69] The Government's rhetoric attempted to reduce Macintosh's sincere religious conviction to mere personal preference. Macintosh's explanations, the Government said, "disclose a willingness to bear arms if he is able to *satisfy himself* 'that the war is morally justified.' But he insists upon the reserved right *to determine that matter for himself*."[70] Such language ignores the point of religious conviction—that the convicted person must satisfy God, that he must yield to determinations made in accord with God's judgment. According to the Government:

> The position of respondent is merely that of a highly educated man with that deep sense of right and wrong which every applicant for citizenship is presumed to possess, seeking to transfer from Congress to himself, the right to determine whether the defense of this country requires him to bear arms.[71]

The Government sought to equate Macintosh's religious convictions with a personal preference not to be asked to do anything he would rather not do.

Counsel for Macintosh and Bland countered the Government's arguments by urging two main points: first, that their clients' reservations to bearing arms personally in any future war stemmed from motives wholly distinguishable from those that moved Rosika Schwimmer; and second, that their reservations were not extreme but were shared among a community of believers. These briefs speak the language of encumbrance and community.

Respondents' first task was to distinguish themselves from Rosika Schwimmer. Counsel for Macintosh—John W. Davis, Charles Clark, and Allen Wardwell—laid out the differences between the cases.[72] First, whereas Schwimmer was an avowed atheist whose objection was rooted in a "cosmic consciousness," Macintosh was clearly motivated by religious conviction.[73] Indeed, the Government had admitted in its brief in *Schwimmer* that "refusal to perform military service on account of religious scruples is not involved in this case."[74] Counsel described Macintosh's position as derivative of religious duty, not autonomous choice. Indeed, it was "his conscience dictated by the will of God" that might require Macintosh to abstain from a particular future war.[75] Again, "[t]he respondent's primary desire was the protection of his right not to bear arms in a war which his conscience, *dictated by the will of God*, might consider to be morally unjustified."[76] The dictates of conscience resonate throughout Macintosh's and Bland's arguments to the Supreme Court.

Second, whereas Schwimmer had made clear that she would take no part in any military effort, Macintosh stated that he was not

wholly opposed to military action; indeed, he had enlisted in the Canadian Army as a chaplain during the First World War.[77] He only wished to reserve the right not to bear arms himself when his religious scruples required his abstention.[78] Bland had urged a similar reservation.[79]

Third, whereas Schwimmer expressed her intention to propagate her ideas about war and pacifism, Macintosh explained that "he does not anticipate engaging 'in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified,' or in altering the opinion of others."[80] Bland made similar arguments. In short, the cases of Douglas Macintosh, the Baptist minister, and Marie Bland, the Episcopalian nurse, were obviously different from that of Rosika Schwimmer, the atheist propagandist. *Schwimmer* could not control.

Moreover, these particular individuals did not stand alone with their religious beliefs. Both Bland and Macintosh presented statements of established religious organizations and leaders echoing the substance of their religious objections to certain kinds of war. Bland's attorney, Emily Marx, submitted an *amicus* brief as counsel for several members of the Protestant Episcopal Church, the principal purpose of which was to demonstrate the extent of the faith community that shared Bland's view toward personal participation in war.[81] Specifically, the brief argued that the Government's hard rule "would exclude from citizenship the many members of the Episcopal Church who acquiesce in the ethical position of the Church as expressed from time to time by its leaders in this country."[82] The brief quoted a 1925 resolution, adopted by the Episcopal General Convention, that condemned "aggressive warfare" as a crime in which individual "followers of Christ" ought not participate.[83] One-hundred-thirty-one bishops from across the nation signed their names to that resolution.[84] Marie Bland was hardly alone in her religious opposition to certain kinds of wars.

The brief then cited the proclamations of the World Conference of the Bishops of the Protestant Episcopal Church, held in England in 1930.[85] More than fifty American bishops took part in that convention,[86] which declared that "war as a method of settling international *disputes is incompatible with the teaching and example of Our Lord Jesus Christ.*"[87] The Conference urged Episcopalians throughout the world to work for the success of the League of Nations and the Kellogg-Briand Pact.[88] "For the Christian must condemn war not merely because it is wasteful and ruinous, a cause of untold misery, but far more *because it is contrary to the will of God.*"[89] Obedience to God's will was the order of the day: "We dare not be disobedient to the heavenly vision of a world set free from the menace of war, or shrink from any effort that will make that vision a reality."[90] The Conference made clear the importance of duty—encumbrance—as the impetus for worldly action. Its statements also reflect the thoughts of a constitutive community of which Bland was a member.

Macintosh presented similar evidence of such a community of belief. In extensive footnotes, his counsel offered the official statements of Presbyterian, Universalist, Episcopal, and Methodist Episcopal churches, as well as the Federal Council of Churches.[91] These statements urged congregants to direct their supreme allegiance toward God, who alone was "Lord of the conscience."[92]

In addition, the Quakers did not think that Douglas Macintosh and Marie Bland were anything like Rosika Schwimmer.[93] In support of Macinstosh and Bland, the American Friends Service Committee wrote:

> Madame Schwimmer would not render to Caesar, for she had "no sense of nationalism, only a cosmic consciousness of belonging to the human family." Nor did she acknowledge a duty to God, for she de-

> clared that she was an "absolute atheist." Professor Macintosh, Miss Bland, and those who have a fellowship with them base that fellowship upon a unity of feeling diametrically opposed to Madame Schwimmer, because they patriotically acknowledge one duty and reverently insist upon the other.[94]

In contrast to Schwimmer, both Macintosh and Bland were attempting to reconcile the demands of two independent sovereigns. Their political opinions were constrained by religious convictions that superseded temporal ties. The Quakers rallied to their defense in an effort to remind the Court of its historic duty to effect the promise of religious freedom.

2. THE OPINIONS

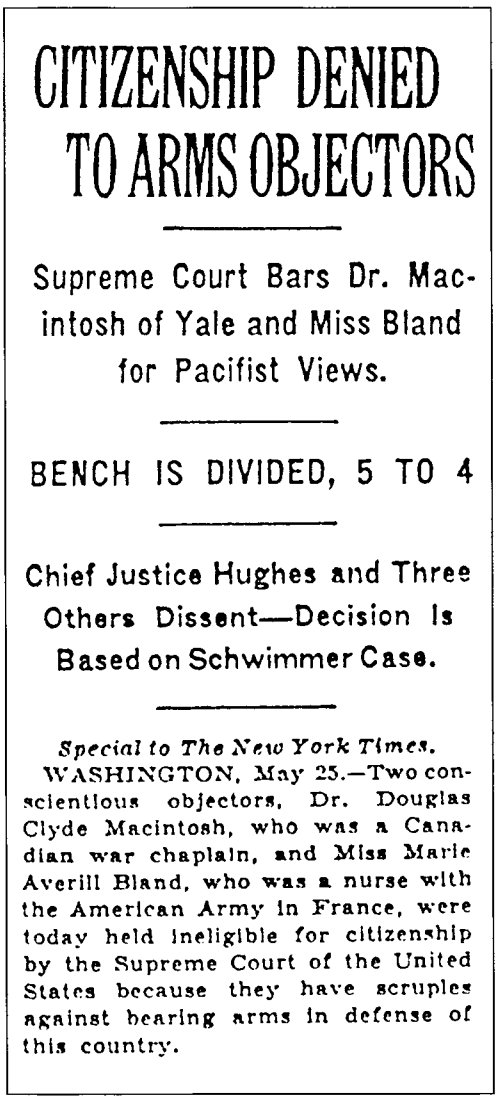
It may be that proof of identity with a larger community alarmed some Justices. If Schwimmer was dangerous because she intended to influence others whom she might meet, Bland and Macintosh may have seemed dangerous as symbols of an already well-established group.[95] Stephen Carter has noted that "America's legally constituted sovereigns have generally been less kind to dissenting groups than to dissenting individuals, perhaps because the one is more dangerous than the other."[96] Regardless of the Court's reaction to their claims of group identity, Bland's and Macintosh's reservations could not be described as idiosyncratic. Neither could they be labeled extreme, since these churches' declarations—and the Kellogg-Briand Pact, for that matter—seemed to be far more expansive than the limited desire to judge the righteousness of particular wars. Nevertheless, the Court treated these religious claims no differently than it had treated Schwimmer's atheist-pacifist claim two years earlier.

a. Sutherland's Majority

Five Justices were not persuaded that a conscience "dictated by the will of God" differed significantly from a conscience not so encumbered. In an opinion authored by Justice George Sutherland, the Court reversed the decision of the Second Circuit and denied Macintosh's application for citizenship. Writing for a 5–4 majority,[97] Justice Sutherland held that *Schwimmer* controlled this case. Moreover, he described all ideological objections to war as mere personal choices. The purpose of the oath of allegiance and the testimony offered in support thereof was to determine whether the applicant "is willing to support the government in time of war, as well as in time of peace, and to assist in the defense of the country, *not to the extent or in the manner that he may choose*, but to the extent and in such manner as he lawfully may be required to do."[98] In contrast to the Second Circuit's careful distinction of Macintosh's reservation from Schwimmer's, Justice Sutherland treated the two as if they were identical—simple, personal preferences that could be forgotten or manipulated in the interest of national needs. Macintosh's problem was that "he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand."[99] The concurrence of so many *amici* apparently mattered little to Justice Sutherland's majority.

The proposition that such individual preference could interfere with the policy of the nation was inimical to national prosperity. Indeed, the nation's right to self-preservation could trump many individual rights, including the rights of conscience.[100] True enough, Justice Sutherland wrote, the United States is a nation that recognizes "the duty of obedience to the will of God."[101]

> But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and obedience to the laws of the



CITIZENSHIP DENIED TO ARMS OBJECTORS

Supreme Court Bars Dr. Macintosh of Yale and Miss Bland for Pacifist Views.

BENCH IS DIVIDED, 5 TO 4

Chief Justice Hughes and Three Others Dissent—Decision Is Based on Schwimmer Case.

Special to The New York Times.

WASHINGTON, May 25.—Two conscientious objectors, Dr. Douglas Clyde Macintosh, who was a Canadian war chaplain, and Miss Marie Averill Bland, who was a nurse with the American Army in France, were today held ineligible for citizenship by the Supreme Court of the United States because they have scruples against bearing arms in defense of this country.

In 1931, the Supreme Court divided five to four to reverse the lower courts' rulings and deny citizenship to Macintosh and Bland. According to *The New York Times*, Justice George Sutherland raised his voice "emphatically at times" in delivering the majority opinion from the Bench.

> land, as well those made for war as those made for peace, are not inconsistent with the will of God.[102]

Having reduced Macintosh's religious scruple to a matter of personal preference, and then elevated the state's interest to a cosmic imperative, Justice Sutherland concluded that the individual religious conscience must yield.

The Court quickly dispatched Bland's claim as "ruled by the decision just announced in *United States v. Macintosh*."[103] Justice Sutherland took the opportunity, however, to cast the Court's decision in these cases as an exercise in preserving the separation of powers. Congress had prescribed the words of the oath, and those words, said the Court, "do not admit of the qualification upon which the applicant insists. For the court to allow it to be made is to amend the act and thereby usurp the power of legislation vested in another department of the government."[104] The Court avoided the substantive issue—whether expressing a bona fide religious conviction limiting one's participation in certain wars rendered a person unattached to the principles of the Constitution.

b. The Hughes Dissent

Justice Sutherland's separation-of-powers argument in *Bland* responded to vigorous arguments articulated by Chief Justice Hughes in his dissent to *Macintosh*.[105] Hughes wrote that Congress was indeed careful in describing the necessary attitudes of applicants of naturalization, and it was not for the Court to infer further requirements, especially not where the attitude at issue was so closely intertwined with religious belief.[106] Hughes explained:

> Among the specific requirements as to beliefs, we find none to the effect that one shall not be naturalized if by reason of religious convictions he is opposed to war or is unwilling to promise to bear arms. . . . [T]he omission of such an express requirement from the naturalization statute is highly significant.[107]

By the principle of *expressio unius*, Congress intended not to include religious objection to bearing arms as a disqualifying mental attitude.

Yet even if the Court should supply additional bases for denial of citizenship—indeed, this was the project undertaken by the Court—it ought not hold religious belief to be

such a disqualifier. Specifically, Hughes noted that the oath required for naturalization was the same oath that had been required of other federal officeholders for years.[108] By the terms of the Constitution, such an oath could not constitute a religious test.[109] The Chief Justice continued,

> When we consider the history of the struggle for religious liberty, the large number of citizens in our country, from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties.[110]

Surely the same oath that every federal officer had taken since the late nineteenth century did not preclude individuals with religious objections to bearing arms from serving in the government. To the contrary, several Quakers had served in President Lincoln's cabinet.[111] The oath did not impose any religious test then, and it ought not be construed to do so now.

Underlying this principle of statutory construction was the Chief Justice's own conception of religious belief and obligation. For Hughes, the problem of religion in politics was the problem of conflicting duties, not inconvenient choices. He explained his general theory of religion in public life:

> When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. . . . The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. . . . One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.[112]

Because the "essence" of religion was devotion to a sovereign other than the state, Hughes wrote, "Professor Macintosh [and Miss Bland], when pressed by the inquiries put to [them], stated what is axiomatic in religious doctrine."[113]

The Chief Justice recognized the unique restraints that religious belief places upon the individual's will. He understood well the duty of religious observance: "[F]reedom of conscience itself implies respect for an innate conviction of paramount duty."[114] As a result, only the clearest statement from Congress could justify an interpretation of a law that would subordinate allegiance to God to allegiance to the State.[115] This argument echoes the republican understanding of freedom of conscience in its recognition of the encumbering effect of religious obligation and its conception of the self as constrained by the duties owed to the divinity. Hughes' respect for the individual's liberty to perform his obligations to his God was remarkable; one biographer has written that "the statements of the Chief Justice represented a lofty libertarian conception rarely excelled in judicial opinions."[116]

Joining the Chief Justice's dissent was Harlan Fiske Stone, who had been a member of the 6–3 majority in *Schwimmer*.[117] Justice Stone recognized the clear distinction between the two cases. In fact, he prepared his own dissent in *Macintosh* based largely on that ground.[118] Stone approved the decision to deny Schwimmer's application for citizenship because she made clear her intention to encourage others to resist the government's war

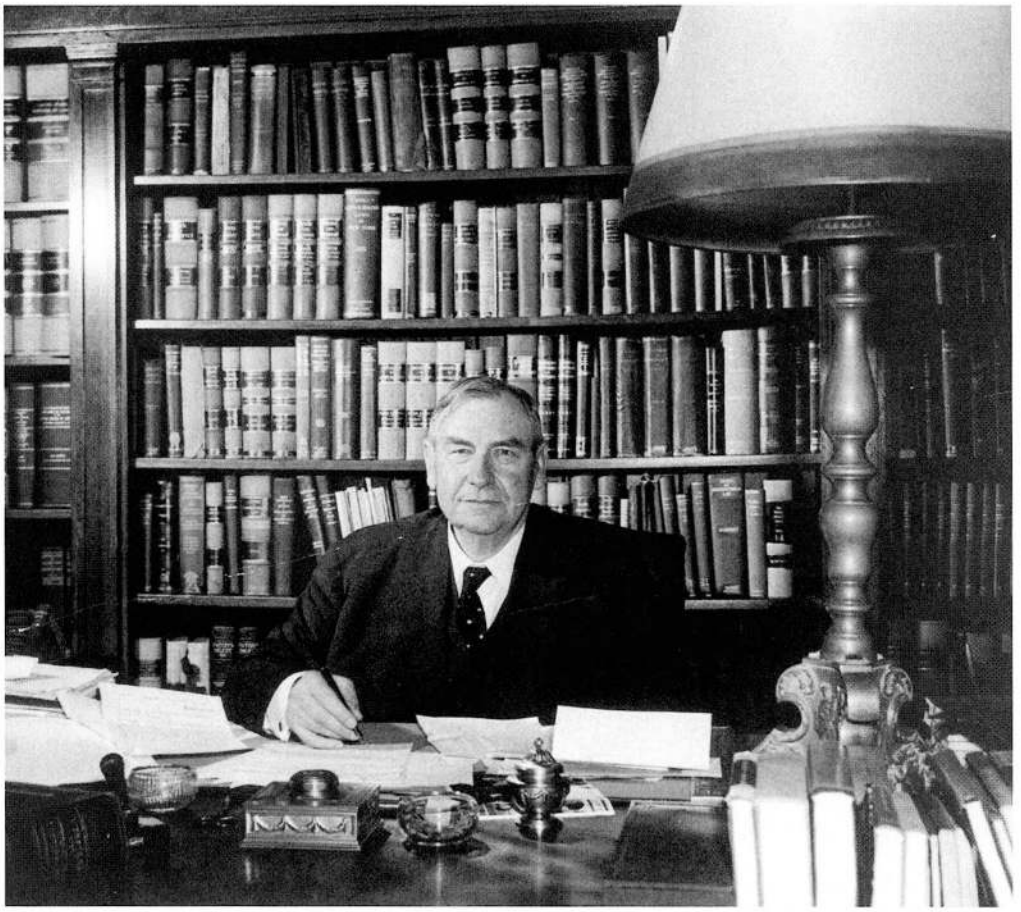
Rosika Schwimmer was a Hungarian-born linguist and atheist who made a career of lecturing others about the virtues of pacifism. When she refused to pledge to take up arms for the United States, the Supreme Court rejected her citizenship application. The Court later made no difference between religious-conscientious objection and atheist-conscientious objection in using *Schwimmer* as a precedent for *Macintosh*.

policies.[119] That fact of conduct, not the extremity of her political opinion, justified the result in her case. Indeed, Stone had urged Justice Butler to edit his opinion in *Schwimmer* to focus on the petitioner's behavior, rather than just her pacifist ideology.[120] This belief/action distinction, familiar to the Court at least since 1879,[121] drove Stone's reasoning. The reason that he did not deliver his own dissent in *Macintosh* was that the Chief Justice made the same point by declaring that *Schwimmer* stood on its own "special facts."[122] Significantly, Stone did not distinguish the cases on the fact that Schwimmer's motivation for objection differed from Macintosh's.

That is not to say, however, that Stone was insensitive to the special circumstance of religious objection. As a member of the Board of Inquiry during World War I, Stone had occasion to entertain numerous claims of conscientious objection.[123] That experience produced in him an "instinctive distrust of radicals and agitators."[124] Nevertheless, while Stone was especially wary of objector claims that sprang from "false social and political theories," he hesitated to dismiss claims that were religiously motivated.[125] Thus, "[a] religious dissenter such as Professor Macintosh . . . could enlist his support."[126]

3. JUDGING *MACINTOSH*

The sweep of Justice Sutherland's majority opinion alarmed some commentators. Despite the clear differences between Schwimmer's and Macintosh's ideas about war, the opinion held that *Macintosh* was controlled by the principle expressed in *Schwimmer*.[127] Sutherland further explained that the nation's "duty to survive" required the government to proceed only upon the assumption that "unqualified allegiance to the Nation and submis-



Although he had been in the 6–3 majority in *Schwimmer*, Justice Harlan Fiske Stone (above) joined Chief Justice Charles Evans Hughes' dissent in *Macintosh*. Stone did not distinguish the two cases on the basis of the plaintiffs' differing motivations for objecting to bear arms. Instead, he reasoned that Schwimmer's clear intention to encourage others to resist the government's war policies meant that her conduct—not her ideology—made her unfit for citizenship.

sion to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."[128] This principle simply meant to abolish the theological-political problem altogether, by declaring the supremacy of the political in every circumstance.

University of Illinois law professor Frederick Green attacked this principle, noting that neither the Constitution nor the Naturalization Act required what the Court seemed to require of American citizens. "That a good citizen should not refuse to fight because of conscientious scruples is only the opinion of the court," he wrote.[129] Green then explained why judges might approach this question differently than might ordinary citizens:

> It may be natural for a judge whose life is spent in vindicating the claims of law, and to whom the unqualified character of legal duty to obey the law is axiomatic, to attribute a similar primacy to moral duty to obey the law and place it above other moral duties. It is not natural for the man in the street to do so. To him obedience to law is one duty among many others. Ordinarily there is no conflict between duties, but, if conflict arises, the duty to obey law seems to him to

> have no necessary or inherent supremacy. If it is a principle of the Constitution that it should have supremacy, it is doubtful that many citizens are attached to that principle.[130]

Moreover, Green explained, Justice Sutherland's assertion that the will of Congress must be deemed to be consistent with the will of God was hardly compatible with the traditional republican notion that the legislature ought not be accorded such status by law, but only (if at all) by popular approbation.

> So far from thinking that the government can safely proceed only "upon the assumption . . . that unqualified . . . submission and obedience to the laws . . . are not inconsistent with the will of God," an ordinary person would be apt to say that it is dangerous for the government to proceed upon such an assumption, and that a government that habitually does so is a bad government. He would say that instead of taking it for granted that its laws are in accordance with God's will, the government should take anxious thought to make and keep them so. . . .[131]

Homer Cummings (above) was counsel to James Girouard, a Canadian-born Seventh-day Adventist to whom the Court granted citizenship in 1946, even though he stated that his religious convictions forbade him to take up arms personally. The decision was guided in part by memory of the honorable service of some ten thousand noncombatant Seventh-day Adventists during the Second World War, mostly in the medical corps.

Justice Sutherland and his brothers in the *Macintosh* majority had subscribed to a principle at once overbroad and anti-republican. Such a principle would not last.

C. *Girouard v. United States* (1946)

The case that finally tested the vitality of the *Macintosh* rule arose in late 1943, when James Louis Girouard filed a petition for naturalization in the federal court in Massachusetts.[132] Born in Canada in 1902, Girouard had lived in the United States since 1923. He was an engineer by trade, and a professed Seventh-day Adventist. When asked whether he would bear arms for the United States, Girouard answered that he could not, on account of his religious beliefs. "[I]t is a purely religious matter with me," he said; "I have no political or personal reasons other than that."[133] Girouard did not seek an exemption from all kinds of military service; rather, he expressed a religious scruple only against actual combat. The district court ordered Girouard admitted to citizenship, but the Court of Appeals for the First Circuit reversed that decision.[134] Girouard's case went up to the Supreme Court.

1. THE ARGUMENTS

Put simply, Girouard urged the Court to overrule *Bland*. *Schwimmer* and *Macintosh* were distinguishable on their facts, since

Girouard had expressed an objection only to combat. Rosika Schwimmer had denied any duty to participate in any war, and Douglas Macintosh had reserved the right to judge the morality of any particular war. Girouard simply stated that he could not fight in any war, regardless of the circumstance.[135] This limited reservation resembled that expressed by Marie Bland some fifteen years earlier.

Counsel for Girouard—Homer Cummings, William Donnelly, and David Coddaire—argued plainly that "[e]xpression of willingness to bear arms is not a condition upon the right to naturalization."[136] The oath by its terms did not require the declarant to agree to bear arms personally, nor had that oath been construed to require as much when administered to various civil officers of the federal government.[137] Moreover, Congress and state legislatures had long allowed religious objectors to offer noncombatant service in lieu of actual combat.[138] These arguments echoed, and often quoted, Chief Justice Hughes's *Macintosh* dissent.

Girouard further argued that the phrase "attached to the principles of the Constitution" should not be construed to require willingness to bear arms.[139] Congress employed a general phrase in the statute, and such an ambiguous provision should not be held to circumscribe the religious liberty guaranteed specifically by the First Amendment.[140] More practically, the experience of Seventh-day Adventists in World War I proved the value of noncombatant service in wartime.[141]

Finally, Girouard's counsel offered a statutory argument in defense of his position. Turning to amendments made in 1942 to the applicable Nationality Act, they argued that Congress had specifically provided that certain veterans could be naturalized without swearing to bear arms.[142] Of course, Girouard was not covered by these provisions, since he was not a veteran. Nevertheless, these amendments demonstrated that "Congress, without abrogation or modification of the statutory requirements as to oath and attachment to the principles of the Constitution, has expressly recognized that such requirements may be fulfilled by an otherwise qualified alien despite his religious conviction against bearing arms."[143]

The Government agreed that this case was indistinguishable from *Bland*.[144] Where it disagreed with Girouard was on the question whether Congress had changed its mind since *Bland*. According to the Government, Congress had chosen not to revisit the substance of the oath or the requirements for naturalization because it had adopted the Court's constructions in *Schwimmer*, *Macintosh*, and *Bland*.[145] Surely aware of considerable public concern, Congress considered several proposals to overturn those decisions. The fact that it passed up all those opportunities, even while it made other changes to the naturalization laws, suggested that Congress concurred in the Court's reading of the oath.[146] Passage of the Nationality Act of 1940 and the 1942 amendments—neither of which altered the basic requirements for naturalization—confirmed this conclusion.

Next, the Government argued that the statutory requirement that the alien be willing to bear arms posed no difficulty for the First Amendment, because "[t]he freedom of religion guaranteed by the First Amendment does not include an exemption on religious grounds from military service or from the duty of bearing arms."[147] This conclusion followed from an examination of the legislative history of the Amendment. Several states had proposed in their ratifying conventions an amendment that would have constitutionalized a religious exemption from military combat.[148] James Madison's proposed amendments included a similar provision. In the end, the religious exemption was not included in the Bill of Rights. Girouard argued that the substance of the proposal had been incorporated into the First Amendment; the Government countered that the failure of the exemption in the First Congress proved that

it was not deemed to be a constitutional right.[149]

After an extended rebuttal to Girouard's statutory construction argument concerning the 1942 amendments to the Nationality Act, the Government added a final argument. "While the *Schwimmer*, *Macintosh*, and *Bland* cases are not open for reconsideration here in view of subsequent congressional action, the logic of events since they were decided confirms their soundness."[150] The Government recognized the popular discomfort with the precedents.[151] Nevertheless, "the inexorable sweep of our national experience since 1929 and 1931" affirmed the reasoning and results of the majority opinions.[152] The events leading up to World War II, especially the attack on the United States itself, magnified the need for citizens' commitments to defend the nation.[153] In short, "the test of one's willingness to defend the Constitution against all enemies becomes more critical and more real when the enemy actually attacks."[154]

2. THE OPINIONS

Having had some fifteen years—and another war—to consider Chief Justice Hughes's *Macintosh* dissent, the Court finally reversed course and overruled *Schwimmer*, *Macintosh*, and *Bland*. In *Girouard v. United States*,[155] the Court held that a Canadian-born Seventh-day Adventist should be granted citizenship, even though he stated that his religious convictions forbade him to take up arms personally.[156] Relying chiefly upon Hughes's dissent in *Macintosh*, Justice William O. Douglas wrote that the Court should not impute to Congress the intent to require a willingness to bear arms personally "unless it spoke in unequivocal terms."[157]

This decision was guided in part by memory of the honorable service of some ten thousand noncombatant Seventh-day Adventists (mostly in the medical corps) during World War II.[158] The decision also recognized the strained reading of the loyalty oath prescribed by the earlier decisions.[159] Moreover, two lower courts had decided similar cases in the intervening years and expressed serious reservations about following the *Macintosh* rule.[160] But, the opinion in *Girouard* was largely reflective of the single idea that Congress cannot make ideological conformity the test of citizenship. Justice Douglas quoted extensively from Justice Holmes' dissent in *Schwimmer*, as well as Chief Justice Hughes's dissent in *Macintosh*, to make the point that "freedom of thought" warranted the highest protection from American courts.[161]

"The victory for freedom of thought recorded in our Bill of Rights," Douglas wrote, "recognizes that in the domain of conscience there is a moral power higher than the State."[162] For that reason, the American tradition had been to accommodate individuals' religious scruples to certain forms of military service. To deny citizenship on the basis of religious objection to certain forms of service in uncertain future wars would constitute "an abrupt and radical departure from our traditions."[163] Such language clearly recalls the argument of Chief Justice Hughes in *Macintosh*.

Less clear is the extent to which Douglas adopted Hughes's understanding of religion. Douglas relied upon a notion of "freedom of thought" that included religious belief but did not distinguish religious convictions from other kinds of beliefs. For instance, the *Girouard* decision explicitly overruled *Schwimmer* as well as *Macintosh* and *Bland*, despite the fact that everyone agreed that Schwimmer's objection to military service was not religiously grounded at all. Moreover, as much as Douglas relied upon the Hughes dissent in *Macintosh*, he also relied upon Justice Holmes' dissent in *Schwimmer*.

Holmes' dissent had focused on the Court's insensitivity to Schwimmer's right to entertain pacifism as a political opinion. "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other," he wrote, "it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that

we hate."[164] If free speech meant anything, he suggested, it meant that citizenship could not be conditioned upon orthodox thought. But, in an ironic conclusion, Holmes likened the atheist Schwimmer to the Quakers who had historically opposed war and were granted exemptions from military service.[165] He thus equated religiously motivated objection to war with general objection grounded in some intellectual opinion. Holmes' casual conclusion here represents an early expression of the reduction principle: Religious expression is no different from atheist expression.

Douglas's equal importation of Hughes and Holmes in the *Girouard* opinion reveals an inclination to treat religious convictions as if they were ordinary political opinions. The Court's willingness to overrule three of its prior decisions in *Girouard* signals a profound disagreement with the reasoning of the earlier Courts. Yet, equal reliance upon the Holmes dissent in *Schwimmer*, which ignored the religion question, and the Hughes dissent in *Macintosh,* which confronted it forcefully, renders it difficult to ascribe to the *Girouard* Court any coherent understanding of religious conviction.

III. The Persistence of Choice

"The decision of the Supreme Court in *Girouard v. United States* should be regarded with approval by proponents of civil liberties everywhere," wrote one commentator in 1946.[166] Arthur Miller likewise praised the decision in a letter to the editors of the *American Bar Association Journal.* He wrote that the Court's ruling recognized that "persons with such religious scruples are under limitations as real to them as those whose physical infirmities prevent their taking an actual physical part in combat."[167] Such applicants as Girouard, he wrote, "are not to be, under our Constitution, persecuted for their religious beliefs."[168]

Although the result in *Girouard* suggested that the Court had finally recognized the duties essential to religion, but the opinion leaves us unsure. How can we make sense of the apparent reversal? It seems that despite the opposite results in *Macintosh* and *Girouard*, the Court did not change much at all. Indeed, it thought about religion in the same way, but it masked its preference for choice with the language of duty. In the end, the Court reduced religion to ordinary belief and decided in *Girouard* that public safety could tolerate one Seventh-day Adventist's idiosyncrasies. The Court and other legal scholars demonstrated a preference for the choice-based understanding of religion by employing the interpretive tools of reduction and marginality.

A. Reduction

The principle of reduction describes the manner in which the Court has equated religious convictions with ordinary opinions.[169] Mark Tushnet explains the operation of the principle thus:

> The reduction principle divides the religious beliefs and activities into three components: the belief itself, the body of ritual activities that accompany belief, and the impact of belief-motivated actions—including rituals—on secular interests. Then, for deciding free exercise issues, the reduction principle applies to each of these components the tests that have been developed to deal with problems of free speech.[170]

The Court denies that there is anything different about religion; in other words, a conviction concerning the character of God and God's laws is substantially equivalent to an opinion about a political leader or the tax code. As a result, freedom of religion is reduced to freedom of expression and denied any of the special status suggested by its particular mention in the text of the First Amendment.[171]

The reduction principle was current among legal scholars even at the time the

Macintosh decision came down. In his commentary on the decision, Professor John H. Wigmore defended the Court's effort to defeat the applicant's asserted "right of individual secession."[172] Wigmore began by noting that Douglas Macintosh presented a personality well suited for a test case because he "made it possible [for the Court] to consider squarely the issue of law without any of those lurking prejudices that have often been associated with the type of conscientious objector so prominent in 1917–18."[173] Even this initial observation betrays a blindness to the differences between Macintosh and Schwimmer. The important difference for Wigmore, it seems, was that Macintosh was the kind of applicant who did not spark the "lurking prejudices" that, to Wigmore's mind, explained the earlier decisions in *Schwimmer* and other cases. What made Macintosh different was that he was "neither a slacker nor a coward," but a man with a "good Scottish name and ancestry" and "a racial congeniality with the fundamental stock of our nation."[174] To be sure, Wigmore accounted for Macintosh's religious identity, but that identity—Macintosh's position as clergyman and divinity professor—was important only insofar as it made Macintosh "a man of exemplary standing."[175] Moreover, Wigmore announced that because he had Scottish ancestry, Macintosh presumably also possessed a "sturdy genuine conscience."[176] For Wigmore, the key difference between Macintosh and Rosika Schwimmer lay in social status and ancestry, not origin and content of belief.

Wigmore's analysis of the decision further reveals his unwillingness to distinguish religious beliefs from worldly political opinions. For Wigmore, it was inconceivable that a citizen should accept the benefits of citizenship without bearing all of its burdens. "The motive is immaterial," he wrote; "the fact would be intolerable."[177] And if Macintosh were permitted to reserve the right not to take up arms personally in all future wars, "then logically the next applicant, and the next, and the next, may be admitted with reservation of the right to disobey some other law or set of laws."[178] Adopting Macintosh's argument would place the United States on a slippery slope toward anarchy.

The Court itself gave effect to the principle of reduction in cases decided between 1931 and 1946. Most relevant are the flag-salute cases, *Minersville School District v. Gobitis*[179] and *West Virginia State Board of Education v. Barnette*.[180] The Court in these cases struggled to balance the interests of the nation at war with the freedom of the individual to exercise his religious convictions. While the Court reached opposite results in these cases, it did not change the way it thought about religion. It merely changed its mind about the appropriate balance between free expression (generally) and community norms.

In *Gobitis*, the Court held that requiring Jehovah's Witness students to salute the American flag each school day, despite their religious convictions forbidding such "idol worship," did not offend the First Amendment's guarantee of religious liberty.[181] According to the Court, the state's interest in promoting national unity was sufficient to overcome the schoolchildren's rights to abstain from exercises that offended their religious convictions.[182] The law was impressed more by the "binding tie of cohesive sentiment" than by the call of God upon individual souls.[183]

Just three years later, the Court reversed itself in *Barnette*. There the Court affirmed the right of Jehovah's Witness schoolchildren to refrain from pledging allegiance to the American flag, despite a state policy requiring them to do so.[184] The children had been expelled from their school, and they challenged the expulsions on the grounds that the policy requiring them to salute the flag violated their First Amendment rights to free exercise of religion and freedom of speech.[185]

Were it not for the reasoning and the rhetoric of the opinion this case produced, the

Court's decision would seem to be a brilliant victory for the free exercise of religious convictions. Justice Robert Jackson, writing for the Court, stated that this case was not about religion at all. He wrote that the issue presented by the Witnesses did not "turn on one's possession of particular religious views or the sincerity with which they are held."[186] Rather, the issue was one of free thought and expression. Turning a remarkably blind eye to the obvious importance of religious conviction in the case, Justice Jackson used the occasion to make a sweeping pronouncement in favor of free expression: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[187]

What did the Court say about religion? Here was a case brought by Jehovah's Witness schoolchildren. They went to court because the State of West Virginia required them to salute a symbol. They refused because their religious convictions forbade their saluting any worldly symbol. For these Jehovah's Witnesses, duty to God required dissent. Rather than recognizing the patently religious quality of their dissent and offering protection for the exercise of their religious convictions, however, the Court reduced their convictions to the level of intellectual whimsies and offered protection only for their expressive effects.

Indeed, the Court resolved the Witnesses' case by speaking of "politics, nationalism, religion, or other matters of opinion."[188] Elsewhere the Court summarized the flag-salute controversy as a dispute about "matters of opinion and political attitude."[189] Thus, while the Court affirmed the right of these dissenters to refrain from saluting the flag as the state required, it did so only by denying the essential character of their dissent—its religious exercise. By glossing the distinction between religious conviction and ordinary attitude, the Court signaled deafness to the language of duty, preference for the language of choice, or both. By conflating religious exercise with "other matters of opinion," the Court gave effect to the principle of reduction.

B. Marginality

Often coupled with the principle of reduction is the principle of marginality.[190] This principle describes the manner in which the Court has affirmed the value of religious freedom only where the exercise of that freedom would be largely inconsequential to the social or political order.[191] The Court's favorable treatment of free-exercise claims by Seventh-day Adventists in South Carolina or Old Order Amish in Wisconsin, for example, may be understood by this principle.[192] In these cases, the Court could be confident that the effects of granting an exemption to religious objectors would not significantly upset the government's interest in administering its programs.[193] In short, the Court has justified religious liberty only by its insignificance.

Professor Wigmore expressed this principle as well in his defense of the *Macintosh* decision. He interpreted legislative exemptions from military service as applying only to groups whose creeds specifically forbade participation in all wars.[194] The "vital distinction between religious and merely conscientious objectors," Wigmore wrote, was that the former were members of larger groups who shared certain beliefs toward war.[195] Macintosh's claim, he wrote, "was a purely individual one, not based on the creed of any 'religious sect or organization.'"[196] Of course, Macintosh had not created his own religion; he was a clergyman in a mainline Protestant denomination. The fact that his denomination, as an institution, did not require its members to advance his position did not alter the nature of his belief. What altered the respect due his belief was the fact that he was part of such a large denomination; if there were many more Macintoshes, war efforts might really suffer. The kinds of groups that profess creeds forbidding participation in all wars are character-

istically small; accommodating these groups would cost very little.[197]

The result in *Girouard* also reflected the operation of the marginality principle, whereby the Court offers protection to religious dissenters only where they are so few in number that accommodation would be relatively cheap. The Court in *Girouard* noted that there were already some ten thousand Seventh-day Adventists serving in noncombatant roles in the United States military.[198] Girouard himself stated that he was willing to participate in such roles.[199] Perhaps the Court really came to believe that "[t]otal war in its modern form" highlighted the need for loyal noncombatants in the war effort.[200] Or perhaps it was clear that this individual, and this group of religious people, were simply too scarce to cause much trouble. Indeed, the Justices could easily distinguish a claim by a Seventh-day Adventist, a single member of a minority sect, from claims brought by a Baptist and an Episcopalian.

Several decisions following the rule in *Girouard* confirm the operation of the marginality principle in religious-objector naturalization cases. In 1949, for example, the Court reversed a judgment of the Kansas Supreme Court denying citizenship to a Quaker man who refused to take any part in military activities.[201] This applicant was less willing to support a war effort than either Macintosh or Girouard had been; he even stated that "he was willing to have repealed all laws providing for armed services."[202] Likewise, the court in *In re Wiebe*[203] approved the application of a German-born Russian national who had answered that he would not be willing to take up arms in defense of the United States.[204] Wiebe was a member of the Mennonite church.[205] *Girouard* was cited as late as 1970 in a decision granting the application for citizenship of a Jehovah's Witness.[206] *Girouard* has thus stood to protect the Quaker, the Mennonite, and the Witness. To the extent that it has opened the gates to citizenship, it has done so only for members of marginal religious groups.

These principles—reduction and marginality—likely explain the confusion in the *Girouard* opinion. Justice Douglas provided good evidence of his adoption of the reduction principle. He lifted words from Holmes and Hughes, words about free thought and words about the essential nature of religious obligation, and formed from them a compound of conscience. That compound denied the unique quality of religious conviction and exercise, and it seemed to serve the interests of applicants who were members of marginal religious groups. The opinion in *Girouard* offered a different result from the earlier naturalization cases, but not a different understanding of religion.

Conclusion

The Supreme Court has convinced itself that it need not define religion in order to protect religious freedom. And that may be right. But, those who define the limits of our freedom do hold certain assumptions about the nature of religious belief that color their judgments. Specifically, those who conceive religion to be a choice—one among many possible ends—will likely conclude that most government interests outweigh the right of the individual to choose his religious beliefs or the manner in which he exercises those beliefs. By contrast, those who understand religion more as a regime of duties—an encumbrance upon the will of the individual—will be more reluctant to burden the religious believer because he responds to another, more powerful sovereign. These basic assumptions underlie the decisions that judges make in religious-liberty cases.

The contest of these assumptions animated the Court's discussion of the naturalization cases in the years from 1931 to 1946. In briefs and opinions, the idiom of duty and the idiom of choice expressed opposing conceptions of religious observance. Indeed, the precise meaning of the phrase "attached to the principles of the Constitution" turned on the

Court's adoption of one or the other understanding of religious belief. Thus, the question whether religion is better understood as paramount duty or preferential choice was as significant to the law before the 1940s as it has been since.

And the Court expressed itself in various ways. In the early 1930s, the duty-based understanding of religion could only be found in Chief Justice Hughes's *Macintosh* dissent. By 1946, that understanding made its way into a majority opinion, but in a curious way. Indeed, that opinion gave voice to religious duty only as a twin of ordinary, nonreligious choice. The flag-salute cases gave the Justices practice in the art of reduction, the denial of religion's unique, encumbering character. So familiar were they with that interpretive tool that their final act in the naturalization story—their vindication of the Seventh-day Adventist Girouard—expressed no change in assumptions concerning the nature of religion, but only a new calculus of accommodation.

This fundamental debate about the nature of religious belief has not been confined to courts. Politicians and cultural leaders have likewise joined the debate. For example, in the wake of the Court's decision in *Girouard*, Congress codified certain exceptions to the oath of allegiance for religious objectors.[207] This time Congress defined its terms clearly, and it did so in a manner that reflects an appreciation for the duties of religion. A nearly identical provision in current federal law makes certain exceptions for applicants who prove objection to military service "by reason of religious training and belief."[208] The statute further defines "religious training and belief" to mean "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [the term] does not include essentially political, sociological, or philosophical views or a merely personal moral code."[209] Congress lifted this language directly from Chief Justice Hughes's dissent in *Macintosh*. As much as the Court's treatment of religion in the naturalization cases suggests the triumph of choice as the touchstone of modern constitutional law, the legislative response to the Court's decisions suggests that there remains some vital, "premodern" attachment to the idiom of duty.[210]

This single episode in the development of the law concerning religious objection reveals the timeless contest of assumptions that attends the theological-political problem. Our Constitution frames the problem in a unique way, expressing as a core political value the citizen's right to oppose his government when religious duty calls. The task of the law, and of politics, has been to decide just when the needs of the state may overcome the citizen's loyalty to God. When judges and legislators decide how good citizens should behave in a republic—and under a Constitution—dedicated to the protection of religious liberty, they must take into account the obligatory aspects of religious observance. The First Amendment, or the concept of religious liberty generally, may not require exemption for religious objectors in all or even most circumstances. Determining whether exemptions are warranted in particular circumstances is a matter of mediating competing claims to loyalty—competing duties. Courts and legislatures demonstrate an understanding of this fundamental problem of political life only by recognizing the sense of duty inherent in religious exercise. The theological-political problem is surely a difficult one, but it will not be solved by ignoring the unique character of religious belief.

***Note:** Thanks are due to Professors Charles W. McCurdy and G. Edward White of the University of Virginia School of Law for their comments and encouragement.*

ENDNOTES

[1]Frederick Green, "*United States v. Macintosh*—A Symposium," 26 *Ill. L. Rev.* 375, 394 (1931).

[2]For a description of the problem, *see* John G. West, Jr., **The Politics of Revelation and Reason: Religion and Civic Life in the New Nation** 3 (1996). West writes:

> Imagine a group of citizens who claim to be citizens of both the United States and some other country. Imagine further that they claim their citizenship in this other country is more important than their U.S. citizenship. Indeed, they will risk torture, disaster, and death on behalf of their other country. . . . If you can picture this, you have grasped the fundamental challenge that religion has posed to politics since at least the rise of Christianity in the Roman Empire.

Id.

[3]8 U.S.C. § 1427(a)(3) (1999).

[4]*Id.* § 1448(a)(5)(A).

[5]*See id.* § 1448(a). This section provides that "a person who shows by clear and convincing evidence . . . that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief" is not required to pledge that he will "bear arms on behalf of the United States when required by the law." Rather, such a person must merely swear that he will "perform noncombatant service in the Armed Forces of the United States when required by the law." Similarly, a person whose religious training and belief forbids any military service is required to swear that he will "perform work of national importance under civilian direction when required by the law." *Id.*

The statute defines "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." *Id.*

These provisions were introduced as part of the Immigration and Nationality Act of 1952, 66 Stat. 163, 258–59 (1952).

[6]*See Petition for Naturalization No. 8314 of Mahmoud Kassas*, 788 F. Supp. 993, 994 (M.D. Tenn. 1992).

[7]*Id.* at 993.

[8]*See id.* at 994.

[9]*See Gillette v. United States*, 401 U.S. 437 (1971).

[10]*See Girouard v. United States*, 328 U.S. 61 (1946); *United States v. Bland*, 283 U.S. 636 (1931); *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929).

[11]Section 4 of the Naturalization Act of 1906, 34 Stat. 596 (1906), required that an applicant for naturalization demonstrate that during his residency in the United States prior to applying for citizenship, he had "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." *Id.* at 598. This Act remained in effect until the codification of all naturalization laws in the Nationality Act of 1940, 54 Stat. 1137 (1940). This particular requirement has survived intact to the present day. *See supra* note 3 and accompanying text.

[12]*See Bland*, 283 U.S. at 637; *Macintosh*, 283 U.S. at 626–27; *Schwimmer*, 279 U.S. at 653.

[13]*See Girouard*, 328 U.S. at 70.

[14]*See id.* at 69.

[15]*See*, e.g., *Thomas v. Review Bd. of the Ind. Indep. Employment Sec. Div.*, 450 U.S. 707, 714–16 (1981) (noting that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task" and then concluding, with little precise definition, that some claims could be "so bizarre, so clearly nonreligious in motivation" as not to warrant First Amendment protection). Commentators have noted the Court's fear of formal definition. *See, e.g.*, Val D. Ricks, "To God God's, To Caesar Caesar's, and To Both the Defining of Religion," 26 *Creighton L. Rev.* 1053, 1054 n.2 (1993) (noting the few cases where the Court has mentioned a definition of "religion"); Kent Greenawalt, "Religion as a Concept in Constitutional Law," 72 *Calif. L. Rev.* 753, 759 (1984) ("Achieving a decent fit with what the Supreme Court has said about defining religion in the last few decades is not particularly difficult, because the Court has said very little.").

[16]Steven D. Smith, **Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom** 63 (1995).

[17]*Id.*

[18]*See* Michael W. McConnell, "Religious Freedom at a Crossroads," 59 *U. Chi. L. Rev.* 115, 120–21 (1992) [hereinafter McConnell, "Crossroads"] ("The explanation [for the Court's religion decisions] presumably lies not in the logic of the Bill of Rights but in the Court's perception of religion.").

[19]The demise of the Free Exercise Clause has been well documented. *See generally* John W. Whitehead, "The Conservative Supreme Court and the Demise of the Free Exercise of Religion," 7 *Temple Pol. & Civ. Rts. L. Rev.* 1 (1997); Mary Ann Glendon & Raul F. Yanes, "Structural Free Exercise," 90 *Mich. L. Rev.* 477, 535 (1991); Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L. Rev.* 1409, 1410 (1990).

[20]494 U.S. 872 (1990).

[21]*See id.* at 881–82.

[22]*See id.* at 881. For example, the Court characterized *Cantwell v. Connecticut*, 310 U.S. 296 (1940)—the case that first applied the Free Exercise Clause to actions by the states—as a free-speech case as much as a free-exercise case. *See id.* Likewise, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case that has been lauded as a triumph for the Free Exercise Clause, was described as a parental-rights case as much as a religious liberty case. *See id.*

[23]*See Smith*, 494 U.S. at 883. Mary Ann Glendon and

Raul Yanes note that "[w]hat *Smith* brings out into the open is the degree to which the Court in prior cases had finessed free exercise problems by paying lip service to a compelling interest test, while in fact according a lower level of scrutiny to asserted governmental interests." Glendon & Yanes, *supra* note 19 at 523.

[24]*See* Smith, 494 U.S. at 876–82, 886 n.3. Since *Smith*, the Court has sustained only one simple Free Exercise challenge. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

[25]For an example of the Justices' preference for choice, *see Wallace v. Jaffree*, 472 U.S. 38, 53 (1985), where Justice Stevens wrote for the majority that "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful." *See also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring), where Justice O'Connor characterized the desire of Sabbath-observers as "the right to select the day of the week in which to refrain from labor." Responding to this characterization, Professor McConnell mused that "It would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God." McConnell, "Crossroads," *supra* note 18 at 125.

[26]*See* Michael J. Sandel, **Democracy's Discontent: America In Search of a Public Philosophy** 65–71 (1996) [hereinafter Sandel, **Democracy's Discontent**]; Michael J. Sandel, "Preface," **Liberalism and the Limits of Justice** xii–xiv (2d ed. 1998) [hereinafter Sandel, **LLJ**]; Michael J. Sandel, "Freedom of Conscience or Freedom of Choice?" in **Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy** 74–92 (James Davison Hunter & Os Guinness, eds., 1990) [hereinafter Sandel, "Freedom of Conscience or Freedom of Choice?"].

[27]*See* Sandel, **Democracy's Discontent**, *supra* note 26 at 12 ("For the liberal self, what matters above all, what is most essential to our personhood, is not the ends we choose but our capacity to choose them.").

[28]Sandel, "Freedom of Conscience or Freedom of Choice?," *supra* note 26 at 76.

[29]Sandel, **LLJ**, *supra* note 26 at xii.

[30]James Madison, **A Memorial and Remonstrance To the Honourable the General Assembly of the Commonwealth of Virginia**, reprinted in **Church and State in American History: The Burden of Religious Pluralism** (John F. Wilson & Donald L. Drakeman, eds., 2d ed., 1987).

[31]Sandel, **Democracy's Discontent**, *supra* note 26 at 66.

[32]*Id.*

[33]*Id.*

[34]This article does not argue that the Founders were republicans rather than liberals. The point is simply that the contest of assumptions concerning the nature of religious belief and the scope of religious liberty was alive then, and perhaps more of a contest.

[35]*See* Sandel, **Democracy's Discontent**, *supra* note 26 at 66.

[36]*Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

[37]Naturalization Act of 1906, 34 Stat. 596, 596 (1906).

[38]*See id.* at 596–98.

[39]*Id.* at 597.

[40]*Id.* at 598.

[41]*Id.*

[42]Congress retained these procedures and requirements when it enacted both the Immigration and Nationality Act of 1940, 54 Stat. 1137 (1940), and the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952).

[43]Samuel Hendel, **Charles Evans Hughes and the Supreme Court** 142 (1951).

[44]For the facts of this case, *see Macintosh v. United States*, 42 F.2d 845, 846–47 (2d Cir. 1930), rev'd, *United States v. Macintosh*, 283 U.S. 605 (1931). *See also* "Brief for the United States" at 3–7, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504); "Brief for Resp't" at 4–6, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504).

[45]*See Macintosh*, 42 F.2d at 847.

[46]*See id.* at 846.

[47]*Id.*

[48]*See id.* Macintosh answered Question 22—regarding his willingness to take up arms—with these words: "Yes, but I should want to be free to judge as to the necessity." *Id.*

[49]"Brief for the United States" at 7, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504) (quoting unpublished district court findings).

[50]For the facts of this case, *see Bland v. United States*, 42 F.2d 842, 843 (2d Cir. 1930), rev'd, *United States v. Bland*, 283 U.S. 636 (1931); "Brief On Behalf of Pet'r-Appellee" at 2–4, *United States v. Bland*, 283 U.S. 636 (1931) (No. 505).

[51]*Bland*, 42 F.2d at 843.

[52]*See id.*

[53]*See Bland*, 42 F.2d at 845; *Macintosh*, 42 F.2d at 849.

[54]*See Macintosh*, 42 F.2d at 847–48.

[55]*Id.* at 848.

[56]*See Bland*, 42 F.2d at 844.

[57]*Id.*

[58]*Macintosh*, 42 F. 2d at 848.

[59]*See United States v. Macintosh*, 282 U.S. 832 (1930).

[60]*See* "Brief for the United States" at 2, 26, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504). The "Question Presented" made no mention of the applicant's religious convictions: The question was "Whether an alien who . . . stated that he would be unwilling to bear arms in defense of the United States unless he believed 'that the war was morally justified,' and who reserved to himself

the right to judge the necessity for taking up arms, is entitled to naturalization." *Id.* at 1–2. And the "Argument" concludes, "Motives which preclude compliance with law, whether conscientious, religious, or sinful, are irrelevant when compliance is made the condition of a right." *Id.* at 26.

[61]*See id.* at 9, 12.

[62]*See id.* at 16–18.

[63]*See id.* at 26.

[64]279 U.S. 644 (1929). For a detailed account of the *Schwimmer* litigation, *see* Ronald B. Flowers and Nadia M. Lahutsky, "The Naturalization of Rosika Schwimmer," 32 *J. Church & St.* 343, 343–58 (1990).

[65]*See Schwimmer*, 279 U.S. at 653.

[66]*See id.* at 648–49.

[67]*See id.* at 648–49, 652. The majority opinion repeatedly noted the likelihood that Schwimmer would encourage others to abstain from wartime activities. *See, e.g., id.* at 652 ("[H]er testimony clearly suggests that she is disposed to exert her power to influence others to such opposition [to war].").

[68]"Brief for the United States" at 19, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504).

[69]*See id.*

[70]"Brief for the United States" at 10, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504) (emphasis added; citations omitted).

[71]*Id.* at 10–11.

[72]*See* "Brief for Resp't" at 43–51, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504).

[73]*See id.* at 44.

[74]*Id.* (quoting "Brief for the United States" at 17, *United States v. Schwimmer*, 279 U.S. 644 [1929] [No. 484]).

[75]"Brief for Resp't" at 40–41, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504).

[76]*Id.* at 44 (emphasis added).

[77]*See id.* at 47.

[78]*See id.*

[79]*See Bland*, 42 F.2d at 843. Bland suggested the following oath: "I hereby declare, on oath . . . that I will support the Constitution of the United States and will[,] as far as my conscience as a Christian will allow[,] defend it against all enemies foreign and domestic. . . . " *Id.*

[80]"Brief for Resp't" at 49, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504) (citations omitted).

[81]*See* "Brief on Behalf of Edward L. Parsons et al.," *United States v. Bland*, 283 U.S. 636 (1931) (No. 505). In addition to statements made by Bland's own denominational leaders, this brief includes an appendix cataloguing statements made by leaders of various denominations, including Methodist Episcopal, Quaker, Northern Baptist, Disciples of Christ, Presbyterian Church in the U.S.A., Churches of Christ, and the United Lutheran Church. *See id.* at 18–22.

[82]*Id.* at 4.

[83]*Id.* at 5.

[84]*See id.* at 5–11.

[85]*See id.* at 12.

[86]*See id.* at 12–14.

[87]*Id.* at 12. (Emphasis in original.)

[88]*See id.* The Kellogg-Briand Pact, signed in 1928, expressed the common desire of 15 countries (originally), including the United States, to rid the world of war. "Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated," the signatories agreed to conduct their foreign relations "only by pacific means." David Hunter Miller, **The Peace Pact of Paris: A Study of the Briand-Kellogg Treaty** 247 (1928).

[89]"Brief on Behalf of Edward L. Parsons et al." at 12, *United States v. Bland*, 283 U.S. 636 (1931) (No. 505). (Emphasis in original.)

[90]*Id.* at 15.

[91]*See* "Brief for Resp't" at 45–48 n.22, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504).

[92]*Id.* at 45.

[93]*See* "Brief in Behalf of American Friends Service Committee" at 5, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504) and *United States v. Bland*, 283 U.S. 636 (1931) (No. 505).

[94]*Id.* at 5.

[95]*See* Stephen L. Carter, **The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion** 39 (1993) [hereinafter Carter, **Culture of Disbelief**] ("As autonomous intermediate institutions, the religions can work against the state.").

[96]Stephen L. Carter, **The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty** 62 (1998). Carter explains,

> [B]y protecting advocacy only until it moves people to act, the courts have drawn not simply a speech/action distinction, but an individual/group distinction. The lone critic is no danger, because he can do nothing alone. But the group, because it is better able to act, becomes a threat. That is why those in power have always sought legal means to thwart organizations that are preaching dissent, while leaving ineffective individuals largely alone.

Id. at 63.

[97]The majority was composed of Justices Pierce Butler, James Clark McReynolds, Owen Roberts, Sutherland, and Willis Van Devanter. Chief Justice Charles Evans Hughes dissented, joined by Justices Louis Brandeis, Oliver Wendell Holmes, and Harlan Fiske Stone.

[98]*Macintosh*, 283 U.S. at 616 (emphasis added).

[99]*Id.* at 625.

[100]*See id.* at 622.

[101]*Id.* at 625.

[102]*Id.*

[103]*United States v. Bland*, 283 U.S. 636, 636–37 (1931), overruled by *Girouard v. United States*, 328 U.S. 61 (1946).

[104]*Id.* at 637.

[105]*See Macintosh*, 283 U.S. at 627–35 (Hughes, C. J., dissenting). Justices Holmes, Brandeis, and Stone joined in this dissenting opinion. Merlo Pusey observed that "[i]n the celebrated case of Douglas Clyde Macintosh four of the strongest men ever to sit on the supreme bench—Hughes, Holmes, Brandeis, and Stone—stood together and lost." 2 Merlo J. Pusey, **Charles Evans Hughes** 718–19 (1951).

[106]*See Macintosh*, 283 U.S. at 627–28.

[107]*Id.* at 628 (Hughes, C. J., dissenting).

[108]*See id.* at 630–32.

[109]*See id.* at 630–31. The Constitution states that state and federal officers "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. Art. VI.

[110]*Id.* at 631.

[111]*See* "Brief for Resp't" at 13 n.3, *United States v. Macintosh*, 283 U.S. 605 (1931) (No. 504).

[112]*See Macintosh*, 283 U.S. at 633–34 (Hughes, C. J. dissenting).

[113]*Id.* at 634.

[114]*Id.*

[115]*Id.*

[116]Hendel, *supra* note 43 at 144.

[117]The majority was composed of Chief Justice William Howard Taft and Justices Butler, McReynolds, Stone, Sutherland, and Van Devanter. Justice Holmes dissented, along with Justices Brandeis and Edward T. Sanford.

[118]*See* Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** 522 (1956).

[119]*See id.* at 519–20, 522.

[120]*See id.* at 519.

[121]The Court had adopted this belief/action distinction in *Reynolds v. United States*, 98 U.S. 145 (1879), an early Free Exercise Clause case.

[122]Mason, *supra* note 118 at 522 (quoting *Macintosh*, 283 U.S. at 635 [Hughes, C. J., dissenting]).

[123]*See id.* at 523.

[124]*Id.*

[125]*Id.*

[126]*Id.*

[127]*See Macintosh*, 283 U.S. at 620.

[128]*Id.* at 625.

[129]Green, *supra* note 1 at 389.

[130]*Id.* at 393–94.

[131]*Id.*

[132]For the facts of this case, *see Girouard v. United States*, 328 U.S. 61, 61–62 (1946); "Brief for Pet'r" at 3–6, *Girouard v. United States*, 328 U.S. 61 (1946) (No. 572); "Brief for the United States" at 2–4, *Girouard v. United States*, 328 U.S. 61 (1946) (No. 572).

[133]Brief for the United States at 3, *Girouard v. United States*, 328 U.S. 61 (1946) (No. 572).

[134]*See United States v. Girouard*, 149 F.2d 760, 763 (1st Cir. 1945).

[135]According to Girouard's brief,

> Petitioner asserts no right to question the moral rightness of any particular war, nor does he debate the finality and necessarily binding effect on him of the decision of Congress. Neither does he seek to reserve to himself determination of the extent or manner in which he shall assist in the defense of his country; his willingness to support the Government in time of war is unequivocal. His sole limitation is that as a matter of religious belief he cannot take human life and in that sense cannot bear arms.

"Brief for Pet'r" at 29, *Girouard v. United States*, 328 U.S. 61 (1946) (No. 572).

[136]*Id.* at 9.

[137]*Id.* at 11.

[138]*Id.* at 13–14.

[139]*Id.* at 18–22.

[140]*See id.* at 20.

[141]*See id.* at 21.

[142]*See id.* at 23–28.

[143]*Id.* at 26.

[144]*See* "Brief for the United States" at 5, *Girouard v. United States*, 328 U.S. 61 (1946) (No. 572). The Government was represented in this case by Solicitor General J. Howard McGrath, Assistant Attorney General Theron L. Caudle, Special Assistant to the Attorney General Frederick Bernays Wiener, Robert S. Erdahl, and Leon Ulman.

[145]*See id.* at 17–23.

[146]*See id.* at 18–22.

[147]*Id.* at 38.

[148]*See id.* at 40.

[149]*See id.* at 40–44.

[150]*Id.* at 55.

[151]"It is true," the brief conceded, "that the opinion in the *Schwimmer* case has not been deemed as quotable as the eloquent . . . dissent of Mr. Justice Holmes, and that the literary quality of the *Macintosh* opinion may suffer by comparison with Chief Justice Hughes' magistral [sic] dissent." *Id.* at 57–58.

[152]*Id.* at 58.

[153]*See id.* at 59–60. In a rhetorically charged passage, the Government reminded the Court of the need for military capability:

> [P]eace yielded to aggression, year after tragic year. The Manchurian incident in September of 1931 was followed by the attack on Shanghai in 1932, by the rise to power of Hitler and his hordes in 1933, by the assassination of the Austrian Chancellor in 1934, by

> the violation of Ethiopia in 1935; there is no need to continue this grim chronology. The forces of darkness, once loosed, swept relentlessly and remorselessly over Europe and Asia, crushing political freedom, crushing religious freedom, overwhelming with a destructive nihilism every human value and every aspect of human decency, until finally millions of human lives were ruthlessly extinguished in a series of scientific slaughter-houses by the side of which the most outrageous excesses by the Huns of Atilla, all the Barbarian hosts of old pale by comparison into orderly decency.
>
> The dark tide struck this country in December 1941, and we were faced with a struggle for our very existence. We triumphed in the end, after many weary, costly, bloody months—because of force, superior force, force of arms. . . . The liberties which we in consequence can still enjoy, and which petitioner can still enjoy, were preserved only through the exertion of millions of arms-bearing citizens, and through the costly sacrifice which over three hundred thousand Americans laid on the altar of freedom.

Id.

[154]*Id.* at 61.

[155]328 U.S. 61 (1946).

[156]*See id.* at 70. James Girouard answered the question whether he would be willing to take up arms in defense of the country with these words: "No (noncombatant) Seventh-day Adventist." *Id.* at 62.

[157]*Id.* at 64.

[158]*See id.* at 62.

[159]*See id.* at 65–69.

[160]*See In re Kinloch*, 53 F. Supp. 521 (W.D. Wash. 1944); *In re Losey*, 39 F. Supp. 37 (E.D. Wash. 1941). Both cases involved Seventh-day Adventist petitioners who wished not to engage in actual military combat. Kinloch was already serving in the Army's medical corps, *See* 53 F. Supp. at 521; Losey, the wife of an ordained minister, stated that she was willing to engage in "any sort of war work except the actual shooting of a weapon," 39 F. Supp. at 37. The court in *In re Kinloch* noted that the Supreme Court's opinions in *Macintosh*, *Bland*, and *Schwimmer* were rendered "by a divided court . . . and in all of these cases there were reversals of the unanimous decisions of the Circuit Courts from which they came." 53 F. Supp. at 522. The court in *In re Losey* admitted that it would grant the application for citizenship, "[w]ere it not for the fact that I feel myself bound by the three decisions of the Supreme Court of the United States upon this question." 39 F. Supp. at 37.

[161]*See Girouard*, 328 U.S. at 65–69.

[162]*Girouard*, 328 U.S. at 68.

[163]*Id.* at 69.

[164]*Schwimmer*, 279 U.S. at 654–55 (Holmes, J., dissenting).

[165]*See id.* at 655. Holmes wrote, "I had not supposed hitherto that we regretted our inability to expel them [the Quakers] because they believe more than some of us do in the teachings of the Sermon on the Mount." *Id.*

[166]Note, "The Bearing of Arms as a Prerequisite to Naturalization," 41 *Ill. L. Rev.* 469, 469 (1946).

[167]Arthur Miller, "Is Qualified Allegiance Involved as to Alien Applicants?" 33 *A.B.A.J.* 324, 324 (1947).

[168]*Id.*

[169]*See* Mark Tushnet, "The Constitution of Religion," 18 *Conn. L. Rev.* 701, 713–23 (1986). For an argument that reduction is the proper analytical method to apply to free-exercise claims, *see generally* William P. Marshall, "Solving the Free Exercise Dilemma: Free Exercise as Free Expression," 67 *Minn. L. Rev.* 545 (1983).

[170]Tushnet, at 713. For cases illustrating the operation of the reduction principle, see *Widmar v. Vincent*, 454 U.S. 263 (1981); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

In *Widmar*, for instance, university students asserted a free-exercise right to pray in university buildings. 454 U.S. at 266. Although the university allowed nonreligious groups to meet in these buildings, it denied equal access to these religious students. *See id.* at 265, 269. Despite the obvious and pervasive importance of religion to this case, the Court conceived the case to be about a content-based restriction on speech. *See id.* at 267–70.

[171]Stephen Carter adopts this description as well. *See* Carter, **Culture of Disbelief**, *supra* note 95 at 129–32. Describing the *Smith* Court's "neutral" approach to religious liberty, he writes that "neutrality treats religious belief like any other belief, controlled by the same rules: the choice is free, but it is entitled to no special subsidy, and indeed, it can be trampled by the state as long as it is trampled by accident." *Id.* at 134. Carter places this reduction principle in a broader context: "In contemporary American culture, the religions are more and more treated as just passing beliefs . . . rather than as the fundaments upon which the devout build their lives." *Id.* at 14.

[172]John H. Wigmore, "*United States vs. Macintosh*—A Symposium," 26 *Ill. L. Rev.* 375, 379 (1931).

[173]*Id.* at 375.

[174]*Id.*

[175]*Id.*

[176]*Id.*

[177]Wigmore, *supra* note 172 at 378.

[178]*Id.*

[179]310 U.S. 586 (1940), overruled by *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[180]319 U.S. 624 (1943).

[181]*See Gobitis*, 310 U.S. at 600.

[182]*See id.* at 595–98.

[183]*Id.* at 596.

[184]*See Barnette*, 319 U.S. at 642.

[185]*See id.* at 630.

[186]*Id.* at 634.

[187]*Id.* at 642.

[188]*Id.*

[189]Barnette, 319 U.S. at 636.

[190]*See* Tushnet, *supra* note 169 at 713.

[191]*See id.* In response to the Court's analytical scheme, litigants frequently appealed to the marginality principle. *See* Tushnet, *supra* note 169 at 723–24 ("The rhetorical strategy of proponents of free exercise exemptions is to minimize the impact of the exemption on the governmental interest. . . . On the other side of the argument, opponents of free exercise exemptions . . . focus on the cumulative impact of that and analogous exemptions.").

[192]*See* Tushnet, *supra* note 169 at 723–24 (describing *Sherbert* and *Yoder*).

[193]*See supra* notes 95–96 and accompanying text.

[194]*See* Wigmore, *supra* note 172 at 380.

[195]*Id.* at 381.

[196]*Id.*

[197]*Cf.* Carter, *supra* note 96, at 62 (noting that governments typically fear organized groups of individuals more than individuals acting alone). Similarly, it may be supposed that governments fear large, influential organizations more than small ones.

[198]*See Girouard*, 328 U.S. at 62.

[199]*See id.*

[200]*Girouard*, 328 U.S. at 64.

[201]*See Cohnstaedt v. INS*, 339 U.S. 901 (1950) *(per curiam).*

[202]*Cohnstaedt v. INS*, 207 P.2d 425, 427 (Kan. 1949).

[203]82 F. Supp. 130 (D. Neb. 1949).

[204]*See id.* at 134.

[205]*See id.* at 130.

[206]*See In re Pisciattano*, 308 F. Supp. 818, 819 (D. Conn. 1970).

[207]*See* Immigration and Nationality Act of 1952, 66 Stat. 163, 258; H.R. Rep. 1365, reprinted in 1952 U.S.C.C.A.N. 1653, 1741.

[208]8 U.S.C. § 1448(a).

[209]*Id.*

[210]This "premodern" attachment retains force today. In response to the *Smith* decision in 1990, Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb (1994). This legislation represented an attempt to restore the compelling-interest test set out in earlier cases. *See id.* § 2000bb–1. Although the Supreme Court invalidated this federal law as it applied to state and local laws (*see City of Boerne v. Flores*, 521 U.S. 507 [1997]), several states have considered enacting their own versions of RFRA (*see* Thomas C. Berg, "The New Attacks on Religious Freedom Legislation, and Why They Are Wrong," 21 *Cardozo L. Rev.* 415, 416 [1999]). These legislative developments confirm the notion that the political branches remain involved in the debate concerning the nature of religious conviction and the proper scope of religious liberty.

Felix Frankfurter, Incorporation, and the Willie Francis Case

WILLIAM M. WIECEK

By 1937, the U.S. Supreme Court had discarded a concept of law and the judicial function that had dominated its work for the preceding half-century. Scholars have variously described this ideology of law as "formalism," "legal orthodoxy," or "classical legal thought."[1] Classical thought provided a comprehensive explanation of the nature and sources of law, the role of judges in a democracy, and law's relationship to the larger society. Its abandonment deprived the Justices of a powerful explanatory and legitimating paradigm that justified the power of judicial review. They quickly tried to come up with an equally persuasive substitute.

One of the principal problems that classical thought had purported to resolve was the issue of objectivity. In exercising the power of judicial review, judges frustrate the will of democratic majorities. How can they legitimately do so without imposing their own personal values and political preferences?

After 1937, the Justices struggled to provide a plausible response to that challenge. Two major possibilities emerged. Felix Frankfurter urged a rigorous form of judicial self-restraint, deference to the judgments of legislative bodies, and reliance on the traditions of the American people as the criterion for evaluating the constitutionality of legislative policy choice. Hugo L. Black rejected that proposal as subjective and instead developed a literalist and absolutist approach to interpreting the text of the Constitution. He opposed Frankfurter's position as a misplaced reliance on what he called "natural law," which provided too much discretion to judges. Both men in their differing ways sought to answer the riddle of *Lochner v. New York* (1905),[2] which each saw as vesting too much power in judges.

The vehicle for the Black-Frankfurter debate was the problem of "incorporation": to what extent, if at all, had the Fourteenth Amendment's Due Process Clause made the first eight Amendments to the Federal Constitution applicable as limitations on state au-

thority? A line of precedent tracing back to Justice William Moody's opinion in *Twining v. New Jersey* [3] and through Justice Benjamin N. Cardozo's opinion in *Palko v. Connecticut* (1937)[4] provided support for Frankfurter's jurisprudential approach. Cardozo invoked "a principle of justice so rooted in the traditions and conscience of our people" and "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[5] *Twining* held that nothing was incorporated; *Palko* adopted what later scholars call a "selective incorporation" approach, permitting some of the federal constraints to be incorporated, but not necessarily all.[6] Black rejected both approaches as subjective, and insisted instead that all guarantees be incorporated.

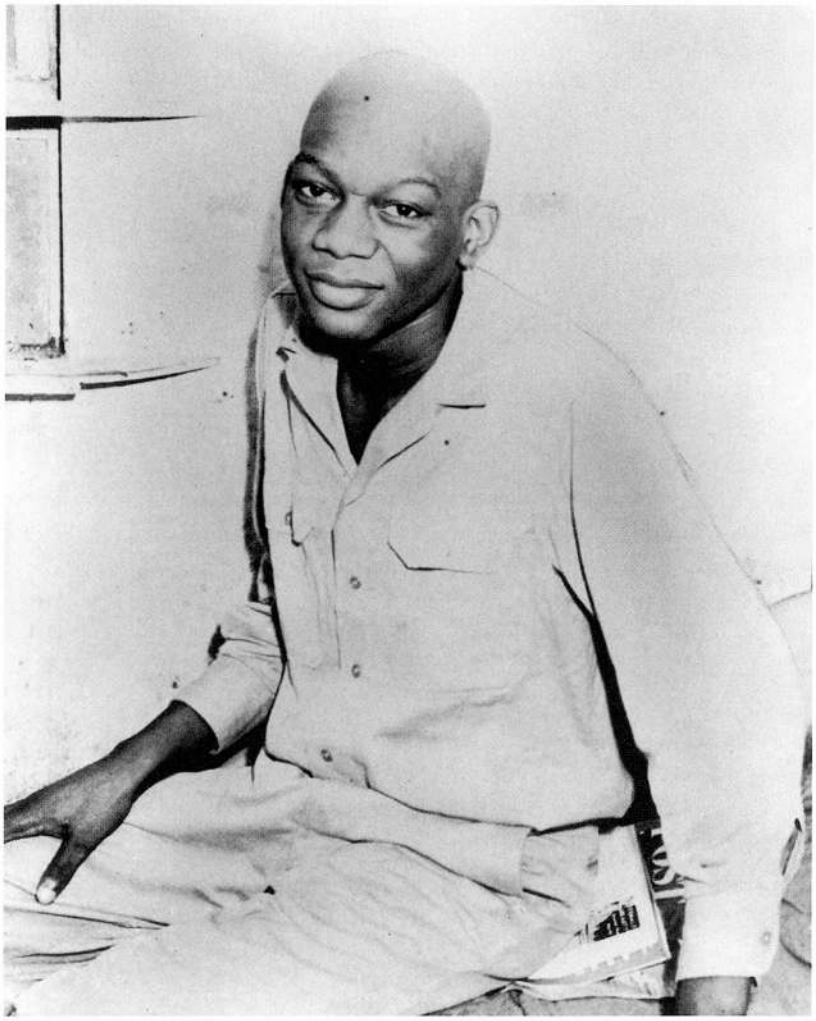
Frankfurter and Black fully articulated their positions in *Adamson v. California* (1947),[7] but they first explored the issues in a case decided earlier in the Term, *Louisiana ex rel. Francis v. Resweber* (1947).[8] The Court had not encountered a case since Frank Palka's[9] in 1937 that presented a real-life embodiment of the incorporation issues in gut-wrenching form. That case came before the Brethren in Willie Francis's case, and it tested the antagonists' dedication to their principles. In the end, their fidelity to those principles sent a boy to a cruel death.

Louisiana tried Francis, a sixteen-year-old black male, for the murder of a white druggist, convicted him, and sentenced him to death in the electric chair.[10] The trial was perfunctory: court-appointed counsel offered no defense and did not appeal the conviction, despite well-founded doubts as to whether Francis was in fact guilty. His conviction rested solely on two confessions that might well have been found to be coerced, if counsel had bothered to challenge them. They did not, and Willie Francis went to the electric chair.

However, at the moment of electrocution, the chair malfunctioned: some current flowed through Francis's body, enough to cause intense pain but not enough to kill him. Neither of the men who had installed the portable electric chair were electricians, and the actual executioners were probably drunk at the time they threw the switch.[11] Prison guards dragged Francis off to his cell and called an electrician. Meanwhile, the NAACP and others mounted a crusade to prevent the state from trying to electrocute him a second time.

The state's bungled execution attempt was the prelude to protracted maneuvering and bargaining on the Supreme Court, as the Justices tried, and ultimately failed, to coalesce around some rationale that would resolve the unprecedented problem facing them: could Louisiana try to kill Francis a second time, after having botched its first attempt? The Court's first response was itself ill-omened, suggesting how difficult it would be to find a humane and just solution that comported with the abstract principles involved. The original vote on granting *certiorari* was three in favor (Frankfurter, Frank Murphy, Wiley B. Rutledge), four opposed (Harold H. Burton, Black, William O. Douglas, and Stanley Reed).[12] With Chief Justice Harlan Fiske Stone recently deceased and Robert H. Jackson in Nuremberg, that was actually a vote in favor of granting *certiorari*, but the Clerk originally reported a denial, and Francis's counsel so advised his client. The error was discovered and corrected the next day, but not before the Court's own fumbling added more to his anguish.

In the conference debates that ensued, Frankfurter's resolve to defend the Moody-Cardozo approach to incorporation hardened. Black did not recede from his position either, while two Justices, Murphy and Rutledge, raised just the issue that Frankfurter and Black in their differing ways were trying to suppress: the place of a judge's individual conscience in reaching a just decision. The labyrinthine internal politics of the Court are worth following in their own right, because they demonstrate how fractured the Court was at the onset of Chief Justice Fred M. Vinson's tenure.



In 1946, Louisiana sentenced Willie Francis to death in the electric chair for murdering a white druggist. At the moment of electrocution, the chair, which had not been set up by trained electricians, malfunctioned. Enough current coursed through Francis's body to cause intense pain, but not enough to kill him.

Skelly Wright, then in private practice, argued the case before the Supreme Court. He framed the issue as whether the electrocution retry would violate the Fifth Amendment's double jeopardy provisions, the Eighth Amendment's ban on cruel and unusual punishment, or the Fourteenth Amendment's due process and equal protection requirements.[13] The original vote at conference after argument was 6–3 to affirm, with Murphy, Burton, and Rutledge in dissent. Vinson assigned the opinion to Reed.

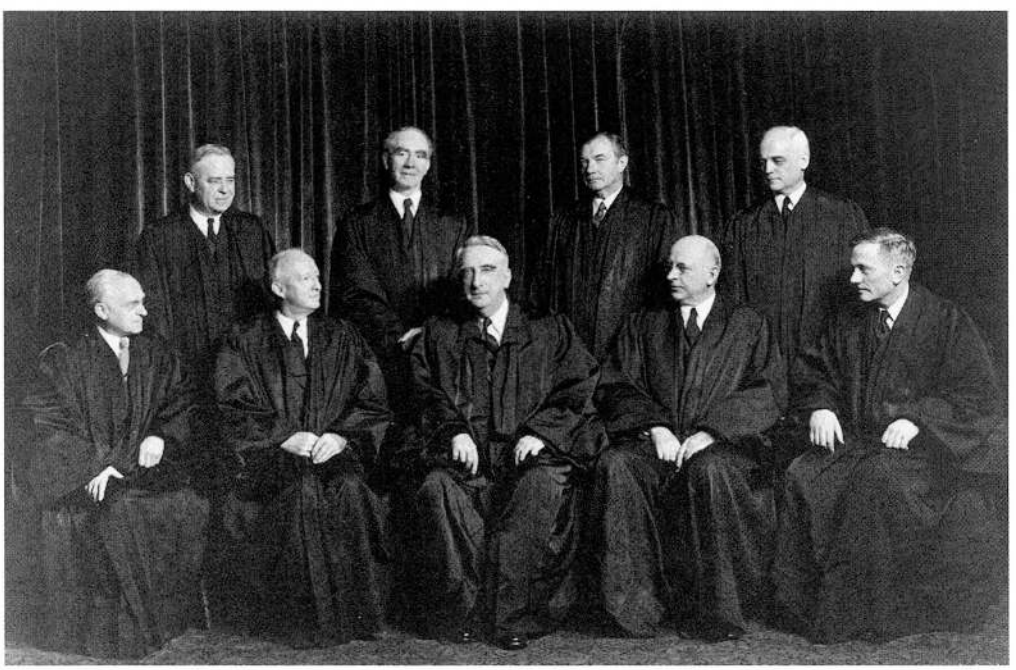
Reed's draft majority opinion found no due process violations as measured by "national standards of decency."[14] He also found no double jeopardy or cruel and unusual punishment, but he did not explicitly explore the incorporation problem. To Reed's and Vinson's dismay, this draft promptly spawned three dissents (Rutledge, Murphy, and Burton), two unwelcome concurrences (Frankfurter and Jackson), and a switch of vote by Douglas to the dissent,[15] leaving a precarious 5–4 majority hanging together on the contestable Reed draft.

Burton circulated an impassioned dissent,

unusual both for its depth of feeling and for the fact that its author usually voted to sustain the government in criminal-procedure appeals. He argued that a re-execution would constitute cruel and unusual punishment, thereby implicitly assuming the incorporation issue.[16] On this point, he stressed the mental anguish that Francis had faced, and would face again. He also found an equal-protection violation based, not on the wretched state of criminal justice extended to African Americans in the southern states at the time, but on the fact that Francis would be treated differently from other men sentenced to death, who went to the electric chair only once.[17]

Murphy and Rutledge joined Burton, each writing to stress, as Murphy put it, that a judge must take his "humanitarian instincts" into account in resolving the questions that Francis's case presented. Murphy had committed himself to such an approach several years earlier, spurning formalistic approaches in order to do justice in a particular case. In a dissent in one of the wartime conscientious objector cases, he had written: "The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution," an apt statement of his judicial outlook.[18] He elaborated that view in his dissent in a right-to-counsel case decided while the Court was considering *Francis:*

> Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivably could depend . . . But the result certainly does not enhance the high traditions of the judicial process. In my view, when undisputed facts appear in the record before us in a case involving a man's life or liberty, they should not be ignored if justice demands their use.



When the Supreme Court heard Francis's case, Chief Justice Fred M. Vinson (center) had just been appointed and the Court was fractured over the issue of incorporation. On one side, Justice Hugo L. Black (second from left, seated) championed a literalist and absolutist approach to interpreting the text of the Constitution. On the other, Justice Felix Frankfurter (seated at left) urged a rigorous form of judicial self-restraint with deference to the judgments of legislative bodies and to the will of the people.

Justice Stanley Reed's majority opinion in *Francis* found no due process violations as measured by "national standards of decency."

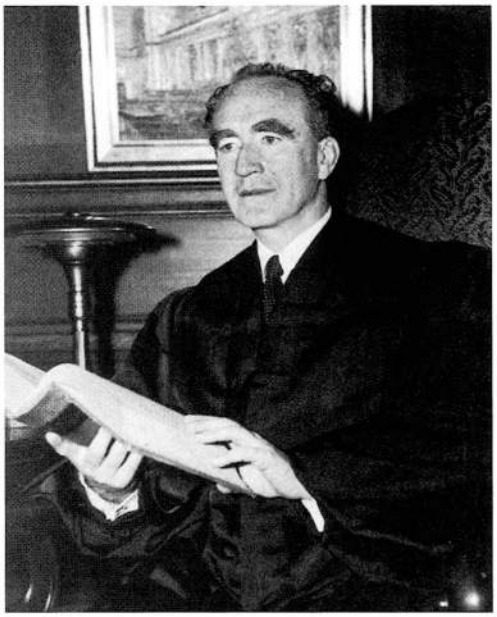
> Here the facts in question . . . emphasize the absence of an intelligent waiver of counsel and petitioner's failure to comprehend the legal problems placed in his path. They serve to make any decision on the issue in the case more intelligent and more just.[19]

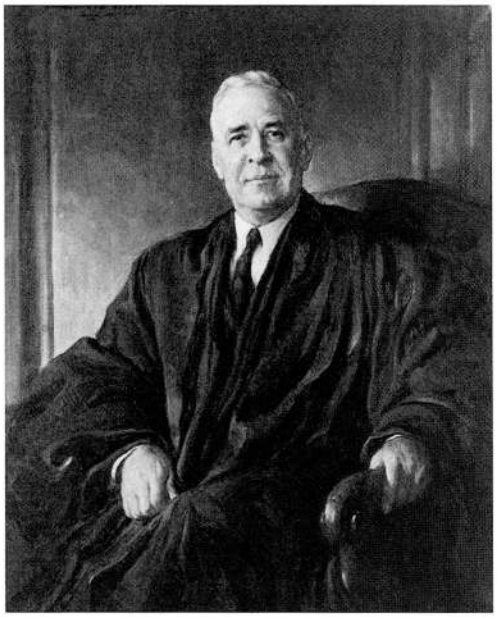
In that frame of mind, Murphy confronted the formalism of Reed's disposition of Willie Francis's case: "[W]e have nothing to guide us in defining what is cruel and unusual apart from our own consciences. . . . Our decision must necessarily be based on our mosaic beliefs, our experiences, our backgrounds and the degree of our faith in the dignity of the human personality."[20] Rutledge adopted a similar position. Burton persuaded both men to shelve their drafts and join him, along with Douglas, in a unified front. Their views directly challenged the core of Frankfurter's beliefs, which was certain to set him off.

Jackson's concurrence eroded Reed's majority, for he explicitly repudiated Reed's "national standards of decency" criterion. In his distinctive prose, he denied that the Framers "ever intended to nationalize decency."[21] Instead, Jackson relegated the decency test to "Louisiana's own law and sense of decency." Jackson also emphatically rejected the Murphy/Rutledge reliance on a judge's personal feelings. Yet, perversely, he condemned the death penalty per se—an odd position for one who had been earnestly trying to hang Nazis just a year earlier. However, whatever the shortcomings of his position may have been, Jackson had at least enunciated a clear standard, something Frankfurter failed to do.

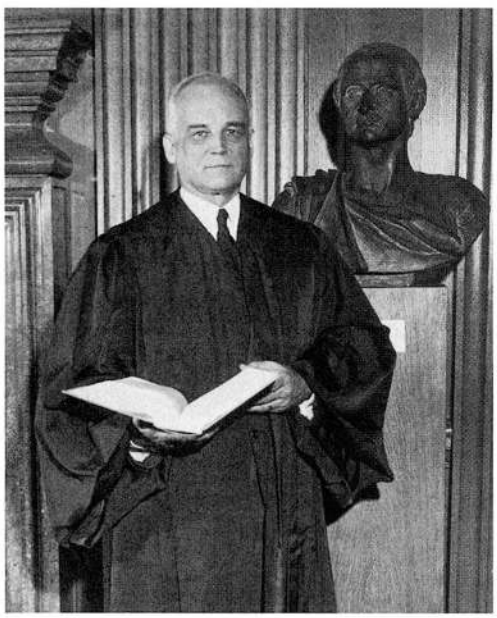
Jackson's draft concurrence aptly exposed the incoherence of the *Palko* standards-of-decency test:

> [Reed] arrives at a conclusion which permits what to another is "repugnant to a civilized sense of justice," "inhuman and barbarous" and violates the "first principles of humanitarianism." A third proposes "elementary standards of decency" which brings him to a result exactly opposite the one reached by those who use as [a] guide "national standards of decency." A fourth identifies "national standards of decency" with "mystic natural law" and rejects the whole philosophy, but still comes out with the same result as those who use it.





Justices Frank Murphy (left) and Wiley Rutledge (right) joined Justice Harold Burton's impassioned dissent in *Francis*. Burton (below) argued that a re-execution would constitute cruel and unusual punishment and would violate equal protection principles because Francis would be treated differently from other men sentenced to death, who went to the electric chair only once. Murphy and Rutledge had originally drafted dissents that did not squarely challenge the majority's incorporation doctrine but were persuaded by Burton to join him in opposing the formalism of Reed's opinion.



As if all these conflicting views were not complication enough, Black drafted a concurrence[22] in which he argued for incorporation of the Fifth Amendment's double-jeopardy and Eighth Amendment's cruel-and-unusual-punishment provisions by the Fourteenth Amendment, condemning "a mystic natural law which is above and beyond the Constitution, and which is read into the due process clause so as to authorize us to strike down every state law which we think is 'indecent,' 'contrary to civilized standards,' or offensive to our notions of 'fundamental justice.'"[23]

In the internal dynamics of the Court, Frankfurter now became pivotal. It was "not [an] easy case," he declared at Conference.[24] He resolved it for himself on the basis of a statement he attributed to Oliver Wendell Holmes, Jr., who "used [to express the relationship between the Supreme Court and the States] by saying that he would not strike down State action unless the action of the State made him 'puke'."[25] The retry "is hardly a defensible thing for the state to do, [but] it is not so offensive as to make him puke—does not shock conscience."[26] He reminisced in after years that the *Francis* case "told on my conscience a good deal. . . . I was very much bothered by the problem, it offended my per-

sonal sense of decency to do this. Something inside of me was very unhappy, but I did not see that it violated due process of law."[27] How odd that Frankfurter could not see that a legal norm based on nothing more than an individual jurist's nausea did not rise to the dignity of anything that we would consider law.

In his note to Burton, Frankfurter did not try to dissuade the dissenter; on the contrary, he warmly commended him for his position. This obliged him to explain his own position, though, and he did so at length:

> I have to hold on to myself not to reach your result. I am prevented from doing so only by the disciplined thinking of a lifetime regarding the duty of this Court in putting limitations upon the power of a State under the limitations implied by the Due Process Clause.[28]

He insisted that the Justices must exercise judicial self-restraint and defer to the judgment of the state. Frankfurter narrowed this point to the matter of accepting the state supreme court's construction of the Louisiana statute: "for such, and such alone, in view of the relation of the United States to States, and of this Court to State courts, is the exact legal situation before us."[29] (The Louisiana Supreme Court had implicitly construed the state electrocution statute as not prohibiting a retry.[30])

If Frankfurter's view had been correct, then his position would have been unassailable, for one of the Court's oldest and most respected canons of interpretation holds that the Supreme Court must accept a state supreme court's interpretation of a state statute as authoritative.[31] Frankfurter's move was a specimen of long-sanctioned lawyers' reasoning of a kind that had been at the core of common law pleading: a large and complex whole of law and fact was reduced by a series of logical cascades or logic gates to a single question of law, defined as narrowly and specifically as possible. Then the resolution of that small question would be dispositive of the case as a whole. This was one way in which the law had traditionally sought to achieve objectivity in judging, but it avoided confronting all the other issues in the case that had been filtered out by the successive cascades. Specifically, in Willie Francis's case, it enabled Frankfurter to avoid having to come to terms with his own sincerely held conviction that it would be wrong to electrocute him a second time.

Having reached a resolution that satisfied his judicial conscience, Frankfurter then turned to formal doctrinal analysis. The due process criterion was to be "the accepted, prevailing standards of fairness and justice," defined as the standards of the state, rather than the nation or the locale of the trial (the rural parish of St. Martin in the Cajun country of southern Louisiana). To this he superadded a reasonable-man test:

> [A]fter struggling with myself—for I do think the Governor of Louisiana ought not to let Francis go through the ordeal again—I cannot say that reasonable men could not in calm conscience believe the State has such a power. And when I have that much doubt I must, according to my view of the Court's duty, give the State the benefit of the doubt and let the State action prevail.[32]

In a subsequent note to Burton, declining his overture to join the dissenters, Frankfurter restated his basic position: "I cannot bring myself to think that if I were to hold there was [a violation of due process standards], I would not be enforcing my own private view rather than the allowable consensus of opinion of the community which, for purposes of due process, expresses the Constitution."[33]

Frankfurter thus defined the two fundamental elements of his view of judging, a view he held consistently through his twenty-three years of service on the Court. First, a judge must determine whether a potential impact of the law's application would

Justice Felix Frankfurter cast a pivotal vote to uphold Louisiana's right to re-execute Francis. The case made him "very unhappy" and he wrote to Burton that he was prevented from dissenting "only by the disciplined thinking of a lifetime regarding the duty of the Court in putting limitations on the power of a State under the limitations implied by the Due Process Clause."

offend the "prevailing standards of justice and fairness." Only if it clearly did could a judge strike down the state's act. Second, a judge must not impose his "own private view" of what fairness and justice might be, for to do so would be to repeat the error of the *Lochner* Court.

There were at least two major problems with this position, although Frankfurter did not acknowledge or even recognize either of them.[34] First, his standard of community consensus about fairness and justice was hopelessly subjective. Frankfurter never suggested how a judge determines what these community standards are, or how such a determination could ever be disciplined, not to say objective. Where was a judge to look for persuasive or even plausible evidence of what these standards were? Frankfurter would have been the first to condemn judging by reference to public opinion polls.

Had he troubled himself to inquire just what the actual community consensus in the *Francis* case really was (as opposed to speculating about what it might be, which is what he did), Frankfurter would have discovered that Governor Jimmie Davis (the former country-western singer and composer of "You Are My Sunshine") had been "deluged with an unprecedented flood of mail. . . . Thousands of letters, telegrams and postcards poured in from [all parts of the United States] urging clemency for Willie Francis."[35] Reed received impassioned pleas from around the nation urging that Francis's life be spared.[36] Similarly, editorials in the nation's press, reacting first to Louisiana's determination to re-electrocute Francis and then to the Court's decision upholding the state's decision, were largely (but not entirely) negative.[37]

Frankfurter had an answer to this challenge, which he had undoubtedly confronted

Governor Jimmie Davis (left), a former country-western singer, was unmoved by Frankfurter's secret campaign to save Francis by executive clemency. The Justice had exhorted Monte Lemann, his former Harvard Law School roommate and a member of the Louisiana bar, to use his influence on Davis to get the sentence commuted.

in the privacy of his conscience countless times. He laid out his personal struggles in a letter to his friend and confidant, Learned Hand:

> To what extent may a judge assume that his own notions of right moral standards are those of the community[?] But if it is his job—as you and I believe it to be—to divine what may rightly be deemed the standards of the community, by what process is he to make that divination[?] How and where should he look for the disclosure of the community's mores[?][38]

He found no answer, though, at least none that he shared with Hand or the rest of the world. Repeating that he thought Louisiana's conduct "shocking," and "a barbaric thing to do, that would not be the feeling of the community whether the community be Louisiana or the United States at large—and that, therefore, I had no right to find a violation of the Due Process Clause."[39] Perversely, however, an actual inquiry into community belief was improper for a judge to undertake, in Frankfurter's eyes. How, then, could the utter subjectivity of his standard, which mocked all pretensions to objectivity, have eluded Frankfurter?

The answer is to be found in the second flaw of his position. The self-discipline with which Frankfurter credited himself diverted his attention both from the subjectivity problem and from nearly all issues of law, fact, and conscience posed by the case before him. His determination to stifle his own moral sense in the act of judging made it impossible for him to acknowledge that his own instincts might be congruent with the community's moral sense, and that he should follow them. By reining in his moral impulses, Frankfurter disabled himself from recognizing what the real community sentiment was, and forced himself to substitute some imagined, synthetic community view.

This was for him, deliberately or not, a strategy first of avoidance and then of self-justification. The claim of self-transcendence would serve Frankfurter's judicial philosophy well in the years to come, masking his reliance on his own personal feelings with his claim to a detached, disciplined impersonality as sanctimonious as it was spurious. A critic might say that Frankfurter's suppression of his personal feelings was a disingenuous way for him to salve his conscience and yet retain the power to impose his own subjective policy preferences, basking in his own denial. Or, in the words of such a critic, Frankfurter's position "collapses, on analysis, into little more than a front for policy making."[40] In the end, sadly, Frankfurter succumbed to the formalism that he had previously condemned in Justices Sutherland, Butler, McReynolds, and Van Devanter.

Frankfurter futilely demanded that Reed add the following passage to the majority opinion: "We have not before us a situation where officers of the State acted with malevolence or callousness or carelessness toward human life. Nothing in the record remotely warrants such imputation."[41] In a strained and technical sense, that was literally correct: nothing in the *record* supported that conclusion. However, had Frankfurter cared to go beyond the record (something impossible for him to do, given his rigid view of the judge's function), he would have discovered superabundant malevolence, callousness, and indifference.

Yet if Frankfurter's refusal to allow any scope to his own feelings seems misguided or worse in retrospect, it nevertheless constituted his earnest effort to resolve the objectivity problem that has bedeviled the modern Court, especially since 1937. The landscape of the twentieth-century Court is littered with Justices' failed efforts to devise credible responses to that dilemma: the dogmas of classical legal thought, Black's literalist fundamentalism, the variant originalisms of the recent Court. So when Frankfurter failed, he was not alone. And yet, and yet . . . Did still another victim have to be sacrificed to the Moloch of White Supremacy and bloodlust that ruled the crossroads of race and the death penalty in southern legal culture? Frankfurter exonerated himself at a terrible price.

Spotting weaknesses in Reed's opinion for the majority, Frankfurter urged several changes, and Reed complied. Frankfurter was gratified: "I am confident HISTORY will approve of them," he scribbled on Reed's printed draft.[42] But if History approved, Frankfurter did not.[43] To Reed's dismay, he circulated a concurrence, which when published would deprive Reed's opinion of majority status.

Frankfurter's draft concurrence began with a tortured and unpersuasive attempt to show that though Reed had relied on "national standards of decency," he really meant what Jackson adopted in his draft concurrence: *state* standards of decency.[44] (This effort was preposterous, and Frankfurter dropped it in his published concurrence.) More to the point, Frankfurter set forth at length his views of the Due Process Clause, incorporation, and the Court's role. In doing so, he both doomed Willie Francis and provoked Black to the confrontation that played out in *Adamson*. In this sense, *Francis v. Resweber* was a dress rehearsal for the jurisprudential confrontation that was to come in the ensuing year.

Troubled both by the power of Burton's dissent and the fact that it spoke for four Justices, Frankfurter announced that he would identify "the criteria by which the State's duty of obedience to the Constitution must be judged" under the Due Process Clause of the Fourteenth Amendment—the majority obviously having failed to do so.[45] Invoking *Twining*, *Hebert*, *Snyder*, and *Palko* (which by that time had become for him the controlling litany), Frankfurter reaffirmed due process as "the meaning of the struggle for freedom of English-speaking peoples [that

incorporates] advances in the conceptions of justice and freedom by a progressive society." In phrases that were provocative to Black, Frankfurter condemned the idea that the Fourteenth Amendment incorporated the Bill of Rights. Rather, it withdrew "from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom." He conceded that "these are very broad terms by which to accommodate freedom and authority." He also admitted that this "involves the application of standards of fairness and justice very broadly conceived." However, he insisted, "they are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce."

Bringing these criteria to focus on the case before him, he concluded:

> I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice "rooted in the traditions and conscience of our people." [citations omitted] Short of the compulsion of such a principle, this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding personal disapproval rooted in more or less universal condemnation. Strongly drawn as I am to some of the sentiments expressed by my brother Burton, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of opinion which, for purposes of due process, is enjoined by the Constitution.[46]

In that passage, Frankfurter definitively laid out his view of the judge's role. He adhered to it in theory (but not in practice) till his death.

Circulated in draft, this concurrence annoyed Reed, who thought that he had already gone far to accommodate Frankfurter's ceaseless demands, only to find that Frankfurter was going to desert him anyway. Matters only got worse as Burton, Murphy, and Rutledge circulated their draft dissents, and Jackson his concurrence. When Black, provoked by Frankfurter's red flag to his bull, circulated *his* draft concurrence, Reed found himself in the impossible and absurd position of having only the Chief Justice agree with what had once been his majority opinion, while the other seven members of the Court insisted that it was wrong, five of them detailing its inadequacies at length in written opinions. While Willie Francis languished on what was bayou Louisiana's equivalent of death row, his case was becoming an obscene parody of the appellate process.

Black rose to the bait of Frankfurter's provocation, circulating a concurrence that insisted that the Due Process Clause of the Fourteenth Amendment had made the Fifth Amendment's double jeopardy and the Eighth Amendment's cruel and unusual punishment provisions applicable to the states. He concluded, though, that the retry would constitute neither. He dismissed Frankfurter's approach as resting on "a mystic natural law" and as being incurably subjective:

> Conduct believed "decent" by millions of people may be believed "indecent" by millions of others. Adop-

> tion of one or the other conflicting views as to what is "decent," what is right, and what is best for the people, is generally recognized as a legislative function. Our courts move, I think, in forbidden territory when they prescribe their "standards of decency" as the supreme rule of the people.

Black condemned both the "standards of decency" and "fundamental principles" criteria as based on "the unarticulated assumption that the Due Process Clause adopted the natural law concept that there is a higher law than the Constitution . . . " To honor such standards would result in leaving courts "free to substitute their ideas of natural justice for the considered policies of state and federal legislatures."[47]

Having been let down by Frankfurter, Reed sought to recoup his majority or whatever part of it he could salvage, by inveigling Black to abandon his concurrence. This he accomplished by agreeing to drop the national standards idea, and to water down other expressions in his draft that Black found objectionable. He also made a verbal concession to Black's position, stating that the Court would "assum[e,] but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment."[48] That bought off Black, but alienated Frankfurter, though the miffed Reed no longer cared.

Now it was Frankfurter's turn to be upset about Reed's concession to Black's hatching heresy. He circulated a memorandum to the Brethren complaining that "it makes for nothing but confusion in the consideration of constitutional issues under the Due Process Clause to cite cases" construing the double jeopardy clause. "The Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards of life which are not defined by the specifically enumerated guarantees of the Bill of Rights." It and its companion, the Equal Protection Clause, "summarize the meaning of the struggle for freedom of English-speaking peoples." In a gesture that was equal parts pique and principled disagreement, he explicitly refused to join the Reed opinion, thereby reducing it to the status of a plurality.[49]

Reed announced the judgment of the Court on January 13, 1947, dooming Francis to a second trip to the electric chair. Frankfurter then undertook an unprecedented secret campaign to persuade Governor Davis to save Francis by executive clemency. Recognizing that the hint in his opinion might not be sufficient to prod the conscience of Louisiana and its governor, Frankfurter wrote a former classmate and roommate at the Harvard Law School, Monte Lemann, a member of the Louisiana bar, exhorting him to use his influence on Davis to get the sentence commuted.[50] Lemann willingly complied, but to no effect. Frankfurter circulated a copy of Lemann's letter explaining his actions among the Brethren, but did not tell any of them except Burton that he had instigated it. The State of Louisiana again electrocuted Willie Francis, this time effectively, on May 9, 1947. For him, the travesty of reason in judicial decision making had come to an end, but the Justices were not yet done with the questions that his fate had placed before them so poignantly.

The Supreme Court bungled Willie Francis's appeal as badly as the drunken executioners had bungled the first electrocution try. The resultant mischief lingers. Later courts recurrently cite *Francis v. Resweber*, along with *In re Kemmler*,[51] as authority for the proposition that the Eighth Amendment does not bar death by electrocution, shutting their eyes to mounds of empirical and graphic data demonstrating beyond any doubt that, far from being "instantaneous and painless," as numerous judges have termed it, death by electrocution

is horrifyingly violent, prolonged, and painful.[52] Though no opinion in *Francis* addressed that issue, the case lives on, misapplied to perpetuate state torture.

ENDNOTES

[1]William M. Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937**(1998).

[2]198 U.S. 45 (1905).

[3]211 U.S. 78 (1908).

[4]302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 [1934] and *Hebert v. Louisiana*, 272 U.S. 312 [1926]).

[5]*Ibid.*

[6]*Ibid.*

[7]332 U.S. 46 (1947).

[8]329 U.S. 459 (1947).

[9]His name was misspelled in the official reports of his case, *Palko v. Connecticut*.

[10]Arthur S. Miller and Jeffrey H. Bowman, **Death by Installments: The Ordeal of Willie Francis** (1988); Barrett Prettyman, Jr., **Death and the Supreme Court** (1961), 90–128.

[11]Miller and Bowman, **Death by Installments**, 132–33.

[12]The votes are recorded in Justice Douglas's conference notes, William O. Douglas Papers, box 140, Manuscripts Division, Library of Congress (hereafter cited: LCMss), and the result noted in *Louisiana ex rel. Francis v. Resweber*, 328 U.S. 833 (1946). In a full bench, four votes would be sufficient to grant *certiorari*. With only seven Justices sitting, that number was reduced to three. *See* Miller and Bowman, **Death by Installments**, 155 fn. 53.

[13]Reply and Supplemental Brief for Petitioner, in Harold H. Burton Papers, box 171, LCMss.

[14]Reed printed draft opinion dated Dec. 1946, Stanley Reed Papers, box 100, University of Kentucky (hereafter cited: UKy).

[15]Douglas handwritten note to Reed, 20 Dec. 1946, Reed Papers, box 100, UKy.

[16]Burton draft dissent, Dec. __ 1946, Harold H. Burton Papers, box 171, LCMss.

[17]This point was originally suggested to Burton by his clerk, Harris K. Weston, though Weston denied that differential treatment in this case deprived Francis of equal protection. Undated note in Harold H. Burton Papers, box 171, LCMss.

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

[19]*Carter v. Illinois*, 329 U.S. 173, 183 (1946) (Murphy dissenting).

[20]Murphy draft dissent, 13 Dec. 1946, quoted in J. Woodford Howard, Jr., **Mr. Justice Murphy: A Political Biography** (1968), 439.

[21]Jackson draft concurrence, marked "Corrected" and "Circulated 12/20/46," Dec. 1946, Jackson Papers, box 138, LCMss. The last quoted sentence in the ensuing paragraph is handwritten; the remainder is in the printed galley.

[22]Black typewritten draft concurrence, in Fred M. Vinson Papers, box 233, UKy.

[23]*Ibid.*

[24]Douglas conference notes, William O. Douglas Papers, box 140, LCMss.

[25]Frankfurter to Burton, 13 Dec. 1946, in Harold H. Burton Papers, box 171, LCMss.

[26]Douglas conference notes, William O. Douglas Papers, box 140, LCMss.

[27]Philip Elman, ed., **Of Law and Men** (1956), 98.

[28]Frankfurter to Burton, 13 Dec. 1946, in Harold Burton Papers, box 171, LCMss.

[29]*Ibid.*

[30]*State ex rel. Francis v. Resweber*, 212 La. 143, 31 So.2d 697 (1947) (*per curiam*).

[31]*Murdock v. Memphis*, 20 Wall. (87 U.S.) 590 (1875). *See* William M. Wiecek, "Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism," in Maeva Marcus, ed., **Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789** (1992), 223, and cases discussed in Charles A. Wright et al., **Federal Practice and Procedure** (1996), vol. 16B, **Jurisdiction**, § 4021, pp. 307–11.

[32]Frankfurter to Burton, 13 Dec. 1946, Harold H. Burton Papers, box 171, LCMss.

[33]Frankfurter to Burton, 31 Dec. 1946, Harold H. Burton Papers, box 171, LCMss.

[34]For an extended contemporary critique of Frankfurter's standards, see George D. Braden, "The Search for Objectivity in Constitutional Law," 57 *Yale L. J.* 571, 582–89 (1948).

[35]New Orleans *Times-Picayune*, 12 May 1946, section 2, p. 9.

[36]Collected in box 100, Stanley Reed Papers, UKy.

[37]Press reaction is surveyed in Miller and Bowman, **Death by Installments**, 117–19.

[38]Frankfurter to Hand, 6 Dec. 1947, Felix Frankfurter Papers, reel 39, LCMss.

[39]*Ibid.*

[40]Braden, "Search for Objectivity," 593–594. Braden leveled the same criticism at Justice Black's literalism.

[41]Frankfurter to Reed, 14 Dec. 1946, Reed Papers, box 100, UKy.

[42]Frankfurter to Reed, 12 Dec. 1946, Reed Papers, box 100, UKy.

[43]Frankfurter, "Memorandum for the Conference," 11 Jan. 1947, Reed Papers, box 100, UKy.

[44]Frankfurter draft concurrence, marked "Circulated Jan. 2 1947," Jan. __, 1947, in Harold H. Burton Papers, box 171, LCMss.

[45]329 U.S. 459, 466 (1947) (Frankfurter concurring). This citation covers all quotes in the following paragraph.

[46]Frankfurter published dissent, 329 U.S. 470–71.

[47]Black draft concurrence, Jan.__ 1947, in Hugo L. Black Papers, box 287, LCMss. This citation covers all quotes in the preceding paragraph.

[48]329 U.S. at 462.

[49]Memorandum for the conference, 11 Jan. 1947, in Reed Papers, box 100, UKy.

[50]Miller and Bowman discuss the Lemann overture in **Death by Installments**, 124–28.

[51]136 U.S. 436 (1890).

[52]Lonny J. Hoffman, "The Madness of the Method: The Use of Electrocution and the Death Penalty," 70 *Tex. L. Rev.* 1039 (1992).

Women Advocates Before the Supreme Court

CLARE CUSHMAN

Legend has it that when Dolley Madison and a group of the First Lady's friends arrived one day at the Supreme Court in the middle of an oral argument, the great advocate Daniel Webster stopped his oration, bowed to the ladies, and started again from the beginning. Although such excessive gallantry was not standard practice in the early nineteenth century, it was customary for wives of Washington dignitaries to dress up in the latest fashions and come to the Supreme Court to observe oral arguments.

The passive, decorative role women then played in the life of the Court contrasts sharply with the professional one they play today. This gradual transformation did not begin until 1880, ninety-one years after the Court's inception, when a woman was finally permitted to leave the spectator ranks and join the show. That was the year that Belva A. Lockwood became the first female attorney to argue a case before the Supreme Court.[1] The previous year she had forced the Court, through congressional intervention, to license women to practice before it.[2] It had not been an easy task.[3] Lockwood's admission opened the doors for successive women attorneys to file petitions and briefs at the Supreme Court, to join its bar and to move the admission of other attorneys, and to argue cases before the Bench.

Before examining the contributions of the women advocates who followed in Lockwood's footsteps, however, it is appropriate to consider claims that two earlier women, Lucy Terry Prince and Myra Clark Gaines—neither of whom were lawyers—personally pleaded their own land dispute cases before the Supreme Court. No official documents have been discovered to support these claims.

Lucy Terry Prince (c. 1725–1821)

Lucy Terry Prince, an African-American, is usually hailed in reference books as the first

No official record has been found documenting the alleged oral argument of Lucy Terry Prince, a freed slave, before Justice Samuel Chase in 1796. This oil portrait of Prince, one of the first published African-American poets, is purely imaginary; no likeness of her exists.

woman to address the Supreme Court of the United States. The popularizer of this legend is Massachusetts historian George Sheldon, who described the event in his 1893 article "Negro Slavery in Old Deerfield," which was published in *New England Magazine* and widely circulated. He wrote that Prince was permitted to argue her Vermont land claim suit in 1796 before the "Supreme Court of the United States . . . presided over by [Justice] Samuel Chase of Maryland." Apparently, Chase was so impressed by Prince's eloquence that he complimented her on making "a better argument than he had heard from any lawyer at the Vermont bar."[4]

Her performance would have been all the more extraordinary considering her background. She was taken from Africa as a child in 1730 and eventually sold to a Deerfield, MA, innkeeper named Ebenezer Wells. She purchased her freedom in 1756 after her marriage to Abijah Prince, a free black. In 1762, a wealthy Deerfield landowner deeded Abijah Prince 100 acres of land in the newly opened territory of Guilford, VT. The Princes and their six children took up residence there in the 1780s. Hungry for land, they had also obtained a grant of 300 acres of wilderness tract in nearby Sunderland.

The predatory behavior of a wealthy Sunderland neighbor, Colonel Eli Bronson, was the basis for the legendary suit. He set up a claim to the Princes' property and, according to nineteenth-century Sunderland historian Giles B. Bacon, "by repeated law suits obtained about one-half of the home lot, and had not the town interposed [the Princes] would have lost the whole."[5] A prominent citizen, Bronson allegedly hired Royall Tyler, a future chief justice of the Vermont Supreme Court, and Stephen R. Bradley, a future Vermont senator, as his counsel. The Princes were said to have engaged Isaac Tichenor, a future governor of the state, to defend their claim.[6]

In his article, Sheldon wrote that Prince argued before "the Supreme Court of the United States," but there is no evidence to suggest that she made the trip to Philadelphia (where the Court was then lodged) to do so. Sheldon based his assumption on a letter written by a Guilford historian named Rodney Field—who was neither an eyewitness to the event nor a contemporary of the Princes—that simply stated that she appeared before a "United States Court."[7]

A more likely scenario, given Chase's favorable comparison of Prince to other Vermont lawyers, would be that she argued before Justice Chase when he was riding circuit in Vermont. (In those days, circuit courts were presided over by one Supreme Court Justice and one district court judge). Justice Chase did sit at one session of court in Vermont while on circuit, at Bennington in May 1796, which coincides with the time at which the litigation would have taken place.[8] However, the court records show no cases with which Prince or Bronson were associated. Perhaps Lucy Terry Prince was a principal or a witness in a federal district court or the state superior or supreme court.

There is no doubt that Prince, an eloquent storyteller renowned for her keen memory, must have been an effective oral advocate before whatever court she did appear. In fact, she merits a place in history whether or not she argued before Justice Chase. Her lyrical thirty-line doggerel, "The Bars Fight," which accurately recounts the dramatic events surrounding an Indian raid on Deerfield that she witnessed in 1746, was printed posthumously in 1855. This accomplishment distinguishes her as one of the first published African-American poets.[9]

Myra Clark Gaines (1803–1885)

The other woman mistakenly reported to have pleaded her land claim case before the Supreme Court is perpetual litigant Myra Clark Gaines. The gallant orator Daniel Webster is alleged to have been the opposing advocate.[10]

The land dispute case of Myra Clark Gaines, involving her claim to valuable New Orleans property, came before some thirty different Justices, who issued thirteen separate rulings.

This myth probably arose because Gaines and her heirs filed an astonishing twenty-one motions before the Court between 1836 and 1891.[11] Some thirty different Justices heard the case, issuing thirteen decisions.[12] Passionate and dogged in her pursuit of her inheritance claim to valuable New Orleans properties, Gaines was wealthy and shrewd enough to engage the most seasoned oral advocates to argue on her behalf.[13] Over a period of five decades she employed more than thirty lawyers, seventeen of whom died in her service. There is no evidence, however, that she ever pleaded her own case against Daniel Webster or any other advocate. (In fact, Webster was one of the advocates she retained in her service.) However, she did present her own argument in a state court trial, stepping in after her counsel, infuriated by the judge's bias, stormed out. Gaines was also active in helping her lawyers prepare briefs.

At issue was the mysterious disappearance of a will drafted by her Irish immigrant father, Daniel Clark, when he died in 1813. In the will, Clark named Myra his legitimate daughter and heir to the large fortune he had accumulated. Her Creole mother, Zulime Carriere, held no record of her marriage to Clark, which they had kept secret because she had not obtained an annulment from her first husband, a French wine merchant and bigamist. Upon Clark's death the will disappeared, and his sisters and business partners claimed that Myra was illegitimate and therefore ineligible to inherit from her father under Louisiana's unique civil code. Because hundreds of New Orleans residents stood to lose their land if she won her claim, she was forced to resort constantly to federal courts to obtain the fair trial that hostile local courts did not always provide. The Supreme Court held that Myra Clark Gaines was her father's legitimate heir shortly before she died in 1885, deeply in debt from a lifetime of legal expenses. It took a few more lawsuits for her grandchildren to force the city of New Orleans to pay them their due.

Pioneers of the Bar

Belva Lockwood thus remains unchallenged as the first woman either to file a brief or present oral argument at the Supreme Court. Subsequent female advocates also qualified as pioneers in various ways.

Opposing the proposed sale by Congress of her tribe's sacred burial ground in Kansas City, KS, Lyda Burton Conley (1874–1946), of Wyandotte and English ancestry, became in 1910 the first Native American woman to argue before the Supreme Court. (The first Native American was probably Elias C. Boudinot, a Cherokee, in 1871.) Along with her sisters Helena and Ida, Conley protested Congress's proposal in 1906 to transfer the bodies and sell off the Huron Cemetery, which would have violated the government's treaty with her tribe. The Conley sisters padlocked themselves in the cemetery, built a fortified shack to dwell in, and fended off government officials and realtors (but not other Wyandottes) with their father's shotgun for seven years.[14]

Conley had long realized the value of the coveted piece of real estate where her parents and a sister were buried, and had equipped herself with a law degree from Kansas City School of Law in 1902 to defend it by peaceful means. She unsuccessfully filed suit for a permanent injunction in district court against the Secretary of the Interior. After losing an appeal, she left her sisters to hold the fort in 1909 while she traveled to Washington to argue the case before the Supreme Court. Conley argued *pro se*; she did not become a member of the Supreme Court bar until 1915.[15] A draft of the argument she delivered at the Court, written in her own hand, reveals that she used biblical imagery to enhance her plea. "Like Jacob of old I too, when I shall be gathered unto my people, desire that they bury me with my fathers in Huron Cemetery, the most sacred and hallowed spot on earth to me," she wrote. "I cannot believe," she added, "that this is superstitious reverence, any more

Lyda Burton Conley argued a case before the Supreme Court in 1910 demanding that the U.S. government honor a treaty with her tribe safeguarding its sacred burial ground, the Huron cemetery in Kansas City, KS.

than I can believe that the reverence every true American has for the grave of Washington at Mount Vernon is a superstitious reverence."[16]

In *Conley v. Ballinger, Secretary of the Interior* (1910), the Court held that in making the treaty the United States had "bound itself only by honor, not by law" and that the Wyandotte tribe had no legal right to the cemetery.[17] However, the Conley sisters' tenacious defense of their ancestors' graves so swayed public opinion that Congress repealed the sale, which had since been transacted. The three sisters were eventually buried in the Huron Cemetery, which is now a green oasis in downtown Kansas City, Kansas.[18]

The first female African-American lawyer to join the Supreme Court bar—Chicago Law School–trained Violette N. Anderson—did so eleven years after Conley. Anderson was admitted in 1926 on motion of James A. Cobb, a black judge in the District of Columbia.[19] The first black woman to petition the Court *pro se* was Jama A. White, who contested her expulsion from Portia Law School. She was expelled for neglecting to tell a coal and groceries dealer that she was separated from her husband and for refusing to pay for the merchandise herself once her marital status was discovered. (She had billed her husband's account despite their separation because a court had ordered her husband to pay her expenses.) The Massachusetts Supreme Court rejected White's claim against the law school, and, acting as her own attorney, she petitioned the U.S. Supreme Court unsuccessfully in 1933.[20]

It is not known which black woman lawyer filed the first brief or argued the first case in the Supreme Court. (The first African-American man to argue was probably Everett J. Waring, in 1890.[21]) One strong possibility is Constance Baker Motley, who, as associate counsel for the NAACP Legal Defense and Education Fund from 1945 to 1966, argued ten desegregation cases, winning nine. She helped prepare the briefs in the landmark case of *Brown v. Board of Education,* which found segregated schools unconstitutional. She also argued James Meredith's suit for admission to the University of Mississippi and Charlayne Hunter-Gault's case that forced the University of Georgia to open its doors to black students. Impressed with her oral arguments before the Supreme Court, Attorney General Ramsey Clark persuaded President Lyndon B. Johnson to appoint Motley to be the first black woman federal judge in 1966.[22]

The first women to argue against each other in the Supreme Court were Elizabeth R. Rindskopf and Dorothy Toth Beasley, the attorneys in *Paul J. Bell, Jr. v. R. H. Burson, Director, Georgia Department of Public Safety* (1971).[23] Beasley, an assistant attorney general of Georgia, opposed a woman advocate again two years later in *Doe v. Bolton.*[24] Her opponent, Margie Hames, representing abortion-seeker Mary Doe, prevailed, and the

As associate counsel for the NAACP Legal Defense and Education Fund, Inc. from 1945 to 1966, Constance Baker Motley argued ten segregation cases before the Supreme Court. She was probably the first black woman attorney to argue a Supreme Court case.

Court struck down a Georgia law that allowed only residents of the state to obtain abortions. "She didn't get it simply because she was female," explained Attorney General Arthur Bolton as to why Beasley, the only female out of a staff of some twenty-six deputies, was given the task of defending Georgia's 1968 abortion law.[25] Beasley, who had briefly worked with Hames in private practice, was simply considered the best advocate for the job.

Doe was argued the same day as *Roe v. Wade*, its companion case. Jay Floyd, who defended the Texas anti-abortion statute in *Roe*, argued against Sarah Weddington and her co-counsel Linda N. Coffee. "It's an old joke," chided Floyd when he began his *Roe* presentation, "but when a man argues against two beautiful ladies like this, they are going to have the last word." His misplaced attempt at humor was met with stony silence.[26] Hames found Floyd's comment "very chauvinistic," and she worried that Chief Justice Warren E. Burger "was going to come right off the bench at him." The Chief Justice "glared him down," remembers Hames. "[Floyd] got the point right away that this was not appropriate in court."[27]

There was no place for gallantry in the 1977 case of *Smith v. Organization of Foster Families for Equality & Reform*, which marked the first time four women had collectively argued one case. The counsel tables had never before been so "female" as when Louise Gruner Gans, Helen L. Buttenwieser, and Maria L. Marcus successfully represented individual foster families and an organization of foster parents in their suit for an injunction against New York City's procedures for removing foster children and attorney Marcia Robinson Lowry argued the city's case.[28]

Women of the Office of Solicitor General

The best source of women advocates has been the Office of the Solicitor General (OSG), the elite corps that represents the United States in the Supreme Court. The OSG has supplied a steady trickle of women to argue the government's position since 1972, when Harriet Sturtevant Shapiro was hired as the first regular woman attorney. There was at least one earlier instance, however, of a woman on the Solicitor General's staff appearing before the Supreme Court, although that episode seems to be an exception: In 1949, Patricia Collins successfully argued *Johnson v. Shaughnessy*,[29] an immigration case, when she was a lawyer in the Office of the Assistant Solicitor General, which was subsequently renamed the Office of Legal Counsel.

The reason Collins got this assignment is revealing. When Robert Ginnane, an associate in the OSG who had been assigned the case, was called suddenly to France, Collins's husband, Assistant Attorney General Sal

Andretta, prevailed on Solicitor General Philip Perlman to select his wife to step in and argue the government's case. Collins (now Patricia Dwinnell Butler) recalls that the Marshal of the Supreme Court complimented her on her performance: "with that [stentorian] voice of yours, you can come back any time." However, Justice Felix Frankfurter's needling did not encourage her to request assignment for further oral arguments.[30]

Twenty-three years after that episode, Shapiro joined the staff as an assistant solicitor general and paved the way for other women attorneys at the OSG. In 1999, five out of twenty lawyers on the staff were women.[31] Now more than 70, Shapiro is a seasoned advocate who holds the record among women staffers for most arguments—seventeen. In terms of gender law cases, Shapiro argued the government's position in *Schlesinger v. Ballard* (1975) and *Newport News Shipbuilding & Dry Dock Co. v. EEOC* (1983).[32] Her record puts her just ahead of Amy L. Wax, now a law professor, who argued fifteen cases for the government during her tenure at the OSG from 1987 to 1994. They may both soon be overtaken by Assistant Solicitor General Beth S. Brinkmann, who as of 1999 had argued thirteen cases since joining the OSG in 1993.[33]

Several former OSG staffers continue to specialize in appellate advocacy and to appear before the Supreme Court. Kathryn A. Oberly, who argued ten cases in her four-year stint at the OSG from 1982 to 1986, specializes in representing accounting firms. In 1989, she argued for Price Waterhouse in the high-profile Supreme Court case brought by Ann Hopkins, who successfully claimed she had been denied partnership because of her

When the assistant solicitor general assigned to an immigration case was unexpectedly called out of the country in 1949, Patricia H. Collins (now Patricia Dwinnell Butler, right) took over and successfully argued the government's case before the Supreme Court. Her husband, Assistant Attorney General Sal Andretta (second from left), had persuaded Solicitor General Phil Pearlman (left) to reassign her the case. Attorney General Tom C. Clark is standing between the Andrettas.

In 1972, Harriet Sturtevant Shapiro (back row, second from left) became the first woman attorney to work at the Office of the Solicitor General (OSG), the elite corps that represents the United States before the Supreme Court. Pictured in this 1972 OSG staff photo: (back row) William Bradford Reynolds, Shapiro, Andrew Frey, Harry Sachse, Edward Korman, Mark Evans, Keith Jones, Allen Tuttle, and Ray Randolph; (front row) Sam Huntington, Philip Lacovara, Daniel Friedman, Solicitor General Erwin Griswold, Lawrence Wallace, and Richard Stone. Shapiro has since argued seventeen cases before the Supreme Court, more than any other woman from the OSG.

gender.[34] Maureen E. Mahoney argued before the Supreme Court eight times when she served as a deputy solicitor general; she has returned to argue two more cases before the Court since leaving the OSG in 1993 to join a law firm.[35] Mahoney also argued one case before the Court prior to joining the OSG, having been invited by the Supreme Court through a special appointment to present argument.[36] She was probably the first woman invited by the Court to appear as an advocate.[37]

There has yet to be a female solicitor general, but the first female attorney general, Janet Reno, has argued once before the Supreme Court. In 1996, she chose to present the government's position, as *amicus curiae*, in *Maryland v. Wilson*,[38] three years after being appointed to the top job at the Justice Department.

Most Appearances Before the Court

These contemporary women advocates do not compare, in terms of numbers of cases argued, with a handful of pioneers who worked as appellate lawyers for various branches of the federal government.[39] The earliest of these professional advocates was Mabel Walker Willebrandt (1889–1963), who served as assistant attorney general in the 1920s and prosecuted scores of violators of the National Prohibition Act.[40] Because the Act was difficult to enforce, she spearheaded the use of tax laws to prosecute illegal distributors of liquor. "Prohibition Portia," as she was nicknamed, argued

As an assistant attorney general during Prohibition, Mabel Walker Willebrandt spearheaded the use of tax laws to prosecute illegal distributors of liquor. She submitted 278 cases on *certiorari* to the Supreme Court during her career at the Department of Justice.

twenty-two times before the Supreme Court, all Prohibition- or tax-related cases, before resigning from the Justice Department in 1929.[41]

Willebrandt's service at the Department of Justice overlapped for one year with that of Helen R. Carloss (1890–1948), another female public servant who frequently represented the United States before the Supreme Court. Carloss left her native Mississippi to attend law school at George Washington University and was then hired to handle tax litigation for the federal government. She earned such an excellent reputation for her ability to collect taxes from delinquent payers that her opponents reportedly hired "the best men lawyers" to prepare their cases.[42] As a litigator at the Internal Revenue Service from 1928 to 1947, Carloss argued sixteen times[43] before the Supreme Court and filed countless briefs, including several in tax cases that were jointly prepared with Willebrandt (among others) in 1929. A brief they filed on May 13, 1929 (along with Attorney General William D. Mitchell and special assistant attorney general Alfred A. Wheat) for the Commissioner of Internal Revenue was likely the first instance of two women's names appearing on the same Supreme Court brief.[44]

In his memoir, **The Court Years, 1939–1975**, Justice William O. Douglas described Carloss as "a gray-haired lady from Mississippi." "If seen by a stranger," he mused,

> she would doubtless be identified as a housewife. But she was an advocate *par excellence*—brief, lucid, relevant and powerful. Typical of the complex and important questions which she presented is *Kirby Petroleum Co. v. Commissioner* (326 U.S. 599) concerning the right of the les-

> sor of oil and gas land to the depletion allowance where the lease is for a cash bonus, a royalty and a share of the net profits.[45]

Another outstanding appellate lawyer and dedicated public servant, Bessie Margolin (1909–1996), is best remembered for her talent for oral argument. She joined the Department of Labor shortly after passage of the 1938 Fair Labor Standards Act and specialized in interpreting that New Deal law, which spelled out federal wage and hour policy. Margolin rose to become assistant solicitor in charge of Supreme Court litigation, and then, in 1963, was promoted to associate solicitor for the Division of Fair Labor Standards. As such, she was responsible for all litigation under the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act. Margolin argued twenty-seven cases before the Supreme Court.[46]

The daughter of Russian Jewish immigrants, Margolin was born in New York City, but was sent to a Jewish Children's Home in New Orleans after her mother died. She attended Tulane University and graduated from its law school. She then pursued a doctorate in law at Yale University. Margolin started her career working on the legal staff at the Tennessee Valley Authority, the New Deal project intended to bring electricity to rural communities.

Justice Douglas remembered Margolin as

> crisp in her speech and penetrating in her analyses, reducing complex factual situations to simple, orderly problems. Typical perhaps of the worrisome but important issues which she argued was *Phillips Co. v. Walling* (324 U.S. 490), holding that an exemption from the Fair Labor Standards Act of employees "engaged in any retail . . . establishment" does not include warehouse and central office employees of an interstate retail-chain-store system. As [Chief Justice] Earl Warren said at a dinner honoring her retirement, she helped put flesh on the bare bones of the Fair Labor Standards Act and made it a viable statutory scheme.[47]

The all-time women's record for arguments before the Supreme Court belongs to Beatrice Rosenberg (1908–1989), a low-profile but brilliant government attorney who, as an authority on search and seizure, argued more than thirty cases before the high court.[48] (The men's twentieth-century record belongs to Deputy Solicitor General Lawrence G. Wallace, who has argued more than 150 cases.) In his autobiography, Justice Douglas remembers Rosenberg as being superior to many better known appellate lawyers with grand reputations. "[L]esser lights and lawyers not well known brought greater distinction to advocacy at the appellate level," he wrote. "Oscar Davis . . . , Daniel Friedman and Beatrice Rosenberg (all of the Department of Justice) made more enduring contri-

A brilliant attorney in the criminal division of the Justice Department and an expert on the government's right to search and seizure, Beatrice Rosenberg argued some thirty cases before the Supreme Court, a record for women advocates.

butions to the art of advocacy before us than most of the 'big-name' lawyers."[49]

Born in Newark, NJ, Rosenberg was a high school classmate of William J. Brennan, Jr. (She herself was reportedly considered for a Supreme Court nomination by Richard M. Nixon in 1971.) Rosenberg graduated from Wellesley College and New York University Law School. She began her government career as a lawyer in the Justice Department's criminal division in 1943. When she left in 1972, she had worked her way up to becoming chief of the Criminal Division's appellate section. As an appellate lawyer, Rosenberg quietly earned accolades from her peers. In 1970, she became the first woman to win the Tom C. Clark Award, which is given by the District of Columbia chapter of the Federal Bar Association for outstanding government service by a federal or local lawyer.[50]

Rosenberg spent the last seven years of her career before she retired in 1979 hearing job discrimination cases—including those involving sexual harassment—on the appeals board of the Equal Employment Opportunity Commission (EEOC). She also litigated appeals and helped persuade the Justice Department that sexual harassment was a form of gender discrimination. Practical and quick-witted, she served at the EEOC as a masterful mentor to a pride of appellate lawyers tackling employment discrimination cases. When she died in 1989, the D.C. bar inaugurated the Beatrice Rosenberg Award "for outstanding government service by a bar member whose career contributions to the government exemplifies the highest order of public service."

Although she does not come close to Rosenberg in terms of quantity of cases, Ruth Bader Ginsburg deserves singling out as an advocate for the quality of the arguments she used to persuade the Supreme Court to strike down laws that treat men and women differently. As a cofounder of, and then general counsel to, the Women's Rights Project at the American Civil Liberties Union (ACLU), Ginsburg was the architect of a comprehensive litigating strategy designed to end overt sex discrimination in the law. She argued six times before the Court, losing only one case, *Kahn v. Shevin* (1974). Initiated by an ACLU affiliate in Florida, that case had not been selected to go before the Court by Ginsburg who, presciently, felt the timing was wrong.

The cases Ginsburg argued or briefed read like a list of landmarks in a gender law textbook: *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), *Weinberger v. Wiesenfeld* (1975), *Edwards v. Healy* (1975), *Turner v. Department of Employment Security* (1975), *Califano v. Goldfarb* (1977), and *Duren v. Missouri* (1979).[51] She also filed influential *amicus curiae* briefs in many other equal protection cases, including the landmark *Craig v. Boren* (1976). Ginsburg went on to be appointed to the United States Court of Appeals for the District of Columbia Circuit in 1980 and then, in 1993, to the Supreme Court.

Getting the Assignment

Working as an appellate lawyer for the federal government has been the most direct route to gaining the opportunity to argue a case before the Supreme Court. In recent Terms, many of the cases heard have been between the federal government and an individual or other private party. Attorneys seeking to represent private parties sometimes participate in "beauty contests" to peddle their services. Affluent clients often make the rounds of a handful of top lawyers who specialize in appellate work—where the number of women is traditionally low—and ask questions about how each candidate would handle the case and how experienced that attorney is at arguing before the Justices. The prestige of arguing a case before the Supreme Court, and the reduction over the past decade in the number of cases the Court has agreed to hear each Term, make the competition for assignments correspondingly stiff.

However, many women (and men) wind up arguing before the Supreme Court not because they are selected to jump in at the ap-

peals level and lend their expertise, but simply because they have ridden the case from the local level. In other words, clients often stick with the attorney who filed their original suit, regardless of whether he or she is an experienced appellate lawyer. These advocates generally do not return a second time unless they are lucky enough to be hired by another client whose case is reviewed by the Supreme Court.

How many women argue before the Supreme Court each Term? Only 17 percent of the lawyers who argued before the Supreme Court in the 1999 Term, and 10 percent in the 1986 Term, were women. This is a big improvement over the 1966 Term, when that figure was barely 1 percent, and over the 1976 Term, when it was a mere 5 percent.[52] However, these figures have not kept pace with the increasing numbers of women entering the legal profession or joining the Supreme Court bar.

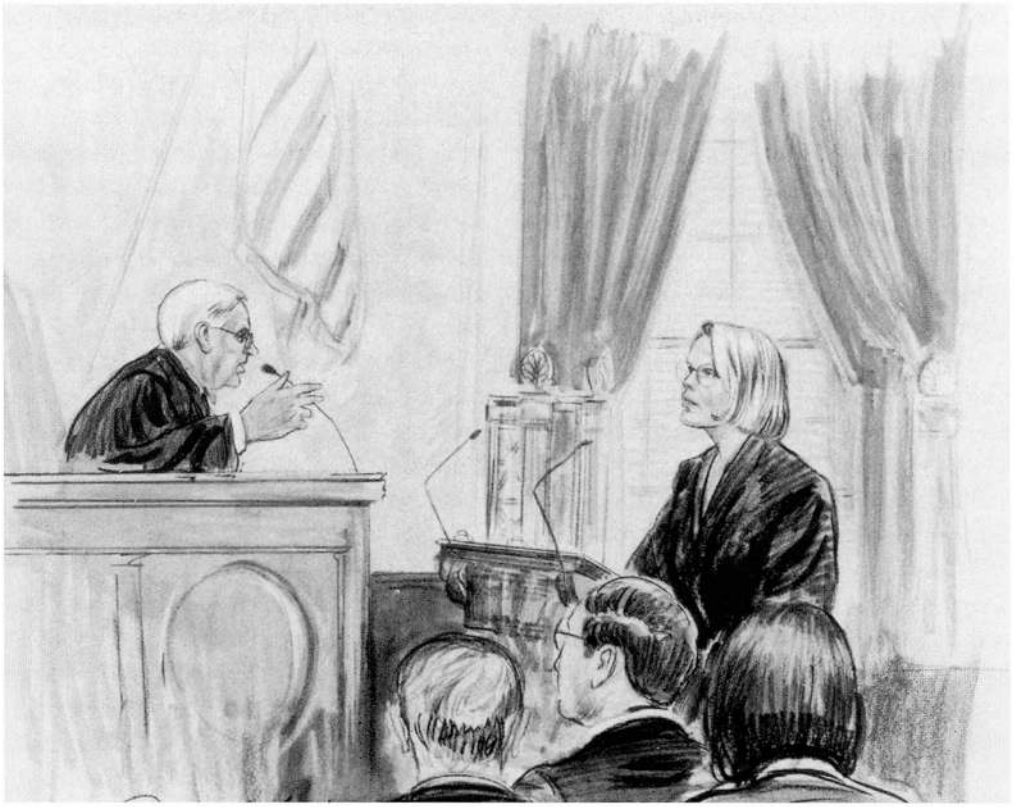
To become a member of the Court's bar, an applicant must be sponsored by two nonrelated members of that bar who swear that she has been a member in good standing of the bar of the highest court in their state for at least three years. Once admitted, members are qualified to file briefs and other papers and to argue before the Bench, although most join simply for the prestige of being a member of an elite bar. In 1996, nearly a quarter of the attorneys admitted to the Supreme Court bar were women. That figure was up from 18 percent in 1986 and 5 percent in 1976.[53] A good indicator of the swelling female ranks of the Supreme Court bar occurred on March 2, 1998. On that day, Susan Orr Henderson, Karen Orr McClure, and Joanne Orr, attorneys from Indiana, became the first three sisters to be sworn in simultaneously.[54]

Do women advocates have a harder time getting clients? Legal experts, and the advocates themselves, generally say the answer is no. Former Deputy Solicitor General Mahoney, who is now carving out her own practice specializing in appellate advocacy, has said: "I've always been convinced that when I lost a client, I lost for a. . . legitimate reason," not because of gender. "There are credentials you need," she emphasized, "and right now a lot more men have those credentials."[55] Those credentials often include a clerkship for a Justice (Mahoney clerked for Chief Justice William H. Rehnquist) and a stint at the OSG arguing for the United States.

One way to get appellate work in the Supreme Court is to specialize in a particular area of law. Betty Jo Christian, a partner at the Washington firm of Steptoe & Johnson, is a good example. Having served as Commissioner of the Interstate Commerce Commission in the 1970s, she is considered a top expert on transportation and railroad law. Combining this expertise with appellate skills has made her an attractive choice for railroad companies in suits interpreting the government's transportation and interstate commerce laws, many of which Christian helped formulate. She has argued four times before the Supreme Court and has prepared briefs either for a party or as *amicus curiae* in countless other cases.[56]

Academic jobs at prestigious law schools also aid engagement in a Supreme Court case. Kathleen M. Sullivan, now dean of Stanford Law School, is perhaps the highest-profile woman in this category. Sullivan helped prepare the brief challenging Georgia's antisodomy statute in *Bowers v. Hardwick* (1986), was on the briefs representing abortion clinics in *Rust v. Sullivan* (1991), and was at the co-counsel table with Lawrence Tribe in *Bush v. Palm Beach County Canvassing Board* (2000).

A good indication that women advocates are making progress and becoming true contenders was the selection in 1998 of Mahoney, over stiff competition from leading male advocates, to represent the House of Representatives in a suit against the Commerce Department challenging the Census Bureau's proposal to use a new method for conducting



In 1999, the House of Representatives hired Maureen Mahoney (right, addressing Justice John Paul Stevens at left) to argue a high-profile case against the Commerce Department challenging the Census Bureau's proposal to use a new method for conducting the population count.

the population count. This action was one of the most highly prized assignments for the Supreme Court bar that Term.[57]

Dressing for Success

While male advocates have followed a formal dress code, women advocates, absent any rules, have had to improvise. In her day, Belva Lockwood wore prim black dresses befitting her profession, but her arrival at the Supreme Court drew considerable attention because she came on a tricycle, which she found more economical than a horse and carriage.[58] When Mabel Walker Willebrandt was named assistant attorney general in 1923, she had a skirt made out of pinstriped material and a black coat to "call [] the attention of her gentleman colleagues of the bar to her ability to conform to the regulations of what a well-dressed lawyer should wear before the Supreme Court."[59] At that time, the dress code for men was cutaways and striped trousers, also called a morning suit.

Although male advocates representing parties other than the United States have long since stopped sporting that uniform, lawyers in the Office of the Solicitor General continue to honor the tradition. The office keeps half a dozen outfits on hand, and most staffers borrow one that fits when they have a Supreme Court appearance. However, when Deputy Solicitor General Jewel Lafontant—a very stylish dresser—became the first woman from the OSG to argue a case before the Court, in 1973, she took a cue from Willebrandt and had a skirt and jacket specially made for her, with a one-button cutaway, pinstriped skirt,

and jabot ruffled blouse. Apparently she dismissed as "too large" then-acting Attorney General Richard Kleindienst's morning suit, which he offered for her first Court appearance.[60] Harriet S. Shapiro also declined to "get dressed up in those crazy costumes that don't fit very well" for her first argument, and instead wore her own suit.[61] Other women from the OSG have generally followed her lead by wearing dark (but not brown) suits or dresses.[62]

Women who work at the Supreme Court as Courtroom deputies (there has yet to be a female Clerk or Marshal of the Court) also wear the traditional cutaways with pants. This custom started in 1992, when Sandy Nelsen, Assistant to the Clerk of the Court, appeared in her usual spot at the Clerk's desk in the Courtroom during oral argument wearing a morning suit. Clerk William Suter had decided it was appropriate that they *both* be dressed according to tradition.[63]

The first woman to argue before the Supreme Court, Belva Lockwood favored prim black dresses with ruffled collars. She used a tricycle to get to her Court appointments because she found it the most efficient and economical means of getting around Washington, D.C.

Five years later, the Justices heard the first argument delivered by a woman in another type of uniform—a military one. Lieutenant Colonel Kim L. Sheffield presented the respondent's case in *U.S. v. Scheffer* (1998) wearing her regulation U.S. Air Force attire.[64]

Other women advocates have chosen clothes that gave them confidence or were simply comfortable. Ruth Bader Ginsburg summoned the image of her mother, Celia, when arguing before the Court: "I wear her earrings and her pin and I think how pleased she would be if she were there."[65]

The first woman to argue a case wearing pants was Marguerite M. Buckley in October 1973.[66] She had previously distinguished herself in 1964 as the first woman to wear a miniskirt while being admitted to the Supreme Court bar. Having been thrown out of a courtroom by a municipal court judge for wearing pants, Buckley chose a black pantsuit for her argument in the Supreme Court as much to make a political statement as to be comfortable.[67] "He wasn't overwhelmed," commented the Clerk of the Court, Michael Rodak, Jr., when the *Washington Post* asked about Chief Justice Warren E. Burger's reaction.[68] Buckley had called ahead to ask permission, and was told by Rodak that the Justices did not mind what she wore as long as it was "neat and clean."[69]

Husbands and Wives

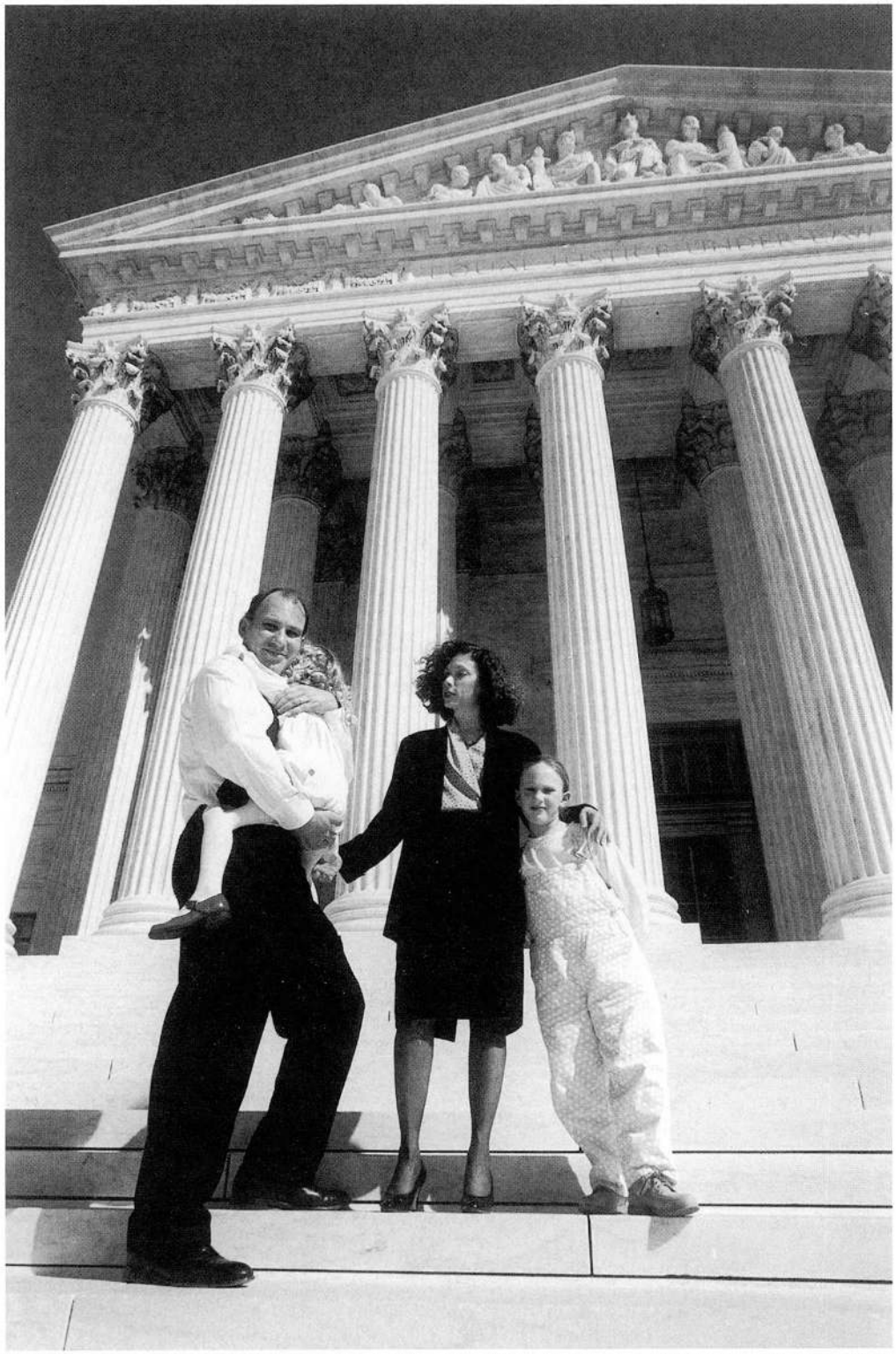
The process of preparing for a Supreme Court argument takes months and is usually nerve-wracking. An advocate only has thirty minutes to make the argument, but she does not know how long she will be able to speak before a Justice jumps in with a question. Advocates prepare answers to possible questions and outline themes and points they intend to deliver, whether in response to a question or through a narrative. It is difficult to predict

In 1973, Jewel Lafontant became the first woman from the Office of the Solicitor General to argue a case before the Supreme Court. For the occasion, she had a tailor make her a skirt and jacket that resembled the pinstriped cutaway coat and pants worn by her male colleagues.

what tangent a Justice's line of questioning might take, and an advocate must be prepared for anything. First-timers are often coached by veterans, who help them stage mock arguments by playing the role of the Justices. Even veterans continue to do mock arguments, no matter how many times they have appeared before the Court. Horror stories abound of advocates who are humiliated because they get off track or fail to think fast enough to answer a Justice's question.

Some male advocates have had the good fortune of collaborating with their wives on their presentation. The first couple to argue a case together before the Court was probably Alice L. Robie and Melvin L. Resnick in a death penalty case called *Crampton v. Ohio* (1971). Resnick presented the argument for Ohio, while Robie, who had cowritten the brief, sat next to him at counsel table. They were both assistant prosecuting attorneys at the time and are now serving as judges on the Sixth District Court of Appeals of Ohio and the Supreme Court of Ohio, respectively.[70]

At least one woman advocate making her first Supreme Court appearance has been coached at home by a husband who was a veteran. Benna Ruth Solomon, a lawyer for the city of Chicago, and David Strauss, a professor at the University of Chicago Law School, delivered arguments a week apart in 1997.[71] Strauss, who had already appeared fifteen times before the Court, admitted that he had a tougher time sitting with his two young daughters watching his wife, who had clerked for Justice Byron R. White, deliver an argument than he had had performing himself. "It's harder because you can't do anything with your energy, your nervousness," he observed. "You just have to sit there."[72] For others sitting in the Courtroom, Benna Solomon's argument was a treat to observe. "It was one of the very best arguments of the Term," a regular observer commented.[73]



David Strauss and Benna Ruth Solomon stood on the steps of the Supreme Court with their daughters in 1977 after Solomon presented oral argument. They form one of several couples that have appeared before the Court, either as co-counsels or, as in this instance, to argue separate cases.

Another woman advocate, assistant solicitor general Cornelia T. L. Pillard, argued six days before her husband, David Cole, a professor at Georgetown University Law Center, in 1994. However, they were not much help to each other, because neither had ever argued before the Supreme Court and they were preparing unrelated cases. The stress level in their household was enormous. "It's like the Iron Man Triathalon of the law," explained Pillard. "There's so much training and preparation, it's . . . the ultimate challenge."[74]

Ruth Bader Ginsburg reports that not only did her husband, Martin D. Ginsburg, now a Georgetown University Law Center professor, read drafts of her briefs and listen to rehearsals of her arguments, but her son and daughter also routinely chimed in with their questions and suggestions during dinner table conversations.

Rolling with the Waves

The gallantry shown women in Daniel Webster's day has long since been replaced by professional courtesy. Female advocates are not cut any slack during the ordeal of oral argument because they are women. There may even have been some initial resistance to women advocates appearing in the Courtroom, if only on the part of Justice James C. McReynolds, who also objected to the Court employing women.[75] When Emily Marx argued the citizenship eligibility case of a Canadian nurse in 1931, Justice McReynolds reportedly remarked in a voice loud enough for

Ruth Bader Ginsburg's son James and nephew David Stiephman attended her 1978 oral argument in *Duren v. Missouri*, one of six cases she argued before the Supreme Court.

all to hear: "Do we have to listen to a *female*?"[76]

As the Court began reviewing sex discrimination cases in the 1970s and the women's movement came into flower, did women advocates gain an advantage in arguing gender-related cases? Justice Douglas implicitly answered that question in describing how four hapless women so irritated him during their arguments that he jokingly considered rolling back all the progress the Supreme Court had granted women in equal protection cases.

> In the sixties and seventies, more and more women appeared as advocates. Their average ability and skill were the same as the male advocates and their presence was no cure for the mediocrity of most arguments before us. I remember four women in one case who droned on and on in whining voices that said, "Pay special attention to our arguments, for this is the day of women's liberation." Several of us did express the view that any law which drew a line between men and women was inherently suspect. That view had not prevailed over the majority saying a discrimination classification would be sustained if "reasonable." During this argument by the four wondrous Amazons, I sent a note along the bench saying I was about to change my mind on sex classifications and sustain them if they were "reasonable."[77]

While presenting a case to the Justices is perhaps the most difficult task a lawyer can perform, it also confers enormous prestige and can be an exhilarating experience. Despite her abilities, even Ruth Bader Ginsburg felt the same fears during her first time arguing before the Supreme Court that strike most advocates, men or women. Yet she has also recalled how powerful the experience made her feel:

> The first time I argued a case here I didn't have lunch . . . because I didn't know whether I could keep it down. I was initially terribly nervous, and after about two minutes into the argument I looked up at these guys and I said, "I have a captive audience. They have no place to go for the next half hour. They must listen to me." And it was a feeling of power. And then there was the challenge of rolling with the waves, sometimes the punches.[78]

ENDNOTES

[1]*Kaiser v. Stickney*, 131 U.S. clxxxvii Appx (1880). Appendix of "Omitted Cases in the Reports of the Decisions of the Supreme Court."

[2]*See* Norgren, Jill, "Before It Was Merely Difficult: Belva Lockwood's Life in Law and Politics." *Journal of Supreme Court History* 23, no. 1 (1999) at 16–40.

[3]Lockwood's efforts to be admitted to the Supreme Court bar were considered amusing by Washington society. Malvina Shanklin Harlan, wife of Justice John Marshall Harlan, attended a party at the White House for Chief Justice Morrison R. Waite on the day the Court initially had refused Lockwood's application for admission. "It was an unprecedented proceeding at that time," she reported, "and the people of Washington generally were laughing in their sleeves over it. The newspaper giving an account of it said, 'The Chief Justice squelched the fair applicant.'" *See* Malvina S. Harlan, **Some Memories of a Long Life, 1854–1911** (revised 1915) (unpublished manuscript, Library of Congress, Washington, D.C.) at 90.

[4]Sheldon, George, "Negro Slavery in Old Deerfield," *New England Magazine* n.s. 8 (March 1893) at 54–57.

[5]Quoted in Proper, David R, **Lucy Terry Prince: Singer of History** (1997) at 32. Proper's work discredits the story of Prince's oral argument before Justice Chase for lack of documentation.

[6]For a well-considered argument giving the benefit of the doubt to the Prince story, *see* Smith, J. Clay, Jr. **Emancipation: The Making of the Black Lawyer, 1844–1944** (1993), at 70–71. For a more contemporaneous historical account of Prince's argument, *see* Holland, Josiah Gilbert, **History of Western Massachusetts the Counties of Hampden, Hampshire, Franklin, and Berkshire: Embracing an Outline, or General History, of the Section, an Account of Its Scientific Aspects and Leading Interests, and Separate Histories of**

Its One Hundred Towns (1855). *See also* two other sources that perpetuate the Prince legend: Merriam, Robert L., **Lucy Terry Prince** (1983); and Katz, Bernard and Jonathan, **Black Woman: A Fictionalized Biography of Lucy Terry Prince** (1973), 225–69.

[7]Correspondence between Rodney B. Field and George Sheldon, quoted in Proper, *supra* note 4 at 47, note 142.

[8]Marcus, Maeva, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800, Vol. III** (1990), Appendix C at 491.

[9]Prince's poetry is discussed in most works on African-American poetry and in: Kaplan, Sidney, "Lucy Terry Prince: Vermont Advocate and Poet," in **The Black Presence in the Era of the American Revolution, 1770–1800** (1973) at 209–211.

[10]Morello, Karen Berger, **The Invisible Bar: The Woman Lawyer in America, 1638 to the Present** (1986) at 8. Morello says in a note that "[h]istorian Barbara Wertheimer in her book on working women, **We Were There,**" reported "the instance in which Myra Clark Gaines of New Orleans, who spent years in litigation over her inheritance, argued and won her own case in the U.S. Supreme Court against the formidable Daniel Webster." However, I could find no reference to either Gaines or Webster in Barbara Mayer Wertheimer, **We Were There: The Story of Working Women in America** (1977).

[11]Supreme Court of the United States, **Minutes**.

[12]*Ex parte Whitney*, 13 Pet. 404 (1839); *Gaines v. Relf*, 15 Pet. 9 (1841); *Gaines v. Chew*, 2 How. 619 (1844); *Patterson v. Gaines*, 6 How. 550 (1848); *Gaines v. Relf*, 12 How. 472 (1852); *Gaines v. Hennen*, 24 How. 553 (1861); *Gaines v. Delacroix et al.*, 6 Wall. 719 (1868); *New Orleans v. Gaines*, 15 Wall. 624 (1873); *Gaines v. Fuentes*, 92 U.S. 10 (1876); *Smith v. Gaines*, 93 U.S. 341 (1876); *Davis v. Gaines*, 104 U.S. 386 (1881); *New Orleans v. Gaines's Administrator*, 131 U.S. 191 (1889); *New Orleans v. Gaines's Administrator*, 138 U.S. 595 (1891).

[13]*See generally* Harmon, Nolan B., **The Famous Case of Myra Clark Gaines** (1946).

[14]Van Brunt, Henry, "Three Sisters' Defense of Cemetery Continued For Nearly Forty Years," *Kansas City Times*, June 7, 1946.

[15]Conley argued her case on January 14, 1910, and was admitted to the Supreme Court bar on October 25, 1915, on motion of John W. Davis. Many newspaper accounts of Conley's achievements erroneously claim that she was the first women admitted to the Supreme Court bar. In fact, she was the fifty-ninth.

[16]Kansas City Public Library, "The Conley Sisters" [Web site] at <http://www.kckpl.lib.ks.us/kscoll/people/lconley.htm>. A transcription of the handwritten manuscript of Lyda B. Conley's oral argument, written in 1909, is posted on this site.

[17]*Conley v. Ballinger, Secretary of the Interior*, 216 U.S. 84 (1910).

[18]**The Historic Huron Indian Cemetery**, pamphlet of the Kansas City Chamber of Commerce.

[19]Smith, J. Clay, Jr., ed., **Rebels in Law: Voices in History of Black Women Lawyers** (1998) at 282.

[20]Smith, *supra* note 6, at 69–70.

[21]*Id.* at 145.

[22]*See generally* Motley, Constance Baker, **Equal Justice Under Law: An Autobiography** (1998).

[23]*Bell v. Burson*, 410 U.S. 535 (1971).

[24]*Doe v. Bolton*, 410 U.S. 179 (1973).

[25]Garrow, David J., **Liberty and Sexuality** (1994) at 446.

[26]Oral argument for *Roe v. Wade*, **The Supreme Court's Greatest Hits**, CD-ROM by Jerry Goldman, 1999.

[27]Quoted in Garrow, *supra* note 25 at 524.

[28]*Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977). One and a half hours were allotted for oral argument. In the Supreme Court's *Journal* entry, Louise "Grumer" is corrected in pencil to read Louise "Gruner Gans."

[29]*U.S. ex rel. Johnson v. Shaughnessy*, 336 U.S. 806 (1949). Argued April 19–20, 1949.

[30]Interview with Patricia Dwinnell Butler, October 1997.

[31]"Current and Previous Women In OSG," Office of the Solicitor General document.

[32]*Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

[33]Dates of service and number of cases argued for all female OSG advocates are from the Office of the Solicitor General.

[34]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See generally* Varchaver, Nicholas, "The Last Emperor," *The American Lawyer*, December 1994 at 52.

[35]Rambler, Mark, "Counting on Maureen Mahoney," *The American Lawyer*, November 1998.

[36]Interview with Maureen E. Mahoney, December 1999.

[37]Interview with Frank Lorson, Chief Deputy Clerk of the Supreme Court of the United States.

[38]*Maryland v. Wilson*, 519 U.S. 408 (1997).

[39]*See generally* Drachman, Virginia G., **Sisters in Law: Women Lawyers in Modern American History** (1998).

[40]*See generally* Brown, Dorothy M., **Mabel Walker Willebrandt: A Study of Power, Loyalty, and Law** (1984).

[41]Clarke, Nell Ray, "Women in the Supreme Court," *Equal Rights* 14 (April 9, 1927) at 71–72. Clarke reports that by that date Willebrandt had argued nineteen times before the Supreme Court: fourteen Prohibition cases and five tax cases. Willebrandt argued three more Prohibition cases (*Reinecke v. Gardner* [1928], *Donnelley v. United States* [1928] and *United States v. John Barth Company* [1929]) before her resignation.

[42]"Assistant to Attorney General Handles Much Work on Trains," *The Washington Post* March 28, 1934 at 13.

[43]*Kirby Petroleum Co. v. Commissioner of Internal Revenue. Commissioner of Internal Revenue v. Crawford* 326 U.S. 599 (1946); *Commissioner of Internal Revenue v. Holmes' Estate* 326 U.S. 480 (1946); *Putnam's Estate v. Commissioner of Internal Revenue*, 324 U.S. 393 (1945); *United States v. Standard Rice Co., Inc.*, 323 U.S. 106 (1944); *Commissioner of Internal Revenue v. Bedford's Estate*, 325 U.S. 283 (1945); *Merrill v. Fahs, Collector of Internal Revenue*, 324 U.S. 308 (1945); *Commissioner of Internal Revenue v. Wemyss* 324 U.S. 303 (1945); *Douglas v. Commissioner of Internal Revenue, Robinson's Estate v. Commissioner of Internal Revenue, Dalrymple v. Commissioner of Internal Revenue*, 322 U.S. 275 (1944) (two cases); *Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1 (1941); *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943); *Haggar Co. v. Helvering, Com'r of Internal Revenue*, 308 U.S. 389 (1940); *Commissioner of Internal Revenue v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943); *Helvering, Commissioner of Internal Revenue v. Metropolitan Edison Co., Metropolitan Edison Co. v. Pennsylvania Water & Power Co.*, 306 U.S. 522 (1939); *Real Estate–Land Title & Trust Co. v. United States*, 309 U.S. 13 (1940); *Lang v. Commissioner of Internal Revenue*, 304 U.S. 264 (1938); *General Gas & Electric Corporation v. Commissioner of Internal Revenue*, 306 U.S. 530 (1939).

[44]*Total Broadhurst Lee Company, Ltd., v. Commissioner of Internal Revenue*, 279 U.S. 861 (1929).

[45]Douglas, William O., **The Court Years, 1939–1975: The Autobiography of William O. Douglas** (1980) at 184.

[46]"Bessie Margolin, Labor Department Lawyer," obituary, *The Washington Post*, June 21, 1996 at B6.

[47]Douglas, *supra* note 45 at 184–5.

[48]"Beatrice Rosenberg; Prominent Attorney for the U.S. Was 81," obituary, *The New York Times*, December 2, 1989, section 1 at 15.

[49]Douglas, *supra* note 45 at 186.

[50]"Beatrice Rosenberg, Lawyer, Justice Official," obituary, *The Washington Post*, December 2, 1989, Metro section.

[51]*See generally* Cushman, Clare, ed., **Supreme Court Decisions and Women's Rights: Milestones to Equality** (2001).

[52]These percentages were calculated by counting the number of women advocates (Mrs. and Ms. in the Supreme Court *Journal*) who have argued in a given Term and dividing that number by the total number of advocates who argued that Term (including *amicus curiae* and *pro hac vice*). Percentages were rounded off.

[53]These percentages were calculated by counting the number of female admittees to the Supreme Court bar in a given Term and dividing that number by the total number of admittees for the same Term. Because the Supreme Court *Journal* does not list honorifics such as Mrs. and Ms. when recording oral and written admissions, gender was determined by the first name. Given names that are ambiguous (Robin, Terry, Leslie, etc.) were not counted. To accommodate a margin of error, percentages were rounded off.

[54]"Three Sisters from Indiana to be Sworn In before the United States Supreme Court," press release, The National Society Daughters of the American Revolution, March 2, 1998.

[55]Biskupic, Joan, "Women Are Still Not Well-Represented Among Lawyers Facing Supreme Test: Despite Gains for Female Advocates, High Court Is Largely a Man's Venue," *The Washington Post*, May 27, 1997 at A3.

[56]Interview with Betty Jo Christian, September 1999.

[57]*United States Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999).

[58]Norgren, *supra* note 2 at 19.

[59]Clarke, *supra* note 41 at 70.

[60]Radcliffe, Donna, and Hyde, Nina S., "Courting Attire," *The Washington Post*, November 27, 1973, at B2.

[61]Interview with Harriet S. Shapiro, May 1999.

[62]Biskupic, Joan, "In This Court, One Must Dress with Respect for the Justices," *Austin American-Statesman*, December 18, 1999, at A33.

[63]"Special Events Supreme Court of the United States," November 3, 1992.

[64]"Special Events Supreme Court of the United States," November 3, 1997.

[65]Quoted in Ayer, Eleanor H., **Ruth Bader Ginsburg: Fire and Steel on the Supreme Court** (1994) at 55.

[66]The case was *Lubin v. Panish*, 415 U.S. 709 (1974).

[67]Interview with Marguerite M. Buckley, March 2000. Some press reports erroneously attributed the distinction of begin the first woman to argue before the Supreme Court in pants to Jane M. Picker, who argued a high-profile pregnancy case, *Cleveland Bd. of Ed. v. LaFleur*, during the same Term. Picker wore a red pant suit in the Supreme Court building while preparing her case, but chose a dress for the actual argument. Interview with Jane M. Picker, March 2000.

[68]Radcliffe and Hyde, *supra* note 60.

[69]Buckley interview, *supra* note 67.

[70]*Crampton v. Ohio*, 402 U.S. 183, argued November 9, 1970. Correspondence with Alice Robie Resnick, September 10, 1999.

[71]David Strauss argued *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), on October 6, and Benna Ruth Solomon argued *Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), on October 14.

[72]Greenberg, Jan Crawford, "This Couple Argues Before Highest Court," *Chicago Tribune*, October 15, 1997, at 6.

[73]Anonymous source.

[74]Greenberg, *supra* note 72.

[75]O'Donnell, Alice L, "A Long Way, Baby: Women and Other Strangers Before the Bar," *Supreme Court Historical Society Yearbook* (1977) at 59. The author recounts how "one Justice was opposed to having any women employees at the Court. One Clerk of the Court finally dared pioneer the course and hired a woman to work in his office. But so violently opposed was the Justice that (tales recount) the woman had to hide every time he was heard to be approaching the office." The anonymous employee was O'Donnell herself; the unnamed Justice was James C. McReynolds.

[76]Schaeffer, Amy, "Meet Miss Marx!", *Barnard College Alumnae Magazine*, January 1941, vol. xxx, no. 4 at 12. The case was *United States v. Bland*, 283 U.S. 636 (1931).

[77]Douglas, *supra* note 45 at 185.

[78]Film for Visitors, Supreme Court of the United States.

Revivifying Political Science: Lucas A. Powe, Jr., on the Warren Court

MELVIN I. UROFSKY

The Supreme Court is studied by a variety of scholars—historians, political scientists, sociologists, economists, and law school professors of all types. While the focus varies according to individual interest—religious scholars will be especially concerned with Establishment and Free Exercise Clause distinctions—for the most part all of us try to look at what the Court does in a larger context. A particular case dealing with free speech must be read not only in terms of prior Court cases but also within the boundaries of free speech theory, public considerations, and current controversies.

When I first became interested in the Supreme Court, political science was dominated by people who recognized that the Court, as a coequal branch of government, had to be viewed through the lens of political activity. With this understanding, men such as E. S. Corwin, Alpheus T. Mason, and Walter Murphy wrote stimulating and classic works on the role of the Court in American society. They had not only a historical understanding of the Court, but also a sense of how the institution functioned within the parameters of government dictated by the Constitution.

Alas, the "institutionalists" have been driven out of many political science departments and replaced by bean counters. For these "behavioralists," nothing is important except numbers—how many opinions, who voted with whom, and so on. I remember reading an online review by a behavioralist of a book on the Court in the 1940s that relied, among other things, on recently opened manuscript collections, oral history memoirs, and the most recent scholarship. The review dismissed the book as having nothing to teach readers, since it did not have any charts, tables, or other evidence of numerical calculations. When I asked a friend, a political scientist of the old school, what was going on, she just sighed and said that was what she had to deal with all the time.

Now comes Lucas A. Powe, Jr., a

one-time clerk to William O. Douglas who holds the Anne Green Regents Chair at the University of Texas Law School. An acknowledged expert on First Amendment law, especially as applied to radio and television, Powe makes it plain in **The Warren Court and American Politics** (Harvard University Press, 2000) that he is fighting this drift toward number-crunching and wants to return to what political science used to be about when dealing with the Court: an understanding of the cases, not just in their legal context, but as part of the broader stream of American political life. The book is a welcome change, and one can only hope that others will follow in Powe's footsteps.

The book is organized semichronologically, in sections of three or more chapters apiece. A listing of the section titles will give the reader an immediate sense of what Powe is about: "Beginnings: The 1953–1956 Terms"; "Stalemate: The 1957–1961 Terms"; "History's Warren Court: The 1962–1968 Terms"; and "The Era Ends." In his first three years as Chief Justice, Warren was getting his bearings even while having to deal with one of the most sensitive and politically volatile of all issues ever to come before the Court: racial segregation. By 1956, President Eisenhower had added John Marshall Harlan and William J. Brennan, Jr., to the Court, which was split almost evenly in two. The conservatives, headed by Felix Frankfurter, controlled four and occasionally five votes, with the liberals—Hugo L. Black, Douglas, Brennan, and the Chief—controlling just four. Powe shows that this apparent stalemate should not surprise us as much as what the Court actually managed to do. Because the Red Scare tactics of McCarthyism and the Truman-Eisenhower loyalty programs so offended Justice Harlan's innate sense of decency, he joined with the liberals to undo the damage caused by the Vinson Court's opinion in *Dennis v. United States* (1951).

Then came the appointments of Arthur Goldberg, to be replaced by Abe Fortas, and eventually of Thurgood Marshall. From 1962 onward, the liberals—those committed to what has been called "a living Constitution"—had the majority. It was during these years, 1962 to 1969, that nearly all of the nonsegregation decisions we associate with the Warren Court came down—decisions regarding rights of the accused, privacy, apportionment, freedom of the press, and other issues.

It was an era of judicial activism unmatched in our history, and—unlike the legacy of Taft and the Four Horsemen of the 1920s—the Warren Court's jurisprudential legacy remains largely intact. State legislatures remain apportioned on a "one person, one vote" formula. The right of privacy is so entrenched that no appointee to the courts can claim that it does not exist or that it is not constitutionally protected. The press is free to investigate the misdoings of political and public figures free from the threat of a libel suit. And even former critics of the Miranda warning now accept it as constitutionally required. As Laura Kalman has shown in a recent book, it is this era of the Warren Court that continues to shine as a judicial Camelot, a time when caring men used the Constitution to do justice.[1]

This tripartite exposition of the Warren Court is in large part familiar to historians. What makes Powe's book so valuable is its placement of important decisions in the broader social and political context of the times. To take one example, Powe introduces his discussion of the obscenity cases (certainly not the Court's most shining hour) by informing the reader that, in May 1960, the Food and Drug Administration approved the prescription sale of Enovid, the first oral contraceptive. Many scholars attribute the great burst of sexual freedom that marked the following decade as flowing directly from the cheap availability to women of a safe and effective contraceptive. Conservative Republican Clare Booth Luce, certainly no radical or hippie, proclaimed that "modern woman is at

last free as a man is free, to dispose of her own body."[2] Helen Gurley Brown wrote the 1962 bestseller **Sex and the Single Girl**, and the circulation of Hugh Hefner's *Playboy* magazine climbed into the millions. At the beginning of the decade, a lower court ruling finally made it possible to legally purchase D. H. Lawrence's **Lady Chatterley's Lover**; by the end of the decade, movies aimed at mass audiences displayed women fully nude.

It was against this backdrop of sexual liberation and the women's movement that the Court wrestled with the question of whether the state could legitimately regulate the content of books and magazines as part of its police powers. Powe also reminds us that really hard-core pornographic material did not enter the market until the 1970s, a fact overlooked by critics who see the Warren Court as the fount of all modern depravity. The type of sexual material with which the Court had to deal would have shocked Anthony Comstock, but not a fourteen-year-old in 1968. No wonder the Court had so much trouble coming up with a definition of obscenity; public perceptions kept changing even as the Justices wrestled with the problem. Perhaps they might have been better off had they adopted William O. Douglas's admonition that neither the Court nor any other arm of the government ought to be a censor; it might have offended some blue noses, but it would at least have provided them with a consistent and intellectually defensible doctrine.

We might also recall that, only two years after the Court handed down its decision in

The Warren Court era was one of judicial activism unmatched in our history, and its legacy remains largely intact. Powe's new book, *The Warren Court and American Politics*, examines the Court's decisions in a broad societal context. This informal photo of the Warren Court was taken in 1963; Justice Harlan was not present.

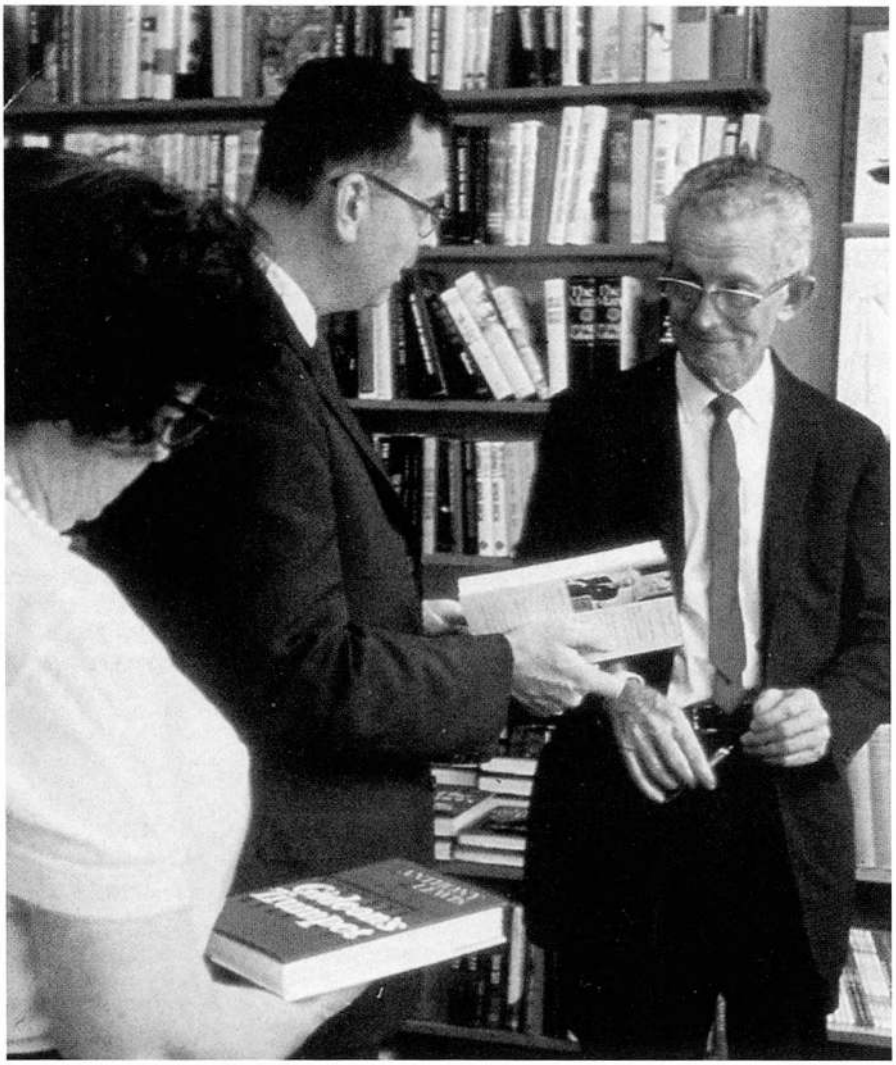
Engel v. Vitale (1962), noted constitutional scholar Philip Kurland wrote that "the Court has been most fortunate in the enemies that it has made, for it is difficult not to help resist attacks from racists, from the John Birch Society and its ilk, and from religious zealots who insist that the Court adhere to the truth as they know it."[3] As much as anything else, this one sentence indicates how times have changed in the last four decades. For the most part, a majority of the American people accepted the original school prayer decisions. To traditionalists who felt that prayer was important, President John F. Kennedy offered a commonsensical suggestion: "We have . . . a very easy remedy. And that is, to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of all of our children."[4] *Engel,* of course, has become a rallying point for the social conservatives gathered on the Christian Right, a group whose noise volume often obscures any real discussion of exactly what the Court meant. However, the Warren Court must have gotten it right, because as recently as last Term the Justices reaffirmed *Engel's* basic principle: that there is no place in state-sponsored institutions for coerced prayer.

Gideon v. Wainwright (1963) was the Warren Court's most popular criminal justice decision, because it rested on an insight that most people could understand: without a lawyer for the defendant in a criminal case, there can be no justice. Anthony Lewis immortalized the case in **Gideon's Trumpet** (1964), and then Henry Fonda starred as Gideon in a television movie. As Warren biographer Ed Cray wrote, "No tale so affirmed the American democracy. No story broadcast around the world so clearly proclaimed that not just the rich received justice in American courts."[5]

Behind *Gideon*, however, is a good example of how the Court controls its docket as well as its image, and Powe—relying on newly opened papers of the Justices—tells the story well. By the time the Court took the case, at least five of the Justices had already joined an opinion in another case that would have effectively overruled *Betts v. Brady*, the 1942 precedent in which the Court had denied a criminal defendant the right to counsel. In fact, even as the Chief Justice directed his clerks to look for a good case on which to overturn *Betts*, the Court issued two terse *per curiam* decisions regarding indigents' rights to counsel.

The chief protagonist in the first case, Willard Carnley, had been convicted of incest and indecent assault upon a minor in Florida. Florida did not provide Carnley with counsel, and, like Gideon, he filed an *in forma pauperis* petition from state prison. Illiterate and poor, Carnley would have been an ideal case except for the crime—incest—plus the fact that, unlike Gideon, there were eyewitnesses who testified to Carnley's guilt. So the Justices reversed on the *Betts* "special circumstances" rule.

The second case involved two men, Bennie Meyes and William Douglas, convicted in California for robbery and assault with intent to commit murder. They had a lawyer, but he was an overworked public defender. They claimed that he had done an inadequate job of defense, and that their two cases should have been separated because of an inherent conflict of interest. Here again the Court could have overruled *Betts* outright or reversed on special circumstances. At Conference, six of the eight Justices voted to reverse, but they could not agree on a rationale. Then evidence appeared that the wrong man had appealed the conviction, and the Justices voted, 6–2, to dismiss the case on the rather rare grounds that *certiorari* had been improvidently granted. Normally such a ruling carries little or no explanation, but in *Douglas v. California*, Justice William O. Douglas, joined by



Powe, relying on newly opened papers of the Justices, ably tells the story behind *Gideon v. Wainwright*, offering it as a good example of how the Court controls its docket as well as its image. Clarence Earl Gideon (right) was a penniless drifter accused of a petty crime and convicted on primarily circumstantial evidence.

Justice Brennan, dissented, and he wrote such a powerful dissent that on circulation three more members of the Court joined, so that Douglas's dissent then became the opinion of the Court.

In fact, the results of the *Douglas* case determined what the opinion would be in *Gideon*, but the unsavory nature of the defendants and of their crime again led the Court to wait. In Clarence Earl Gideon, a drifter accused of a crime and convicted on primarily circumstantial evidence, the Court finally had the case it wanted. And when Abe Fortas agreed to represent Gideon, the Justices now had the stage set for the drama as they wanted it played out. In the film, the assistant attorney general representing Florida appears to have had little chance of winning; in fact, he had none.

Why should we read this type of Court history, as opposed to that churned out by the behavioralists? For one thing, this book is readable. Powe is not a master stylist, but he

writes clearly and in a way that makes it easy to follow his story and his analysis. For another thing, numbers do not really tell us much beyond who voted with whom, or what a Justice's voting tendency has been on similar cases.[6] Like Corwin, Mason, and others, Powe can tell us this information as it should be told: as a small part of a much more important story, namely, how the Supreme Court of the United States undertook to re-examine basic constitutional principles and to bring them up to date in a time of turmoil, and how, with few exceptions, it did so successfully.

There are many laudable parts to this book—good research; careful analysis of cases; and, above all, a clear understanding of what was happening outside the Marble Palace and how it affected the Justices' opinions. It is a fine example of political science of the old school, and one can only wish Powe the best as he tries to revivify that discipline in the new century.

ENDNOTES

[1]Laura Kalman, **The Strange Career of Legal Liberalism** (New Haven: Yale University Press, 1996).

[2]James T. Patterson, **Grand Expectations** (New York: Oxford University Press, 1996), p. 360.

[3]Kurland, "Foreword," 78 *Harvard Law Review* 143, 176 (1964), quoted in Powe, 358.

[4]*New York Times,* 28 June 1962, p.12.

[5]Ed Cray, **Chief Justice: A Biography of Earl Warren** (New York: Simon & Schuster, 1997), pp. 405–06.

[6]Justices often have a way of voting independently, making such numerical analyses useless. To give but one example, Justice Robert H. Jackson's voting record would indicate that he usually supported the government in issues of individual rights. Yet he fooled everyone and penned one of the most eloquent and most dramatic defenses of religious liberty in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). One might also note Louis D. Brandeis' lifelong opposition to monopoly, a view he often expressed while on the Court, and then wonder how the behavioralists would explain his vote in *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932).

Contributors

Jeffrey M. Anderson is an associate at Bradley Arant Rose & White in Birmingham, Alabama. He wrote this article, which won the 2000 Hughes-Gossett Student Essay Prize, as his master's thesis in history at the University of Virginia.

Clare Cushman is Director of Publications at the Supreme Court Historical Society and editor of **Supreme Court Decisions and Women's Rights: Milestones to Equality** (CQ Press, 2001).

Jon O. Newman is a judge of the United States Court of Appeals for the Second Circuit.

Melvin I. Urofsky is Chairman of the Board of Editors at the Supreme Court Historical Society and Director of the Ph.D. Program in Public Policy at Virginia Commonwealth University.

Frank D. Wagner is Reporter of Decisions at the Supreme Court of the United States

William M. Wiecek is Chester Adgate Congdon Professor of Public Law and Legislation and Professor of History at Syracuse University.

Photo Credits

Page 3, Library of Congress
Page 4, Courtesy of Morris L. Cohen
Page 6, Collection of the Supreme Court of the United States
Pages 10–21, all Collection of the Supreme Court of the United States
Pages 26, 27, 35, *The New York Times*
Pages 37, 38, 39, Library of Congress
Page 55, Corbis Images
Page 56, Collection of the Supreme Court of the United States
Page 57, Collection of the Supreme Court of the United States
Page 58, all Collection of the Supreme Court of the United States
Page 60, Harvard Law Art Collection
Page 61, Corbis Images
Page 68, Painting by Louise Minks
Page 70, Library of Congress
Page 72, *Kansas City Star*
Page 73, Library of Congress
Page 74, Courtesy of Patricia Dwinnell Butler
Page 75, Courtesy of Harriet S. Shapiro
Page 76, Library of Congress
Page 77, Courtesy of Nancy Stanley and Chuck Reichel
Page 80, Drawing by Dana Verkateren
Page 81, file photo
Page 82, Corbis/Bettman UPI
Page 83, *Chicago Tribune*
Page 84, Courtesy of Ruth Bader Ginsburg
Page 91, Library of Congress
Page 93, Corbis Images

Cover: Associate Justice Felix Frankfurter (1939–1962), Collection of the Supreme Court of the United States

Contributors

Jeffrey M. Anderson is an associate at Bradley Arant Rose & White in Birmingham, Alabama. He wrote this article, which won the 2000 Hughes-Gossett Student Essay Prize, as his master's thesis in history at the University of Virginia.

Clare Cushman is Director of Publications at the Supreme Court Historical Society and editor of **Supreme Court Decisions and Women's Rights: Milestones to Equality** (CQ Press, 2001).

Jon O. Newman is a judge of the United States Court of Appeals for the Second Circuit.

Melvin I. Urofsky is Chairman of the Board of Editors at the Supreme Court Historical Society and Director of the Ph.D. Program in Public Policy at Virginia Commonwealth University.

Frank D. Wagner is Reporter of Decisions at the Supreme Court of the United States

William M. Wiecek is Chester Adgate Congdon Professor of Public Law and Legislation and Professor of History at Syracuse University.

Photo Credits

Page 3, Library of Congress
Page 4, Courtesy of Morris L. Cohen
Page 6, Collection of the Supreme Court of the United States
Pages 10–21, all Collection of the Supreme Court of the United States
Pages 26, 27, 35, *The New York Times*
Pages 37, 38, 39, Library of Congress
Page 55, Corbis Images
Page 56, Collection of the Supreme Court of the United States
Page 57, Collection of the Supreme Court of the United States
Page 58, all Collection of the Supreme Court of the United States
Page 60, Harvard Law Art Collection
Page 61, Corbis Images
Page 68, Painting by Louise Minks
Page 70, Library of Congress
Page 72, *Kansas City Star*
Page 73, Library of Congress
Page 74, Courtesy of Patricia Dwinnell Butler
Page 75, Courtesy of Harriet S. Shapiro
Page 76, Library of Congress
Page 77, Courtesy of Nancy Stanley and Chuck Reichel
Page 80, Drawing by Dana Verkateren
Page 81, file photo
Page 82, Corbis/Bettman UPI
Page 83, *Chicago Tribune*
Page 84, Courtesy of Ruth Bader Ginsburg
Page 91, Library of Congress
Page 93, Corbis Images

Cover: Associate Justice Felix Frankfurter (1939–1962), Collection of the Supreme Court of the United States