Introduction

Melvin I. Urofsky

In the past few years those of us associated with the *Journal of Supreme Court History* have been pleased not only with the response of our members, but also with reactions from the academic community. Legal scholars in law schools and history and political science departments now see the *Journal* as a legitimate venue in which to publish their research, and they appreciate the fact that their work will reach a wider and more diverse audience than if published in a law review or more technical scholarly journal. This, of course, is exactly what we have been striving for over the past decade: to make the *Journal* not only welcome reading in the homes of our members, but also an attractive place for scholars to display their work. Very often when I am asked what style I am looking for in pieces submitted to us for review, I respond that we would like to be an *American Heritage* devoted to the history of the Supreme Court—well-written, well-conceived articles on important and interesting issues, adequately annotated, and then presented in an attractive manner. Comments to us indicate that we are well on the way toward achieving that ideal.

This issue is a good example of the variety we like to see on the contents page. Robert Karachuk's article concerns how, in the 1790s, the Supreme Court's decisions on technical points of law—perhaps as much as those on substantive issues—provided the Court with opportunities to shape the character of the government in the young republic and thereby contributed to the Court's emergence as a potent voice in the life of the new nation. Karachuk examines several admiralty cases and shows how the Justices split into two camps in determining the process by which such cases could secure review, either by writ or by appeal. In the 1790s, as today, a legal technicality could bear on the very essence of constitutional government, as this split reflected very different understandings of the balance of power between Congress and the Court.

Nearly every historian I know tells the story about how upset Theodore Roosevelt was with Oliver Wendell Holmes, Jr.'s dis-

sent in the *Northern Securities* case, and how Roosevelt fumed and muttered that he could carve a judge with more backbone out of a banana. Yet the relationship between the two men was far more complex than that, and in the end Holmes remained Roosevelt's greatest appointment to the federal bench. Like many of us, Richard H. Wagner was intrigued by their relationship, and here he spells it out for us in greater detail than one will find anyplace else.

Norman Dorsen is an old friend, and those of us who know him also know that he cherishes the year he spent as a law clerk to Justice John Marshall Harlan II. Norman has been involved in several conferences regarding Justice Harlan's work, and a year or so ago he and some others conceived the idea of privately printing a small book of reminiscences by Harlan's clerks. After he and his co-editor, Amelia Ames Newcomb, saw what material they had gathered, they realized that while the private, limited edition would meet the original purposes of the group, many of the stories would appeal to a wider audience. We are delighted that they came to us to see if we would be interested.

The *per curiam* opinion often confuses students—and nonstudents as well—in that it represents the opinion of the Court, but it is not an opinion. Moreover, it sometimes has dissents, thus making the idea of a consensus agreement even more confusing. Laura Krugman Ray's original research and highly technical findings regarding the *per curiam* opinion were initially published in a law journal, an appropriate venue for the article as it existed. However, several of us who saw that piece realized that underneath the technical analysis lay a good historical report. At our request, Professor Ray wrote a second article to meet our needs and, we hope, your interests.

Finally, our thanks again to Grier Stephenson, who, in his own inimitable style, keeps us all abreast of current research on the Court's history. Few journals can offer the continuity of a well-read and well-informed reviewer. We are delighted that the *Journal of Supreme Court History* is one of them.

As usual, a rich feast. Enjoy!

Error or Appeal? Navigating Review Under the Supreme Court's Admiralty Jurisdiction, 1789–1800

ROBERT FEIKEMA KARACHUK*

Legal technicalities are boring only when they are no longer susceptible to argument. Ask any lawyer or litigant whose case depends on a question of procedure, practice, or jurisdiction.

During the 1790s, the formative years of the federal judiciary, cases involving technical points of law comprised a large and important part of the Supreme Court's workload. Although the Constitution sketched the outlines of judicial power, and acts of Congress added much detail, the Court was left with many blank spots to fill in itself. Decisions on technical matters—perhaps as much as those on substantive issues—provided the Court with opportunities to shape the character of government in the young republic and thereby contributed to the Court's emergence as a potent voice in the life of the new nation. But the members of the Court, when ruling on such occasions, did not always find it possible to speak as one. The different perspectives of the individual Justices could not be compromised in every case.

A prime illustration of the broad ramifications of technical legal problems and their consequent difficulty of resolution appears in the process by which the early Court determined the procedure for bringing an admiralty case before it for review. The question was raised in one form or another in nine cases between 1789 and 1800.[1] It was actually argued in five[2] and decided in the course of three.[3] And, still, it had to be revisited in one more.[4] While the exact reasons for the protraction of the Court's decision-making cannot be fully traced, a case-by-case review of its progress in the matter affords valuable insight into the matrix of concerns and the elusiveness of consensus. The Justices, with the aid of the lawyers who argued before them, took into account not only constitutional and statutory constraints but also political and practical considerations. When they were done, they split into two camps. Arriving at opposite conclusions on the procedural point, the respective sides embraced different understand-

ings of the balance of power between Congress and the Court. In the 1790s, as today, a legal technicality could bear on the very essence of constitutional government.

During the Court's first decade of operation, the question of what process ought to be used to secure review in an admiralty case came down to one of two options: error or appeal. A writ of error was a common law process by which a higher court reviewed the record of proceedings in a lower court for any error of law. Only errors of law apparent on the face of the record were cognizable on error, and the record consisted only of the writ and return, pleadings, verdict, and judgment. An appeal was a civil law process by which a higher court removed the entirety of a case from a lower court for a new trial. Both law and fact came under review, and consideration was given to the evidence as well as the pleadings, proceedings, and decree. With respect to the scope of review, the difference between error and appeal was fundamental.

Which procedure was the correct one for securing Supreme Court review in an admiralty case was by no means clear prior to the Court's resolution of the matter. The Constitution, in Article III, section 2, granted the Supreme Court appellate jurisdiction in admiralty and other cases "both as to Law and Fact." The same section, however, qualified the Court's review power by making it subject to whatever "Exceptions" and "Regulations" Congress might impose. Congress, in section 22 of the Judiciary Act of 1789, provided for Supreme Court review on error of circuit court judgments and decrees in civil actions involving more than $2,000. In the same section, it prohibited reversal on error for any error of fact. Section 19 of the same act required a circuit court, when deciding a case in admiralty or equity, to cause the facts underpinning its decision to appear on the record, through either the pleadings and decree or a statement of the case negotiated by the parties or their counsel or, failing such an agreement, by the court itself.[5]

The intersection of these constitutional and statutory provisions raised the process of review under the Supreme Court's admiralty jurisdiction in three different ways. First, did section 22 of the Judiciary Act include admiralty cases among the civil actions to be brought on error, or was the constitutional grant of review on appeal undiminished with respect to admiralty cases? Second, if a circuit court neglected to comply with section 19 of the Judiciary Act and omitted the facts from the record, did section 22 require the Supreme Court to forgo review of the law for lack of the facts, or could the Court ascertain the facts for itself from the evidence? Third, when a circuit court complied with section 19 and got the facts on the record, did section 22 require the Supreme Court to review the law on the basis of the facts found below, or, again, could the Court ascertain the facts for itself from the evidence? The crux of the problem, no matter how it was put, was whether review under the Supreme Court's admiralty jurisdiction was to be had on error or on appeal.

The decade during which the Court confronted the question of error or appeal was a time of marked political uncertainty in the United States. Nation-building had only just begun, and its success was by no means guaranteed. Already a first attempt at establishing an effective general government under the Articles of Confederation had failed. In that instance, the dispersal of real political power among the several states had rendered Congress impotent, even irrelevant. Whether the federal republic established under the Constitution would prove to be any more workable remained to be seen, but there was reason to doubt. The invigoration of Congress, along with the creation of executive and judicial branches of some authority, had provoked alarm over the apparent consolidation of power. If the American people were to come together as a nation, the government that they shared had to be both vigorous and restrained, attentive to common interests yet respectful of state and individual rights. The constitutional

system of checks and balances was designed to keep this tension in equilibrium: it did not eliminate it. As a result, the limits of federal power ended up a matter of some discretion and much disagreement. Controversy over the issue helped to give birth to political partisanship so bitter that the union itself seemed to be in jeopardy.

The international backdrop against which the Court addressed its power of review in admiralty cases was war. In the early 1790s, Europe became embroiled in a fierce conflict pitting France against Austria, Prussia, Sardinia, Great Britain, Holland, and Spain. The United States, although located an ocean away from the belligerents, found maintaining a neutral stance difficult, as hostilities quickly spread to the waters of the New World. Privateering—the capture of enemy ships by private armed vessels commissioned for the purpose—became rife along the American coast and in the West Indies. Although all of the warring powers resorted to the practice, its use by France—whose privateers often disregarded generally accepted limits by outfitting in American waters, sailing with American officers or crew, or disposing of prizes in American ports—threatened to drag the United States into the fray, as Britain and her allies questioned the reality of American neutrality. With the British, on one side, demanding American adherence to the rules of neutrality under the law of nations and the French, on the other, insisting on their rights under the 1778 Franco-American Treaty of Amity and Commerce, the Washington administration was caught in a diplomatic vise. The Supreme Court felt the pressure, too. Victims of French privateers, arguing that their captors' violations of American neutrality rendered the subsequent seizure of their vessels and cargoes invalid, sued for restitution in the federal district courts in admiralty. When such cases came before the Court for review, as several did, their resolution tended to depend on facts that were the subject of dispute all around. Whether the Court could consider the facts, however, was a function of the process by which review was obtained. Admiralty cases, and how the Court approached them, could have serious implications for the young nation's foreign relations.

The first admiralty case brought before the Supreme Court by any process was *Glass v. Sloop Betsey*, which came up on appeal from the Maryland federal circuit court during the February 1794 Term. *Glass*, a prize case involving a Swedish merchantman and a French privateer, was also the first admiralty case heard by the Court to question the procedure by which review had been obtained. But *Glass* did not involve the issue of whether error or appeal was the proper method for securing review under the Supreme Court's admiralty jurisdiction. Nor did it present any difficulty with respect to the section 19 requirement that the facts underlying a circuit court decree appear on the record. Instead, it concerned the particular means for taking an appeal. The irregularity of the appeal in *Glass* was ultimately resolved through an agreement of counsel. That accord, however, fundamentally redefined the scope of review.

Argument in the Supreme Court in *Glass* began with an objection to the process by which the case had been brought for review. Counsel for the defendant in error, James Winchester and Peter S. Du Ponceau, challenged "the regularity of the appeal." In particular, they complained, the appeal had not been presented to a court or judge of the United States but had been made to a notary public. Although the Court refused to credit the proceeding before the notary, the objection did not stand, as lawyers on both sides, John Caldwell on behalf of the plaintiff in error and Benjamin R. Morgan for the defendant in error, agreed to waive "all exceptions to the manner of the Appeal" and to have it "argued and decided on the case as disclosed upon the face of the record." Caldwell and Morgan thus relieved the Court of having to consider the evidence and find the facts and left it only the decision of the law. The effect

of their agreement, then, was to shift the basis of review from appeal to error. At the same time, there seems to have been no suggestion that error rather than appeal was the process by which the case ought to have been brought before the Court to begin with. Appeal had been the method used to secure review in admiralty cases in both the British and colonial courts prior to independence and the state and congressional tribunals up to the ratification of the Constitution. That the Judiciary Act might have altered established practice in this regard probably just did not occur to anyone involved in *Glass*.[6]

Unlike *Glass*, the second admiralty case brought before the Supreme Court did not come up on appeal. *Talbot v. Jansen*, a prize case involving a Dutch merchantman and two ostensibly French privateers, came up from the South Carolina federal circuit court during the August 1795 Term on a writ of error. With *Talbot*, section 19 of the Judiciary Act fell under scrutiny for the first time. The question was: what were the consequences for Supreme Court review of an admiralty case on error, if a circuit court failed to get the facts underlying the challenged decree on the record? Although the issue was argued in *Talbot*, it was not decided. Waived because the parties preferred to move on to the merits of the case, the want of facts obliged the Supreme Court to consider the evidence and draw its own conclusions. The Court had to rule on the facts before it could do so on the law. Thus, *Talbot* unfolded in a way that made it the mirror image of *Glass*. While *Glass* had been brought on appeal but heard on error, *Talbot* was brought on error but heard on appeal.

In preparing their client's case for review by the Supreme Court, counsel for the plaintiff in error in *Talbot* sought advantage in the section 19 requirement that a circuit court, when deciding a case in admiralty or equity, cause the facts underlying its decree to appear on the record. One of the errors assigned by Alexander James Dallas was that "the Circuit Court has not caused the facts on which they founded their sentence and decree fully to Appear on the record." Associate Justice James Wilson, who had heard the case in the circuit court, had neither set out the facts in his decree nor produced his own statement of facts after counsel had failed to agree to one.[7]

Argument in the high court initially centered on the sufficiency of the record. The circuit court, Dallas repeated, had not caused the facts to appear on the record. Furthermore, the circuit court clerk had sent up the evidence without judicial sanction. And the entirety of what had been forwarded—pleadings, decrees, and evidence—had been certified by the clerk rather than by the court. Dallas noted the differences between section 30 of the Judiciary Act, which allowed the transmission of evidence from a district court to a circuit court, and section 19, which required a circuit court to get the facts on the record.[8] He also expressed concern about the possibility of oral testimony having been taken in the lower courts, apparently suggesting that the evidence forwarded to the Supreme Court might not be complete.[9]

Jacob Read, counsel for the defendant in error, insisted not only that all the evidence was now before the Court but that the facts therefore did not need to appear on the record. According to Read, a circuit court judge "may direct *all the proof* if he pleases to be transmitted—instead of transmitting *Facts*." Having ordered all the evidence sent up, Wilson had rendered a statement of facts unnecessary. Even if the want of facts did constitute error, Read went on, the plaintiff in error could not object to it, because it was the result of his own act. The plaintiff in error or his attorneys were responsible for assuring the sufficiency of the record. At the same time, Read argued, the facts actually appeared on the record through the pleadings. His understanding of the term "pleadings," however, was a liberal one plainly intended to embrace the evidence: it went beyond "*the legal formal pleadings*" to include "all the Papers."[10]

Although the subject of argument, Dallas's objection to the want of facts was soon waived. The parties, anxious for a decision on the merits, proved unwilling to let the case bog down. Thus, the Supreme Court did not rule on the sufficiency of the record in *Talbot*. It rendered no opinion on the implications of the circuit court's failure to make the facts appear on the record or on the permissibility of the high court itself considering the evidence. But when the Court finally turned to the merits, it heard read not only the pleadings and decrees from below but all the exhibits and testimony. And when it rendered its decision, the Justices spoke on matters of fact as well as law. Although brought for review on a writ of error, *Talbot* was treated in effect as an appeal. Or, as Dallas described the case in the reports that he published on the side, it was "a Writ of Error, in the nature of an Appeal."[11]

Talbot set the general pattern for the disposition of *Wallace v. Brig Caesar*, *Hills v. Ross*, and *Cotton v. Wallace*, three prize cases involving British merchantmen and French or ostensibly French privateers that came up to the Supreme Court from the Georgia federal circuit court during the February 1796 Term. Like *Talbot*, *Caesar*, *Hills*, and *Cotton* were admiralty actions brought up on writs of error. Each case raised the same section 19 problem: how did a circuit court's neglect to assure that the facts underlying its decree appeared on the record affect the Supreme Court's power of review? Every time, the want of facts was resolved not through a decision of the Court but through an agreement of counsel. And the apparent effect of that agreement was to change the basis of review from error to appeal.

But *Caesar*, *Hills*, and *Cotton* had their idiosyncrasies as well. In particular, the timing of the agreement varied in each case. In *Caesar*, where no section 19 challenge was made, counsel came to terms before argument began, putting the case on a fast track to review on the merits.

The record in *Caesar* did not contain the facts as required by section 19 of the Judiciary Act. Associate Justice John Blair, who had heard the case in the circuit court, had neglected to incorporate the facts into his decree or to produce his own statement of facts after counsel had failed to agree to one. But counsel for the plaintiff in error did not contest Blair's decree on those grounds. In drafting the assignment of errors, Thomas Gibbons did not list the want of facts. At the same time, the errors that Gibbons did specify involved—as James Whitefield, the clerk of the Georgia federal courts, understood—"Law and fact together." Associate Justice James Iredell, in taking notes on the record in preparation for the Court's consideration of the case, also recognized the section 19 difficulty that it presented. Counsel in the Supreme Court—Read, Edward Tilghman, and William Lewis for the plaintiff in error and Du Ponceau and Jared Ingersoll on behalf of the defendant in error—must have noticed the problem as well, for they negotiated an agreement rectifying it. The terms of that agreement do not survive, but they apparently did not preclude review of at least some of the facts. Although brought before the Court on error, *Caesar*, when finally heard on the merits, was adjudicated as an appeal, although perhaps a limited one. The lawyers agreed to the reading of certain evidence "on the Appeal," and testimony was actually presented to the Court during argument. The special mandate declared that the circuit court decree contained "no error either in law or in fact." And the Supreme Court clerk, Jacob Wagner, in forwarding the special mandate to the Georgia circuit court for execution, equivocated in characterizing the case, writing that it had been heard "[o]n writ of error in nature of an appeal."[12]

In *Hills*, the Supreme Court not only heard but ruled on a section 19 challenge to a circuit court decree. The decision in *Hills*, however, did not resolve what a want of facts on the record meant for the Supreme Court's power of review. Although holding that a circuit court's omission of a statement of facts was not reversible error, the Court in *Hills* de-

clined to take the next logical step—to affirm the circuit court decree despite the want of facts. The Court's hesitation to endorse the decree forced counsel to come to terms if they wished to obtain a final judgment. Unable to agree on the facts themselves so as to allow the case to go forward on error and the law alone to undergo review, the lawyers consented to have the case heard as an appeal, with review to encompass both the law and the facts.

As in *Talbot*, counsel for the plaintiffs in error in *Hills* tried to use section 19 to advantage. Among the errors assigned by Joseph Clay, Jr., was the want of facts on the record. Paraphrasing section 19, Clay pointed out that "the Facts on which the Decree is founded do not appear upon the Record either from the Pleadings and Decree itself, or from a State of the Case agreed upon by the Parties or their Counsel or by a Stating of the Case by the Court." Justice Blair, who had adjudicated the case in the circuit court, had neither set out the facts in his decree nor produced his own statement of facts after counsel for the plaintiffs in error had declined to agree to one. Joining in error, Read countered Clay's challenge to the sufficiency of the record. Read insisted that the facts fully appeared not only on the record but also from the evidence. His point seems to have been that the Supreme Court could satisfy itself of the facts through its own review of the evidence. But whether the Court had authority to consider the evidence was another issue, one which brought the matter full circle to section 19.[13]

Clay also relied on section 19 to resist efforts by opposing counsel to remedy defects in the record arising from the want of evidence. When Thomas Gibbons undertook to depose a number of witnesses *de bene esse*, so that their testimony, which had gone unrecorded in the circuit court, could still be considered by the Supreme Court, Clay objected to the examinations. Arguing that the Court had no authority to consider the evidence, he observed, among other things, that the only vehicle provided by Congress to convey a circuit court's findings of fact on a writ of error taken to the Supreme Court was "by those facts being made fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their council, or, if they disagree by a stating of the case by the [circuit] Court." Although the district judge, Nathaniel Pendleton, allowed the examinations to proceed, he inserted a deferential note in the record, along with the depositions and Clay's objections, suggesting that the Supreme Court were "the proper Judges, whether any and what evidence shall be received" on the writ of error.[14]

Clay's colleagues in the Supreme Court—Du Ponceau, John D. Coxe, and Ingersoll—believed that section 19 afforded the strongest ground for objecting to Blair's circuit court decree. Laying out their strategy for presenting their clients' case in August 1795, Du Ponceau, Coxe, and Ingersoll emphasized that section 19 made it "the *duty* of the Circuit *Courts* to *cause* the facts *fully* to appear upon the Record." They also noted that, under principles of both civil and common law, an erroneous judgment, attributable to an error of the court, was supposed to be reversed in its entirety. The want of facts, they concluded, was "a most fatal Error." Still, the three attorneys expected that they would need to resist any attempt to have Blair supply the want of facts from his notes in the circuit court or through a statement of facts. Blair, they were prepared to argue, simply could not do so. Once the Georgia circuit court had adjourned, he had ceased to be a judge of that bench: the justice assigned to follow him at the next session had already taken his place. Even if Blair were still a judge of the circuit court, his statement of facts ought to have been produced and made part of the record while he had the case before him. Otherwise, it was void. The power of a circuit judge to find facts in admiralty and equity—an innovation in American jurisprudence, where the

common law reserved the fact-finding authority to juries—ought to be strictly construed. This power was too susceptible to abuse, especially as it lay with "a Judge of *last resort as to facts*."[15]

By the time the Supreme Court heard *Hills* on 26 February 1796, Justice Blair had resigned because of ill health, and he had left behind no statement of facts. As a result, the only question argued during that Term was the effect of Blair's failure to comply with section 19. Counsel for the plaintiffs in error contended that the omission of a statement of facts "vitiated the whole record," and, therefore, the circuit court decree ought to be reversed. Reviewing the provisions of the Judiciary Act pertaining to the production of testimony, the attorneys demonstrated that the act "had greatly innovated upon the old system of Admiralty and Chancery proceedings." The changes, they maintained, proved that Congress intended circuit court rulings in admiralty and equity cases to be "final and conclusive, as to fact," and Supreme Court review to extend only to matters of law. "[A]n *appeal*," which by definition extended review to the facts as well as the law, "did not lie" to the Supreme Court, "but only a writ of error," which limited review to the law alone. To review the law, however, the Supreme Court needed to know the facts. According to counsel, if the facts did not appear from the pleadings and decree, then they had to be stated. And responsibility for seeing that they were lay with the circuit court. The lawyers warned that a circuit court, by neglecting to get the facts on the record, could render its own decree final in law as well as in fact, thereby nullifying the Supreme Court's power of review. Thus, Blair's failure to make sure that the record specified the facts on which his decree depended was a "default of the court" and "might be well assigned for error."[16]

Counsel for the defendant in error—Read, Tilghman, and Lewis—countered that the Supreme Court ought to affirm Blair's decree. The omission of a statement of facts, they insisted, was only "a technical defect," not a substantial error. Furthermore, responsibility for the imperfect record lay with the plaintiffs in error themselves, who ought to have negotiated a statement of facts with opposing counsel or, failing that, applied for one from the circuit court. Inviting the Supreme Court to consider the evidence, the lawyers for the defendant in error offered to supply the facts from the notes of their counterpart in the court below. In the meantime, they argued, the Supreme Court could not reverse Blair's decree, as section 24 of the Judiciary Act required the Court to consummate such a reversal by issuing the decree that the circuit court ought to have issued, and that the Court could not do without knowledge of the facts.[17]

The Court ruled unanimously that the omission of a statement of facts was not a sufficient ground for reversing Blair's circuit court decree. Rather than affirm his judgment, however, the Court urged the parties to come to an agreement that would allow argument on the merits. After some discussion, counsel on both sides agreed to have the case continued to the August 1796 Term, to take new evidence in the meantime, and finally to bring the matter before the Court as if it were an appeal, permitting review of the facts as well as the law.[18]

Although *Cotton* involved a section 19 challenge to a circuit court decree, the scope of Supreme Court review on error in the absence of facts on the record soon became irrelevant, as counsel settled the case on the merits prior to argument. But the early mooting of the facts did not prevent the case from being thought of as an appeal. *Cotton*, despite being brought on error, was probably viewed as an appeal from the start. The same was likely true of *Talbot*, *Caesar*, and *Hills*. In this light, the various agreements of counsel empowering the Supreme Court to consider both the facts and the law seem to have served to align the actual practice of review on error with the expectation of review on appeal. The real significance of *Cotton*, however, lies in its status

as the first case heard by the Supreme Court to directly question whether error or appeal was the proper procedure for bringing admiralty cases before it for review.

As in *Talbot* and *Hills*, counsel for the plaintiff in error in *Cotton* sought advantage in section 19 of the Judiciary Act. Once more, Justice Blair, who had disposed of the case in the circuit court, had neither incorporated the facts into his decree nor produced his own statement of facts after counsel had failed to agree to one. In this instance, however, the want of facts was the only specific error that Clay assigned. And it went entirely unargued. When the Court took up *Cotton* in March 1796, it heard no argument at all. Rather, by consent of the parties, it affirmed the circuit court decree and continued the case for consideration on the question of damages. Why *Cotton* went without argument either on the section 19 challenge or on the merits is not known. The contemporaneous decision in *Hills* suggests that Clay's counterparts in the Supreme Court could have succeeded in parlaying the want of facts into review of the facts. Perhaps the decision in *Talbot* the previous Term had rendered the facts in *Cotton* moot: the outcome in both cases depended on the legal status of the same privateer, which sailed at different times under different names. Or perhaps the facts stated in the district court decree were understood to have been incorporated into the circuit court decree by reference. Regardless, *Cotton*—like *Talbot*, *Caesar*, and *Hills*—was viewed as an appeal, at least at this juncture in the litigation. The special mandate declared that the circuit court decree contained "no error either in law or in fact." And Supreme Court clerk Wagner, in forwarding the special mandate to the Georgia circuit court for execution, described the case as having been heard "[o]n writ of error in nature of an appeal."[19]

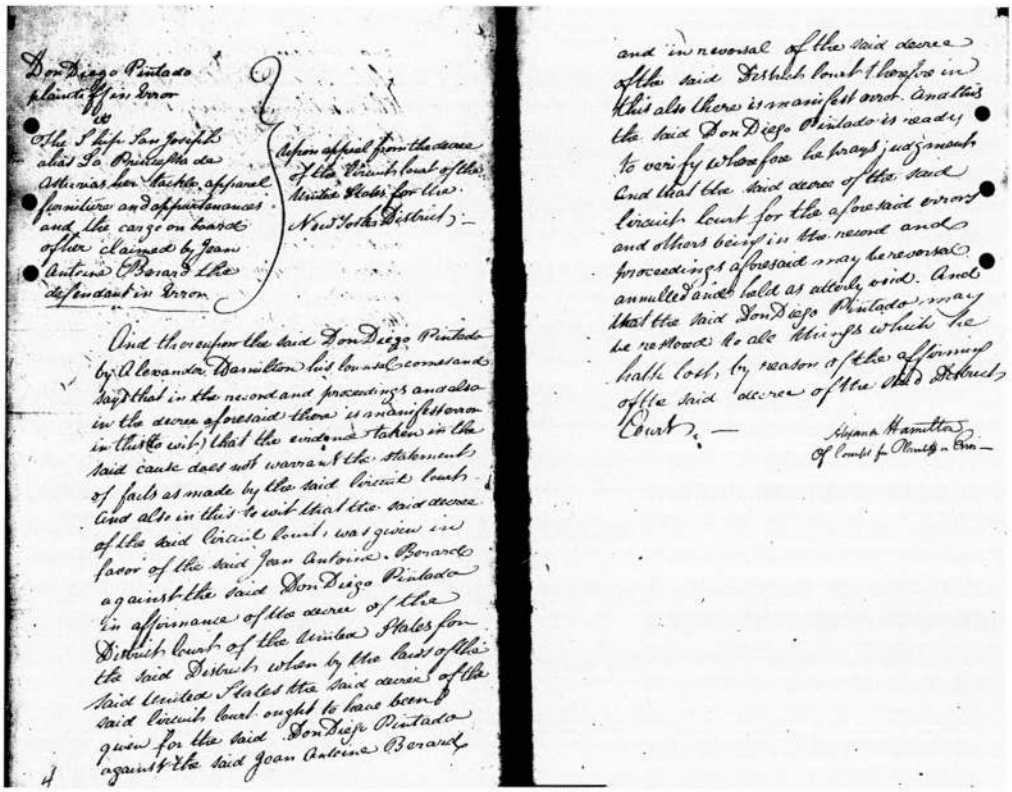
When, the following Term, the Supreme Court returned to *Cotton* to adjudicate the question of damages, the attempt of counsel to venture outside the record to prove a fact led to argument on the process by which admiralty cases ought to be brought before the Court for review. As a measure of what was supposedly due to his client, Read, one of the attorneys for the plaintiff in error, offered the Court a certificate of damages not previously produced in the lower courts. Associate Justice William Paterson inquired: "Do you mean to go out of the record to prove your damages; or is your estimate of damages founded upon what appears on the record itself?" Explaining that the record failed to show the extent of his client's damages, Read conceded that he and his co-counsel, Lewis and Tilghman, hoped to establish the full amount "by matter *dehors* the record." Paterson pointed out that, in every previous case in which the Court had revised a damages award, the facts on which it had acted had appeared on the record. He himself accepted that the Court, when reviewing a case on error, could not travel outside the record to ascertain a fact but admitted to having "great doubts" about "whether a writ of error is the proper remedy, to remove an Admiralty cause" in the first place. Lewis, clearly aiming to extend review to the facts as well as the law so as to secure the introduction of new evidence in proof of his client's damages, proceeded to argue that "[a]n appeal [was] the proper remedy." Beginning with Article III, sections 1 and 2, of the Constitution and progressing through sections 13, 21, and 22 of the Judiciary Act, Lewis offered a survey of the bounds of appellate jurisdiction in admiralty cases that at least in outline anticipated Justice Wilson's opinion in *Wiscart v. Dauchy*.[20] Ingersoll, representing the defendant in error along with Du Ponceau, struggled to hold the line. Ingersoll seems to have countered that the Court had already disposed of *Cotton* on the merits without objection from opposing counsel regarding the form of review and added that the Judiciary Act made no provision for the alteration of a lower court judgment or decree when affirmed on error. Tilghman, citing sections 10 and 23 of the Judiciary Act, appar-

ently pressed the propriety of review on appeal in admiralty cases and denied the impotence of the Court to revise a lower court decree that it had affirmed on error.[21]

A week later, the Court rendered its decision. Ignoring the question of whether error or appeal constituted the correct method for securing Supreme Court review in admiralty proceedings, it treated only the question of damages, on which it ruled that none could be allowed on a judgment or decree affirmed on a writ of error other than for delay.[22]

Pintado v. Ship San Joseph, a prize case involving a Spanish merchantman and a French privateer, and *United States v. La Vengeance*, a prosecution against the same privateer for illegal arms exportation, came up together from the New York circuit court during the August 1796 Term. The two cases paralleled *Talbot*, *Caesar*, *Hills*, and *Cotton* in that they were admiralty actions brought on writs of error. Furthermore, they involved section 19 and the scope of Supreme Court review. But unlike the earlier cases, neither *Pintado* nor *La Vengeance* suffered a want of facts on the record. In each case, Associate Justice Samuel Chase had produced a statement of facts laying out the factual basis for his legal rulings, in full compliance with section 19. At issue, then, was the effect of a circuit court's findings of fact on the scope of Supreme Court review: was a circuit court's statement of facts conclusive?

The lawyers involved in preparing the two cases for review—Alexander Hamilton, Robert Troup, and Richard Harison on behalf of the plaintiff in error in *Pintado*, Harison alone for the plaintiff in error in *La Ven-*


Don Diego Pintado
plaintiff in Error
vs
The Ship San Joseph
alias La Prinsesa da
Asturias her Tackle, Apparel
furniture and Appurtenances
and the cargo on board
of her claimed by Joan
Antonio Benard the
defendant in Error

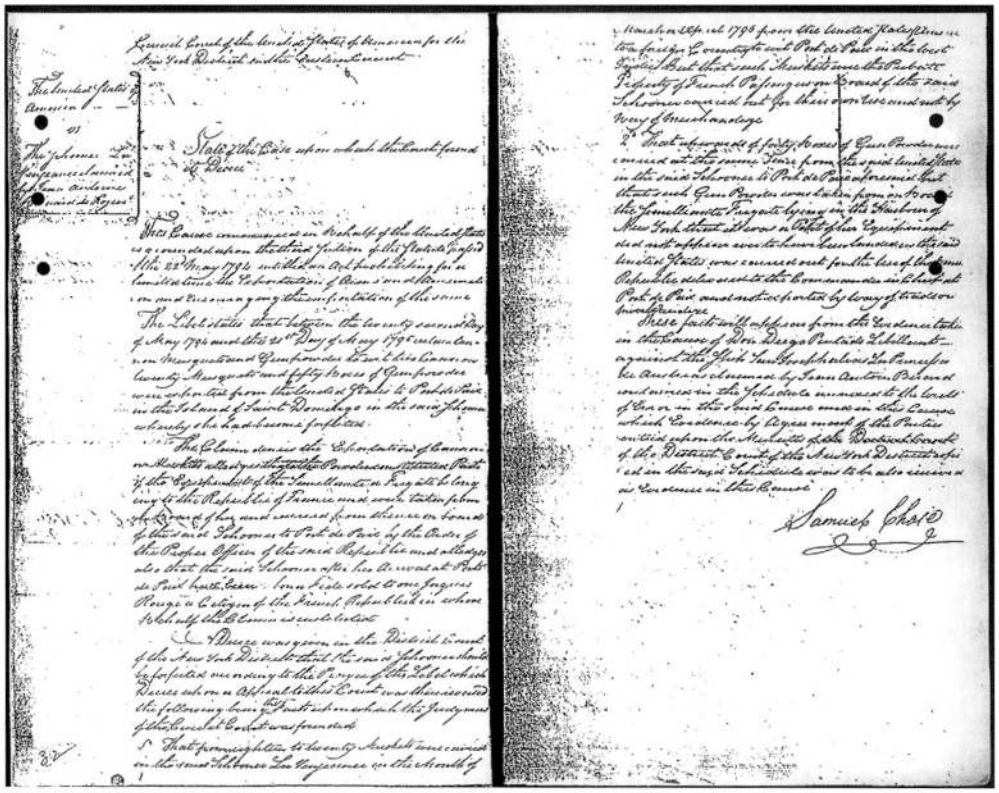
upon appeal from the decree
of the Circuit Court of the
United States for the
New York District

And thereupon the said Don Diego Pintado
by Alexander Hamilton his counsel comes and
says that in the record and proceedings and also
in the decree aforesaid there is manifest error
in this to wit that the evidence taken in the
said cause does not warrant the statements
of facts as made by the said Circuit Court
And also in this to wit that the said decree
of the said Circuit Court was given in
favor of the said Joan Antonio Benard
against the said Don Diego Pintado
in affirmance of the decree of the
District Court of the United States for
the said District when by the laws of this
said United States the said decree of the
said Circuit Court ought to have been
given for the said Don Diego Pintado
against the said Joan Antonio Benard

and in reversal of the said decree
of the said District Court therefore in
this also there is manifest error and this
the said Don Diego Pintado is ready
to verify wherefore he prays judgment
and that the said decree of the said
Circuit Court for the aforesaid errors
and others being in the record and
proceedings aforesaid may be reversed
annulled and held as utterly void. And
that the said Don Diego Pintado may
be restored to all things which he
hath lost by reason of the affirming
of the said decree of the said District
Court. —

Alexd. Hamilton
Of Counsel for Plaintiff in Error —

Uncertain whether cases ought to be brought before the Supreme Court on error or appeal, counsel and clerks sometimes merged the two procedures, as when they characterized review as taking place "On writ of error in nature of an appeal." Although Alexander Hamilton filed this assignment of errors in *Pintado v. Ship San Joseph* in pursuance of a writ of error, its header declared the case to be "Upon appeal." While appeal extended review to the facts as well as the law, error limited it to the law alone.



Associate Justice Samuel Chase, who heard *United States v. La Vengeance* in the New York federal circuit court, produced this statement of facts in accordance with section 19 of the Judiciary Act of 1789, which required a circuit court, when deciding a case in admiralty or equity, to cause the facts underpinning its ruling to appear on the record through either the pleadings and decree, a statement of the case approved by the parties or their counsel, or a statement by the court itself.

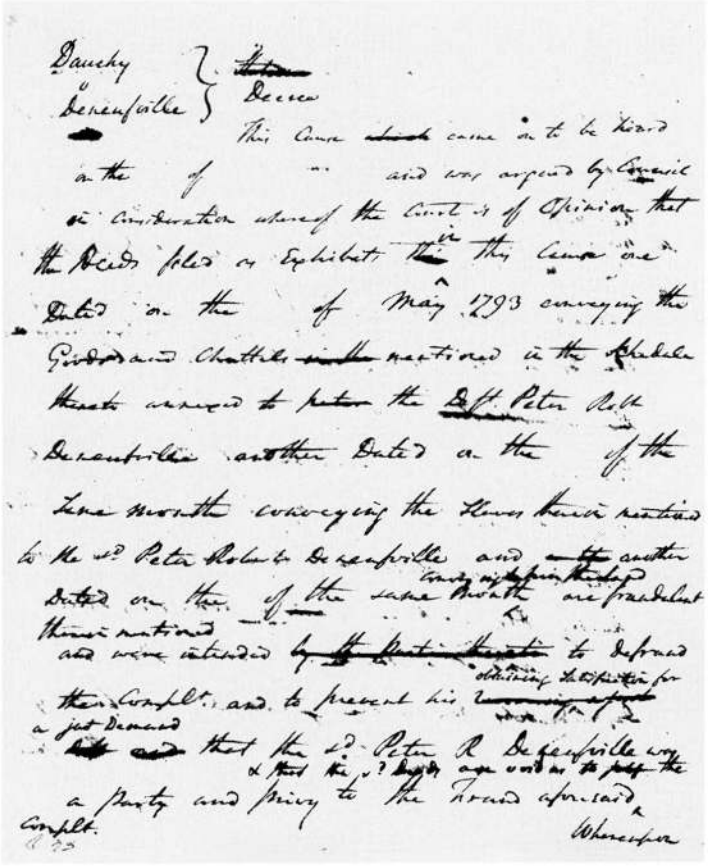
geance, and Edward Livingston, Brockholst Livingston, and Du Ponceau for the defendants in error in both cases—expected argument in the high court to revolve around the findings of fact made by Chase in the circuit court as well as around the process by which the cases came up for review. The assignments of errors—one drafted by Hamilton and the other by Harison—specifically challenged Chase's statements of fact. Counsel in the respective cases agreed, however, that the annexation of the testimony taken in the lower courts to the return on the writ of error did not preclude attorneys for either of the defendants in error from arguing that the facts found by Chase were conclusive. They also agreed that the annexation of the assignment of errors and citation was not an admission by lawyers for either of the plaintiffs in error of the applicability of section 22 of the Judiciary Act. Counsel for the plaintiffs in error evidently intended to argue that the section 22 prohibition against reversals on writs of error for errors in fact should have no role in the disposition of *Pintado* and *La Vengeance* because the two cases, as actions in admiralty, ought to be heard by the Supreme Court on appeal rather than error. Hamilton's assignment of errors in *Pintado* roundly declared the case to be "[u]pon appeal." Counsel on all sides recognized that the conclusiveness of a circuit court's statement of facts depended on whether review took place on error or appeal.[23]

A full Bench heard argument in *Pintado* on the conclusiveness of a circuit court's

statement of facts. One day later, the Court rendered its decision, ruling by a majority that the statement of facts drawn by Chase was conclusive.[24] Whether the Court considered the conclusiveness of a circuit court's statement of facts in *Pintado* and *La Vengeance* separately or concurrently is not known, but it came to the same decision in the latter case as it did in the former: Chase's findings of fact were deemed conclusive in both instances.[25]

On the same day the Court ruled in *Pintado* that the statement of facts in that particular case was conclusive, it declared in *Wiscart v. Dauchy* that, in equity and admiralty cases in general, a circuit court's statement of facts, whether forwarded to the Supreme Court with or without the evidence, was also conclusive. Unanimous with respect to the status of a statement of facts absent the evidence, the Justices in *Wiscart* divided on the weight of a statement of facts accompanied by the evidence. Both Chief Justice Oliver Ellsworth, speaking for the majority, and Justice Wilson, dissenting, based their respective opinions on the premise that the authority of a circuit court's statement of facts under section 19 of the Judiciary Act depended on the procedure for securing Supreme Court review under section 22. Each addressed the matter with particular reference to review procedure in admiralty, despite the fact that the case before them was in equity.

Wiscart originated as a fraud case in the Virginia federal circuit court, where Justice Iredell and Judge Cyrus Griffin had held, in a decree drafted by Iredell, that certain deeds were "fraudulent" and had been "intended . . . to defraud," that the grantee had been "a Party and Privy to the Fraud," and that the deeds were "void." Brought before the Supreme



Dauchy
vs
Desenfolle
Decree
This Cause came on to be heard
on the of and was argued by Counsel
on consideration whereof the Court is of Opinion that
the Deeds filed as Exhibits in this Cause are
Dated on the of May 1793 conveying the
Goods and Chattels mentioned in the Schedule
thereto annexed to whom the Defts Peter Robt
Desenfolle another Dated on the of the
same month conveying the Slaves therein mentioned
to the sd Peter Robert Desenfolle and another
Dated on the of the same month are fraudulent
& void as against the Complt and that the sd Peter R Desenfolle was
at the time of executing the same a Party and Privy to the fraud aforesaid
Complt.
Whereupon

Associate Justice James Iredell drafted this decree in *Wiscart v. Dauchy* in the Virginia federal circuit court. When the case came before the Supreme Court, its resolution turned on two questions: the conclusiveness of a statement of facts in general and the sufficiency of Iredell's decree in general.

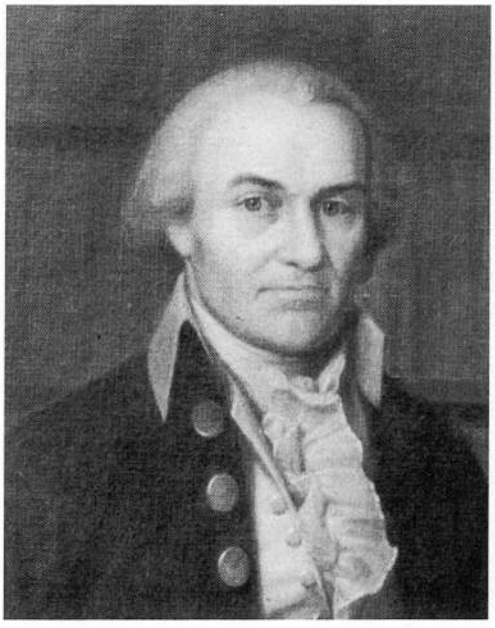
Court on error, the case immediately came to center not on the fraudulence of the conveyances but on the conclusiveness of the circuit court decree. Before the Justices could decide that issue, however, they had to answer two questions: "Whether a statement of facts by the Circuit Court was in any case conclusive? And whether the Decree, in the present case was such a statement of facts as the law contemplated?"[26]

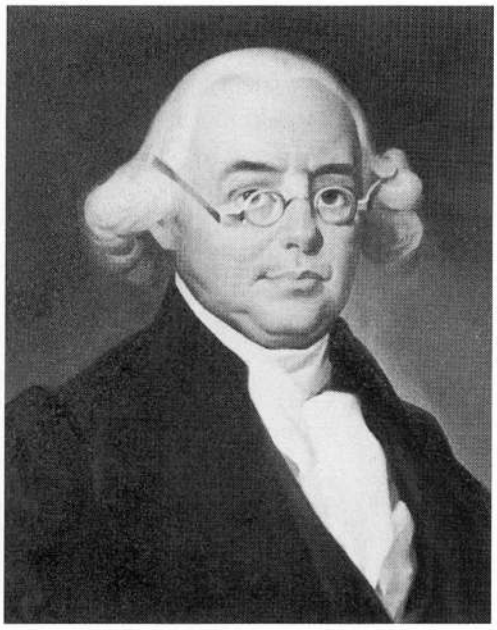
Counsel for the plaintiffs in error—Charles Lee, Ingersoll, and Tilghman—apparently hoped to sidestep the section 22 limitation on Supreme Court review by portraying the evidence transmitted with the record as the section 19 statement of facts. In support of their contention, they cited *Talbot* and *Hills*, in each of which the lack of an express statement had led the Court to proceed upon the evidence, albeit only with the agreement of counsel. Ingersoll went on to argue that the decree declaring the conveyances to be fraudulent did not satisfy the requirements of section 19: it was not a statement of facts but "an inference of law arising from the facts." The question of fraud, he asserted, was a matter of law, which the Constitution obliged the Court to review. At this juncture, Justice Chase interrupted to point out that the question of intent, on which that of fraud depended, was always a matter of fact. Counsel responded by faulting the decree for its failure to specify any evidence in support of its finding of fraudulent intent. Protesting that a decree "ought not in any case to be deemed conclusive," they maintained that the statement of facts in the present case "must be that which, reciting the evidence and exhibits, is expressly called a statement, and as such is subscribed by the Judge."[27]

In opposition, Du Ponceau, counsel for the defendant in error, attempted to show that the decree, in conjunction with the pleadings, did embrace the necessary statement of facts. Indeed, Du Ponceau contended, the pleadings and decree together comprised the preferred means by which a circuit court could preserve its findings of fact. If that portion of the record contained all the facts, then reference to any other part—whether a statement approved by the parties or their counsel, or a statement set forth by the judges, or the evidence itself—was "unnecessary and unauthorised." Du Ponceau also rejected the notion that a statement of facts had to indicate the evidence upon which the facts were found. Characterizing the question of fraud as a matter of fact, he insisted that the pleadings and decree in the case under consideration fully stated the circuit court's finding of fraud, leaving no error in law upon which the Supreme Court could act. As a result, he concluded, the Court had no choice but to disregard the evidence.[28]

On the same day the Court heard argument, it delivered the first half of its decision. The Justices unanimously held that, in both equity and admiralty cases, a circuit court's statement of facts, when forwarded to the Supreme Court unaccompanied by the evidence, was "conclusive as to all the facts, which it contains." But Justice Wilson dissented and Justice Paterson concurred with him when the rest of the Court determined that such a statement, even when joined by the evidence, was similarly definitive.[29] The different results reached by the majority and the dissenters on the latter rule stemmed, at least with respect to cases in admiralty, from the contradictory opinions that they held regarding the correct procedure for bringing an admiralty action from a circuit court to the Supreme Court. According to Wilson and Paterson, "the natural and proper mode of removing an admiralty cause" was on appeal, which would oblige the Court to review matters of fact as well as law. For Chief Justice Ellsworth and Associate Justices Cushing, Iredell, and Chase, such removal had to take place on a writ of error, limiting review to questions of law alone. Each side based its stance on its understanding of sections 21 and 22 of the Judiciary Act.[30]

Wilson noted that the provisions of sections 21 and 22 for the removal of cases from the district to the circuit courts distinguished





The opinions of Chief Justice Oliver Ellsworth (left), who spoke for the majority in *Wiscart v. Dauchy*, and Associate Justice James Wilson (right), who dissented, differed not only with respect to the Supreme Court's jurisdiction over matters of fact in admiralty and equity cases brought on error, but also, more fundamentally, regarding Congress's authority to regulate the Court's power of review.

between admiralty and civil proceedings. That distinction, he reasoned, must carry over to the removal of cases from the circuit courts to the Supreme Court. As section 22 allowed for Supreme Court review only of civil actions, Wilson looked elsewhere for guidance in determining how admiralty causes were to be brought before the Supreme Court. The Constitution, he found, "had previously declared that in certain enumerated cases, including admiralty and maritime cases, 'the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.'"[31] Congress, apparently satisfied with the constitutional provision as it applied to admiralty actions, had introduced neither exceptions nor regulations. Thus, Wilson concluded, "the case remains upon the strong ground of the Constitution, which . . . provides and authorises an appeal; the process that, in its very nature . . . implies a re-examination of the fact, as well as the law." Closing his dissent with a nod to the political and diplomatic implications of some admiralty cases, Wilson suggested that "it is of moment to our domestic tranquillity, and foreign relations, that causes of Admiralty and Maritime jurisdiction, should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal."[32]

Ellsworth rejected the distinction between admiralty and civil proceedings made by Wilson in his reading of sections 21 and 22. In doing so, the Chief Justice also disavowed Wilson's conception of the Supreme Court's appellate jurisdiction. According to Ellsworth, the Constitution left the Court's exercise of appellate jurisdiction entirely dependent on congressional authorization: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." Ellsworth went on to show that section 22 of the Judiciary Act did indeed establish a rule to govern Supreme Court review of circuit court rulings in admiralty actions. The provisions of section 22 for

the removal of cases from the district to the circuit courts, Ellsworth observed, subsumed admiralty actions among civil ones. "It is there said, that final *Decrees* and judgments in civil actions in a District Court may be removed into the Circuit Court *upon writ of error* and since there cannot be *a decree* in the District Court in any case, except cases of admiralty and maritime jurisdiction, it follows of course, that such cases must be intended." As for the removal of admiralty actions from the circuit courts to the Supreme Court, section 22 included among the decrees and judgments liable to review on writ of error "such as had been previously removed into the Circuit Court, 'by appeal from a District Court,' which can only be causes of admiralty and maritime jurisdiction."[33] The consequent incapacity of the Supreme Court to decide questions of fact in such causes occasioned no denial of justice, as determinations of fact, although reserved to the circuit courts when not settled by counsel, were nevertheless made by "an impartial and enlightened tribunal." If the Supreme Court were to re-examine evidence, Ellsworth noted, the section 19 mandate requiring a circuit court to cause a statement of facts to appear on the record would be "useless." To effect Supreme Court review of testimony and exhibits, furthermore, would entail "great private and public inconveniency." And, after all, the purpose of the Supreme Court was not just to review cases but also "to preserve unity of principle, in the administration of justice throughout the *United States*."[34]

Two days after rendering its decision on the conclusiveness of a circuit court's statement of facts, the Supreme Court handed down its ruling on the sufficiency of the pleadings and decree in the particular case under consideration. Before it did so, however, Iredell acknowledged that he and Judge Griffin had not intended their decree in the Virginia circuit court to serve as a statement of facts. Rather, they had simply transmitted the record in the same form used by other circuits. Iredell himself went on to observe that his declaration "can have no effect to expound the record; nor to influence the final judgment now to be pronounced." Ellsworth then delivered the opinion of the Court. Noting that the Virginia circuit court decree proclaimed not only the fraudulence of the conveyances but also the fraudulent intent behind them, the Chief Justice held that "the Circuit Court have sufficiently caused the facts, on which they decided, to appear from the pleadings and decree, in conformity to the act of Congress." The Supreme Court accordingly affirmed the decree.[35]

The *Wiscart* decision left unsettled at least one question regarding the scope of Supreme Court review on error. The first of the two rules laid down in August 1796 applied only where the record in an admiralty or equity case removed from a circuit court to the Supreme Court included a statement of facts but not the evidence. The second rule applied where the record in such a case included a statement of facts as well as the evidence. In *Jennings v. Brig Perseverance*, a prize case involving a British merchantman and a French privateer decided during the February 1797 Term, the Supreme Court had to determine what rule to apply where the record included the evidence but not a statement of facts. *Jennings* differed from *Talbot* and *Hills* only insofar as the section 19 question at issue was framed cleanly—free of any challenge to the sufficiency of the evidence—and answered squarely.

Nowhere in the record in *Jennings* were the facts underlying the decree of the Rhode Island federal circuit court specified. Although Justice Chase had produced a statement of facts in both *Pintado* and *La Vengeance*, he neglected to do the same in *Jennings*. And while the circuit court decree in *Wiscart* had at least intimated the facts on which it had been based, the one in *Jennings* did not go even that far. Desire for review on the merits, which had persuaded counsel to come to terms on the facts in *Talbot*, *Caesar*,

and *Hills*, bore no force in *Jennings*, because the latter case raised no question of law independent of any error of fact. Indeed, it appears that only the lack of a statement of facts afforded the plaintiffs in error any hope on review in the first place. With no error in law to allege, their attorney in the circuit court evidently took advantage of Chase's failure to lay out the factual basis for his decree as the sole available ground on which to bring the case before the Supreme Court.[36]

Attorneys for the defendants in error anticipated that opposing counsel would attempt to obtain Supreme Court review of the facts. In a statement of their clients' case, Asher Robbins and Du Ponceau acknowledged that the record did not indicate the facts on which the circuit court had founded its decree. They went on to declare: "It is intended by the Defendants in error to object to any error *in fact* being assigned or argued by the Plaintiffs. . . ." In support of their position, the lawyers cited section 22 of the Judiciary Act, which prohibited reversal for such an error. They then asserted that responsibility for assuring that the facts appeared on the record lay with the plaintiffs in error. If the facts did not appear there, then the Supreme Court "will presume" that they were "such as warranted the inference of law, which [the circuit court] thought proper to draw from them." Robbins and Du Ponceau went on to observe that the Supreme Court itself had indicated in *Pintado*, *La Vengeance*, and *Wiscart* that it could not examine the evidence without consent of the parties. Such consent, it was made clear, would not be forthcoming from the defendants in error in the present case.[37]

Surprisingly, when the Court heard argument in *Jennings*, counsel for the respective parties offered similar readings of the precedents established the previous Term. Du Ponceau and Robbins, who seem to have opened argument despite representing the defendants in error, again insisted that the plaintiffs in error "could not go into a consideration of errors in fact," as the rules laid out in *Wiscart*, *Pintado*, and *La Vengeance* were "conclusive." Tilghman, speaking for the plaintiffs in error, forthrightly admitted that the case of a record transmitted with the evidence but without a statement of facts appeared to fall within the second rule handed down in *Wiscart*. If the Justices agreed, the attorney volunteered, "he would decline troubling them with any further argument." A remarkable comment then escaped the Bench. Justice Chase, perhaps embarrassed by his own failure to specify the facts on which he had founded his decree in the circuit court, warned Tilghman that, even if the Supreme Court were to permit further argument, "you would find little encouragement to enter into the merits: The evidence is too plainly against you." Already pessimistic about his clients' chances, Tilghman did not need Chase's show of pique to alert him to the likely futility of his efforts.[38]

As Tilghman anticipated, the Court, in a decision announced three days later, extended the second rule in *Wiscart* to the fact situation in *Jennings*. Revisiting the earlier case, Justice Paterson, who had remained silent during the exchange of opinions there, publicly voiced his concurrence with the dissent of Justice Wilson and confirmed that the vote on the second rule—that recognizing a circuit court's statement of facts as conclusive, even in the presence of the evidence—had been divided four to two. From Paterson's perspective, principle and policy had argued against the stance of the majority. Ignoring the evidence had not only "shut . . . the door against light and truth" but also "le[ft] the property of the country too much to the discretion and judgment of a single Judge." Paterson went on to reveal that the question in *Jennings*—whether the Court could consider the evidence in the absence of a statement of facts—had actually been the subject of discussion during deliberations in *Wiscart*. The same majority that had affirmed the conclusiveness of a statement of facts, even when joined by the evidence, had determined that the Court could

not, when a statement of facts was lacking, regard the evidence. Indeed, Paterson observed, the reasoning of Chief Justice Ellsworth in support of the second rule in *Wiscart* "went clearly to this case." As a result, further argument was not necessary. Although originally inclined to give the Judiciary Act "the most liberal construction," Paterson now held that "the decision of the Court precludes me from considering the evidence . . . as a statement of facts." And, he concluded, "if there is no statement of facts, the consequence seems naturally to follow, that there can be no error." The Court, concurring in Paterson's remarks, dispensed with further argument and affirmed Chase's circuit court decree.[39]

With respect to the Supreme Court's power of review on writs of error, the decision in *Jennings* brought that in *Wiscart* into full relief. On its own, the earlier case seemed to stand for no more than it said: in equity and admiralty proceedings, a circuit court's statement of facts, whether forwarded to the Supreme Court with or without the evidence, was conclusive as to the facts that it contained. In light of *Jennings*, however, *Wiscart* took on broader significance. It became clear that the Supreme Court, when reviewing a circuit court decision on a writ of error, could never consider the evidence. The provision in section 22 of the Judiciary Act prohibiting reversals on error for errors in fact was, of course, absolute. But, *Wiscart* and, more particularly, *Jennings* went further: they forbade resort to the evidence even where the want of a statement of facts otherwise rendered review of the law impossible. A legal ruling by the Supreme Court depended on the findings of fact by the circuit court whose decision was under review. Without certain knowledge of the facts of the case, the high court could not judge whether the lower one had applied the law correctly. Although section 19 of the Judiciary Act directed the circuit courts to cause the facts underlying decisions in admiralty or equity to appear on the record, nothing really prevented a circuit court from omitting a statement of facts, thus thwarting Supreme Court review and in effect making its own judgment final—just as counsel in *Hills* had warned.

Between *Wiscart* and *Jennings*, one might have thought that controversy over the scope of Supreme Court review on error with respect to the facts had been resolved and that uncertainty about the procedure for Supreme Court review in admiralty cases had been removed. But *Blaine v. Ship Charles Carter*, a debt action in admiralty that came from the Virginia federal circuit court to the Supreme Court twice in 1800, resurrected both issues. *Blaine I*, brought up on appeal during the February Term, obliged the Court to reconsider whether it could hear an appeal in admiralty. Adhering to its decision in *Wiscart*, the Court declared error to be the proper procedure for securing high court review in all cases. *Blaine II*, brought up on error during the August Term, confronted the Court with another circuit court decree unreviewable on the law for want of facts on the record. Standing by its decision in *Jennings*, the Court refused to hear the matter. Thus, *Blaine* served to confirm *Wiscart* and *Jennings* as good precedent.[40]

With the decisions in *Blaine*, the early Court offered its final words on the procedure to be used to secure review under its admiralty jurisdiction. But the cases from the 1790s establishing error as the correct method did not long retain their precedential value—at least on the technical point. In February 1801, a lame-duck Federalist Congress passed a new judiciary act, which, in addition to creating a host of fresh judgeships for party stalwarts to fill, required the Supreme Court to review circuit court rulings in equity, admiralty, and prize cases on appeal. That legislation, anathema to the entering Republican Congress, was repealed in its entirety in March 1802. One year later, however, the same Congress passed another act reestablishing appeal as the proper vehicle for Supreme Court review in equity, admiralty, and prize cases. In the end,

the determination of the Court was found wanting on both sides of the party divide.[41]

The question of what process ought to be used to bring an admiralty case before the Supreme Court for review excited an intensity of interest among those involved in arguing and deciding it in the 1790s that would strike many today as unfathomable. In a period in the Court's history when every question was one of first impression, however, the implications of even the most mundane of technical points could be far-reaching. The choice between error and appeal went beyond procedural form. It extended to the scope of review and the jurisdiction of the Court. And it took in the balance of power within the federal government. It was a legal technicality of constitutional breadth.

Resolving which procedure was the correct one was not a straightforward affair. Bench and bar, adhering to the established practice of appeal, did not immediately recognize the statutory adoption of error. Once the conflict between the norms of admiralty and the Judiciary Act came to light, counsel maneuvered to retain the substance of appeal—particularly review of the facts as well as the law—within the form of error. No doubt the lawyers were motivated at least in part by strategic considerations limited to the particular cases under their care. However, they might also have deemed the shift from appeal to error too revolutionary to accept without palliation. The Court itself resisted the contraction of the scope of review implied by the change. The hesitation of lawyers and Justices alike seems to have derived from a shared sense of priorities. Whenever a case presented a substantive question in addition to the procedural point, counsel sooner or later waived objection to any technical irregularity in pursuit of a decision on the merits. On the one occasion when counsel sought a decision on the procedural question in such circumstances, the Court handed down an inconclusive ruling with the recommendation that the lawyers come to terms so as to allow argument on the merits. Bench and bar apparently agreed that substantive justice ought not to be sacrificed on the altar of technical legalism.

When the Court in *Wiscart* finally addressed whether error or appeal was the proper procedure for securing review under its admiralty jurisdiction, the Justices failed to reach a consensus. Their division reflected a basic difference in their understanding of the Constitution, particularly with regard to the balance of power between Congress and the Court. The majority, led by Chief Justice Ellsworth, believed that Article III, section 2 prohibited the Court from undertaking review without congressional authorization. The dissenters, Associate Justices Wilson and Paterson, held that it required the Court to act but permitted congressional regulation. While one side considered the Court's appellate jurisdiction to be inoperative unless Congress intervened, the other deemed it self-executing. As Ellsworth, Wilson, and Paterson were all active participants in the Constitutional Convention, the divergence of their views in *Wiscart* belies the existence of a single understanding of the Constitution shared by the founding fathers. Any interpretation of the Constitution anchored in an undifferentiated original intent must therefore be suspect.

The two camps in *Wiscart* differed not only on constitutional grounds but also on statutory, political, and practical ones. In his opinion for the majority, Ellsworth declared that the Court's mission was not simply to decide cases but to superintend the administration of justice throughout the United States and assure uniformity in the application of law. To require the Court to examine evidence and determine the facts as well would be to overburden it. And the circuit courts were fully capable of finding facts. Not coincidentally, Ellsworth construed the Judiciary Act as providing for Supreme Court review in admiralty cases on error. In dissent, Wilson, alert to the implications of some admiralty cases for domestic affairs and foreign relations, suggested that the Court had a duty to assure the

appearance of justice as well as its substance. If the Court were to review admiralty cases on the facts as well as the law, respect for its authority would avert political or diplomatic controversy. Paterson, revisiting the *Wiscart* decision in *Jennings*, underscored the Court's responsibility to administer justice in every case. Leaving the determination of facts to a single circuit judge obstructed the search for truth. It also jeopardized the security of property. Although proceeding from different premises, Wilson and Paterson joined in interpreting the Judiciary Act so as to mandate review on appeal. The diverging views of the majority and dissenters in *Wiscart* reveals that original intent is no more reliable when construing statutes than when interpreting the Constitution. Although both Ellsworth and Paterson, as members of the Senate committee for the organization of the federal judicial system, had played leading rôles in the drafting of the Judiciary Act, they did not share the same understanding of its provisions.

The Supreme Court of the 1790s, like the government of which it was part and like the nation that it served, was an institution very much in the making. Whether it, or they, would survive remained open to doubt. But as the Justices went about the business of deciding cases—including ones of technical import as well as those of substantive interest—they laid the foundation for the Court's emergence as a full partner alongside Congress and the President. In doing so, they helped transform the Constitution into a workable government and contributed to the unity of the nation.

Legal technicalities are not boring when they are open to argument and one has a stake in the outcome, particularly when the character of the federal government and the future of the American nation lie in the balance.

Note:* *The author thanks his colleagues on the* ***Documentary History of the Supreme Court**—Maeva Marcus, Stephen L. Tull, Robert P. Frankel, Jr., Anthony M. Joseph, and Elliott Ashkenazi—and dedicates this article to Denise Karachuk Feikema.*

ENDNOTES

[1]*Talbot v. Jansen*, *Wallace v. Brig Caesar*, *Hills v. Ross*, *Cotton v. Wallace*, *Pintado v. Ship San Joseph*, *United States v. La Vengeance*, *Wiscart v. Dauchy*, *Jennings v. Brig Perseverance*, and *Blaine v. Ship Charles Carter.*

[2]*Talbot*, *Hills*, *Cotton*, *Pintado*, and *Wiscart.*

[3]*Hills*, *Wiscart*, and *Jennings.*

[4]*Blaine.*

[5]U.S. Constitution, art. 3, sec. 2; Maeva Marcus and James R. Perry, eds., **The Documentary History of the Supreme Court of the United States, 1789–1800**, 6 vols. to date; vols. 7–8 forthcoming (New York: Columbia University Press, 1985–present), 4:76, 80; **U.S. Statutes at Large** 1 (1845): 83, 84–85.

[6]Appeal, 18 November 1793, and Agreement of Proctors, 8 February 1794, *Glass v. Sloop Betsey*, **Documentary History of the Supreme Court**, 6:342, 347; Fine Minutes, 8 February 1794, *ibid.*, 1:224; *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 7 (1794). For more information on *Glass*, see pp. 296–355 in volume 6 of the **Documentary History of the Supreme Court**.

[7]Record and Proceedings, *Talbot v. Jansen*, Appellate Jurisdiction Records, Record Group (RG) 267, National Archives, Washington, D.C.; Proceedings and Decree of the United States Circuit Court for the District of South Carolina, 25 October–5 November 1794, Writ of Error, 5 November 1794, and Specification of Errors, 5 August 1795, *Talbot v. Jansen*, **Documentary History of the Supreme Court**, 6:663–64, 665, 674.

[8]Section 30 of the Judiciary Act of 1789 allowed oral testimony taken in an admiralty action on trial in a district court to be written down by the clerk for use on appeal in case the witnesses were to prove unable to appear at the circuit court. **Documentary History of the Supreme Court**, 4:96; **U.S. Statutes at Large**, 1:88–90.

[9]Fine Minutes, 6 August 1795, **Documentary History of the Supreme Court**, 1:246; James Iredell's Notes of Arguments in the Supreme Court [6 and 7 August 1795], *Talbot v. Jansen*, *ibid.*, 6:677; *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 138n (1795).

[10]James Iredell's Notes of Arguments in the Supreme Court [6 and 7 August 1795], *Talbot v. Jansen*, **Documentary History of the Supreme Court**, 6:677 (emphasis in original); *Talbot v. Jansen*, 3 U.S. (3 Dall.) at 138n.

[11]James Iredell's Notes of Arguments in the Supreme Court [6 and 7 August 1795], James Iredell's Supreme Court Opinion, 22 August 1795, and William Tilghman's Notes on the Justices' Opinions, 22 August 1795, *Talbot v. Jansen*, **Documentary History of the Supreme**

Court, 6:675–85, 699–714, 714–17; *Talbot v. Jansen*, 3 U.S. (3 Dall.) at 133, 138n, 152–69. For more information on *Talbot*, see pp. 650–718 in volume 6 of the **Documentary History of the Supreme Court.**

[12]Record and Proceedings, *Wallace v. Brig Caesar*, Appellate Jurisdiction Records, RG 267, National Archives, Washington, D.C.; Minutes, 5 May 1795, United States Circuit Court for the District of Georgia, RG 21, National Archives-Southeast Region, East Point, Georgia; Writ of error, 15 May 1795, *Wallace v. Brig Caesar*, Case Records-Admiralty, United States District Court for the District of Georgia, RG 21, National Archives-Southeast Region, East Point, Georgia; Assignment of Errors, 19 June 1795, James Whitefield to Samuel Bayard, 30 June 1795, ? to Jacob Wagner, [19–22 December 1795], James Iredell's Notes on the Record, [3–26 February 1796], James Iredell's Notes of Arguments in the Supreme Court, 26 and 27 February 1796, Peter S. Du Ponceau to Gortier, Nadau & Company, 29 February 1796, and Special Mandate, 12 March 1796, *Wallace v. Brig Caesar*, **Documentary History of the Supreme Court**, vol. 7. Dallas did not publish a report of *Caesar*. For more information on *Caesar*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court.**

[13]Record and Proceedings, *Hills v. Ross*, Appellate Jurisdiction Records, RG 267, National Archives, Washington, D.C.; Minutes, 5 May 1795, United States Circuit Court for the District of Georgia, RG 21, National Archives-Southeast Region, East Point, Georgia; Writ of error, 14 May 1795, *Ross v. Ship Elizabeth*, Case Records-Admiralty, United States District Court for the District of Georgia, RG 21, National Archives-Southeast Region, East Point, Georgia; Peter S. Du Ponceau to John Y. Noel, 1 August 1795, Assignment of Errors, 1 February 1796, and Joinder in Error, 1 February 1796, *Hills v. Ross*, **Documentary History of the Supreme Court**, vol. 7. The assignment was originally dated 16 June 1795, and the joinder, 3 August 1795.

[14]Nathaniel Pendleton to Joseph Clay, Jr., 23 June 1795, and Note of Nathaniel Pendleton, 24 June 1795, *Hills v. Ross*, Appellate Jurisdiction Records, RG 267, National Archives, Washington, D.C.; Joseph Clay, Jr.'s Objections to the Taking of Testimony *De Bene Esse*, 23 June 1795, *Hills v. Ross*, **Documentary History of the Supreme Court**, vol. 7.

[15]Peter S. Du Ponceau to John Y. Noel, 1 August 1795, *Hills v. Ross*, **Documentary History of the Supreme Court**, vol. 7 (emphasis in original).

[16]John Blair to George Washington, 25 October 1795, *ibid.* 1:59; Fine Minutes, 26 February 1796, *ibid.*, p. 264; James Iredell's Notes of Arguments in the Supreme Court, 26 February 1796, *Hills v. Ross*, *ibid.* vol. 7; *Hills v. Ross*, 3 U.S. (3 Dall.) 184, 185–87 (1796).

[17]James Iredell's Notes of Arguments in the Supreme Court, 26 February 1796, *Hills v. Ross*, **Documentary History of the Supreme Court**, vol. 7; *Hills v. Ross*, 3 U.S. (3 Dall.) at 185, 187. Section 24 of the Judiciary Act of 1789 required the Supreme Court, when reversing a judgment or decree, to render the decision that the lower court should have given, unless the reversal favored the party who brought the original suit and the damages or the decree were uncertain, in which circumstances the Court was to remand the case for a final decision. **Documentary History of the Supreme Court**, 4:84; **U.S. Statutes at Large**, 1:85.

[18]*Hills v. Ross*, 3 U.S. (3 Dall.) at 187–88. For more information on *Hills*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court.**

[19]Record and Proceedings, *Cotton v. Wallace*, Appellate Jurisdiction Records, RG 267, National Archives, Washington, D.C.; Decree, 5 March 1795, and Writ of error, 14 May 1795, *Wallace v. Brig Everton*, Case Records-Admiralty, United States District Court for the District of Georgia, RG 21, National Archives-Southeast Region, East Point, Georgia; Minutes, 5 May 1795, United States Circuit Court for the District of Georgia, RG 21, National Archives-Southeast Region, East Point, Georgia; Assignment of Errors, 17 June 1795, and Special Mandate, 2 March 1796, *Cotton v. Wallace*, **Documentary History of the Supreme Court**, vol. 7; Fine Minutes, 2 March 1796, *ibid.* 1:266; Julius Goebel, Jr., **Antecedents and Beginnings to 1801**, vol. 1 of **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States** (New York: Macmillan, 1971), p. 695.

[20]Article III, section 1 of the Constitution vested the judicial power of the United States in a Supreme Court and whatever inferior courts Congress might establish. Section 2 extended the judicial power to all cases in admiralty and gave the Supreme Court appellate jurisdiction "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Section 13 of the Judiciary Act of 1789 gave the Supreme Court appellate jurisdiction over the federal circuit courts in certain cases specified elsewhere in the act. U.S. Constitution, art. 3, secs. 1 and 2; **Documentary History of the Supreme Court**, 4:69; **U.S. Statutes at Large**, 1:81. For the relevant provisions of sections 21 and 22, see note 30 below.

[21]William Paterson's Notes of Arguments and Opinion in the Supreme Court, [2 and 9] August 1796, *Cotton v. Wallace*, **Documentary History of the Supreme Court**, vol. 7; *Cotton v. Wallace*, 3 U.S. (3 Dall.) 302, 302–4 (1796). Section 10 of the Judiciary Act of 1789, which made decisions of the Kentucky federal district court eligible for Supreme Court review in the same circumstances and under the same conditions as decisions of the federal circuit courts, suggested that both writs of error and appeals could lie to the high court. Section 23 required the Supreme Court, when affirming a judgment or decree on a writ of error, to award the respondent in error

damages for delay as well as single or double costs. **Documentary History of the Supreme Court**, 4:58, 83; **U.S. Statutes at Large**, 1:78, 85.

[22]William Paterson's Notes of Arguments and Opinion in the Supreme Court, [2 and 9] August 1796, *Cotton v. Wallace*, **Documentary History of the Supreme Court**, vol. 7; Fine Minutes, 9 August 1796, *ibid.*, 1:278–79; *Cotton v. Wallace*, 3 U.S. (3 Dall.) at 304. For more information on *Cotton*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court**.

[23]Minutes, 20 April 1796, United States Circuit Court for the District of New York, RG 21, National Archives-Northeast Region, New York; Writ of Error, 20 April 1796, Statement of Facts, [20 April 1796], Assignment of Errors, [20 April–8 July 1796], Agreement of Counsel, 28 June 1796, Agreement of Counsel, 8 July 1796, and Peter S. Du Ponceau to Robert Troup, 11 July 1796, *Pintado v. Ship San Joseph*, **Documentary History of the Supreme Court**, vol. 7; Writ of Error, 20 April 1796, Statement of Facts, [20 April 1796], and Assignment of Errors, [20 April–8 July 1796], United States v. La Vengeance, *ibid.*, vol. 7; Goebel, **Antecedents and Beginnings to 1801**, p. 698.

[24]Fine Minutes, 9 and 10 August 1796, **Documentary History of the Supreme Court**, 1:277–80; Peter S. Du Ponceau to Edward Livingston, 10 August 1796, and Special Mandate, 10 August 1796, *Pintado v. Ship San Joseph*, *ibid.*, vol. 7; *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 324 (1796). Dallas did not publish a report of *Pintado*, but his report of *Wiscart v. Dauchy* indicates that the question of "how far a statement of facts by the Circuit Court is conclusive" had been argued previously and tentatively names *Pintado* as the case in which that argument took place. For more information on *Pintado*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court**.

[25]Peter S. Du Ponceau to Robert Troup, 17 August 1796, *Pintado v. Ship San Joseph*, **Documentary History of the Supreme Court**, vol. 7. For more information on *La Vengeance*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court**.

[26]Decree of the United States Circuit Court for the District of Virginia, [12 December 1795], and Writ of Error, 21 December 1795, *Wiscart v. Dauchy*, **Documentary History of the Supreme Court**, vol. 7; *ibid.*, 3:74; *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 322–24.

[27]William Paterson's Notes of Arguments in the Supreme Court, [10 August 1796], *Wiscart v. Dauchy*, **Documentary History of the Supreme Court**, vol. 7; Peter S. Du Ponceau to John A. Chevallié, 15 August 1796, Du Ponceau Papers, Historical Society of Pennsylvania, Philadelphia; *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 322–23.

[28]William Paterson's Notes of Arguments in the Supreme Court, [10 August 1796], *Wiscart v. Dauchy*, **Documentary History of the Supreme Court**, vol. 7; *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 323–24.

[29]*Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 324. The two rules described in Dallas's reports as part of the Court's decision in *Wiscart* also appear in a letter by Du Ponceau relating the Court's decision in *Pintado*. Peter S. Du Ponceau to Edward Livingston, 10 August 1796, *Pintado v. Ship San Joseph*, **Documentary History of the Supreme Court**, vol. 7.

[30]*Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 324–30; Charles Lee to Timothy Pickering, 27 July 1797, *Wiscart v. Dauchy*, **Documentary History of the Supreme Court**, vol. 7. Section 21 of the Judiciary Act of 1789 provided for circuit court review on appeal of district court decrees in admiralty causes involving more than $300, while section 22 authorized the same on writ of error for district court judgments and decrees in civil actions involving more than $50. The latter section also permitted Supreme Court review on writ of error of circuit court judgments and decrees in civil actions involving more than $2,000. **Documentary History of the Supreme Court**, 4:78, 79–80; **U.S. Statutes at Large**, 1:83–84, 84.

[31]U.S. Constitution, art. 3, sec. 2.

[32]*Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 324–27.

[33]**Documentary History of the Supreme Court**, 4:79–80; **U.S. Statutes at Large**, 1:84. According to Ellsworth, Congress, when fashioning section 22, had viewed civil actions in opposition to criminal prosecutions, all review of which it had meant to prohibit. *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 328.

[34]*Wiscart v. Dauchy*, 3 U.S. (3 Dall.) at 327–30.

[35]*Ibid.*, 322n, 330; Fine Minutes, 12 August 1796, **Documentary History of the Supreme Court**, 1:282; Special Mandate, 12 August 1796, *Wiscart v. Dauchy*, *ibid.*, vol. 7. For more information on *Wiscart*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court**.

[36]Record and Proceedings, *Jennings v. Brig Perseverance*, Appellate Jurisdiction Records, RG 267, National Archives, Washington, D.C.; Decree, 25 June 1796, *Jennings v. Brig Perseverance*, Final Records, June 1796 Term, United States Circuit Court for the District of Rhode Island, RG 21, National Archives-New England Region, Waltham, Massachusetts; Assignment of Errors, [7 February 1797], *Jennings v. Brig Perseverance*, **Documentary History of the Supreme Court**, vol. 7; *Jennings v. Brig Perseverance*, 3 U.S. (3 Dall.) 336, 336–37 (1797).

[37]*Jennings v. Brig Perseverance*, 3 U.S. (3 Dall.) at 341n.

[38]Fine Minutes, 10 February 1797, **Documentary History of the Supreme Court**, 1:287; *Jennings v. Brig Perseverance*, 3 U.S. (3 Dall.) at 336.

[39]Fine Minutes, 13 February 1797, **Documentary History of the Supreme Court**, 1:289–90; *Jennings v. Brig*

Perseverance, 3 U.S. (3 Dall.) at 337. Whether Wilson felt similarly bound by the August 1796 rules and sided with the majority on the statement of facts question is not known. For more information on *Jennings*, see the section on that case in volume 7 of the **Documentary History of the Supreme Court**.

[40]Fine Minutes, 8 February and 14 August 1800, **Documentary History of the Supreme Court**, 1:323, 329; *Blaine v. Ship Charles Carter*, 4 U.S. (4 Dall.) 22 (1800); *Blaine v. Ship Charles Carter*, 8 U.S. (4 Cranch) 328, 329 (1808). The Court finally heard *Blaine* on the merits in 1808. For more information on the 1800 adjudications of *Blaine*, see the section on that case in volume 8 of the **Documentary History of the Supreme Court**.

[41]**Documentary History of the Supreme Court,** 4:308; **U.S. Statutes at Large** 2 (1845): 99, 132, 244.

A Falling Out: The Relationship Between Oliver Wendell Holmes and Theodore Roosevelt

RICHARD H. WAGNER

Theodore Roosevelt is often credited with founding and shaping the modern American presidency.[1] With his appointment of Oliver Wendell Holmes to the Supreme Court of the United States, Roosevelt also set in motion a force that would transform the judiciary. However, it did not go as Roosevelt had planned. Holmes' refusal to conform to Roosevelt's desires in *Northern Securities Co. v. United States*[2] demonstrated that Holmes was his own man and not Roosevelt's instrument. The decision brought an abrupt halt to what had been becoming a close friendship between the two men. Over the years the rift deepened. The bitterness that grew between them reflected more than a difference of opinion over law and economic principles; it reflected the type of disillusionment that comes only when a friend fails to live up to expectations.

Holmes was born in 1841 into a house where ideas were king. His father was a medical doctor who had achieved international fame as a poet and essayist. As a result, people such as Ralph Waldo Emerson and Henry Wadsworth Longfellow were no strangers to the boy's home.[3] Because his family had played a prominent role since Boston was founded, Holmes also knew the elite of city society.

Coming from such a background, Holmes naturally cherished the ambition to make a mark in the world of ideas. Ignoring his father's advice that a man could never achieve greatness in the law, Holmes enrolled in Harvard Law School and attended classes from September 1864 to June 1866. After a period of working in a law office, he passed the bar exam in March 1867 and went into private practice, specializing in admiralty law.[4] However, at the same time he was practicing, Holmes undertook a private study "to master profoundly and in detail the great body of the law."[5] He worked in "a black gulf of solitude more isolating than that which surrounds the dying man."[6] From this, he wrote numerous

Holmes' father was a medical doctor and an internationally acclaimed poet and essayist. Oliver Wendell Holmes, Sr., inspired the future Justice to make his mark in the world of ideas, but cautioned that a man could never achieve greatness in the law.

scholarly articles about the law, revised the leading treatise on the law (James Kent's **Commentaries on American Law**), and edited the *American Law Review*. This effort culminated in a series of lectures on the law that were published in 1881 as a book, **The Common Law**, which is still widely read today.[7] "It cost me many hours of sleep and the only reward which I have promised myself is that a few men will say well done."[7]

While Holmes loved ideas, he was also a man of action. When the Civil War broke out in 1860, he felt duty-bound to volunteer for the Union Army. Over the next three years, he rose to the rank of brevet colonel and was wounded three times. The experience affected him greatly, and he frequently used military analogies throughout the rest of his life.[8] Accordingly, when he was offered a teaching position at the Harvard Law School, he accepted reluctantly because "academic life is but half life—it is a withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister."[9] It is thus not surprising that a few months later Holmes jumped at the chance to rejoin the fight as a judge on the highest court in Massachusetts—"after all, the place for a man who is complete in all his powers is in the fight."[10]

As 1901 began, Holmes had been on the Supreme Judicial Court of Massachusetts for nearly eighteen years.[11] His elevation to Chief Justice two years earlier had evidenced the fact that his work on that court had earned respect in Massachusetts. However, Holmes was concerned that he would never get a chance to play a role on the national stage. For Holmes, who had a burning desire to have his work recognized as superlative, this was a bit-

ter prospect.[12] Two obstacles appeared to stand in his way. First, in a series of dissents, Holmes had spoken in favor of the right of workers to organize. This caused a number of powerful interests to regard him as "unsafe." Second, in March of that year he would be sixty, and soon he would be perceived as too old to be appointed to the Supreme Court of the United States.

Then rumors began to circulate that Justice Horace Gray was ill and that he would soon leave the high court bench.[13] To prepare for such an eventuality, President William McKinley began to look for possible replacements.[14] Since Gray was from Massachusetts, the then-prevailing custom dictated that a Massachusetts man would fill the vacancy. Accordingly, McKinley sought the advice of former Massachusetts governor John Davis Long, who was now McKinley's Secretary of the Navy.[15] Although Long had appointed Holmes to the Supreme Judicial Court of Massachusetts, he did not recommend Holmes to McKinley; rather, Long recommended his former law partner, Alfred Hemenway.[16] McKinley agreed and an informal offer was extended and accepted.[17]

Since it was unlikely that the Massachusetts seat would become vacant again in the near future, McKinley's decision appeared to end Holmes' hopes of becoming a Supreme Court Justice.[18] However, fate intervened on September 6, 1901, when McKinley was fatally wounded by an assassin while attending the Pan-American Exposition in Buffalo. As a result, the decision as to who would succeed

President William McKinley did not consider Holmes as a possible candidate to succeed Justice Horace Gray on the Supreme Court's Massachusetts seat. At the advice of his Secretary of the Navy, John Davis Long, McKinley instead extended an informal offer to Alfred Hemenway, Long's former law partner. When McKinley was assassinated (pictured), Vice President Theodore Roosevelt did not feel compelled to honor this informal agreement.

Justice Gray now lay in the hands of McKinley's successor.

Theodore Roosevelt had been a nearsighted and asthmatic boy. His father was a philanthropist and a prominent figure in New York society "whom I have always been able to regard as the ideal man."[19] The senior Roosevelt challenged the boy to build his body so as to overcome his physical shortcomings.[20] Theodore responded, "I'll make my body," and threw himself into an exercise program—including lifting dumbbells and taking boxing lessons—that transformed his body over the years. In the process, it instilled in him self-confidence and a desire to accept any physical challenge. This led him to undertake mountain-climbing, hiking, riding, rowing, big-game hunting, a safari in Africa, exploration of the Amazon jungle, cattle-ranching in the Dakota Badlands, and the leadership, at the head of the Rough Riders, of the charge against the Spanish emplacements on San Juan Hill in the Spanish-American war.

Roosevelt was just as obsessed with improving his mind as he was with improving his body. As a boy, he had been interested in natural history and had collected, dissected, and studied a multitude of birds and animals.[21] After achieving only mediocre grades during his first year at Harvard, he established a rigorous study regime that brought him to the upper part of his class.[22] Although he had no naval background, after graduation, he published a book on the naval conflict during

Theodore Roosevelt's military exploits in the Spanish American War—he led the Rough Riders against Spanish emplacements on San Juan Hill—made him nationally popular and an ideal candidate for the Vice Presidency.

the War of 1812. He researched the topic so thoroughly that his book became required reading in the United States Navy. He read constantly and would carry books with him so that he could read a few pages while waiting for a carriage and during other otherwise wasted moments.

Roosevelt was elected a member of the New York Legislature when he was twenty-three, and his enthusiasm and persistence led him to be elected Minority Leader a few years later. It was there that he began to pursue an agenda of progressive reform. "If I wished to accomplish anything for the country, my business was to combine decency and efficiency; to be a thoroughly practical man of high ideals who did his best to reduce those ideals to actual practice. This was my ideal, and to the best of my ability I strove to live up to it."[23] While his dedication to work impressed everyone he met, his complete assurance that he was right and his devotion to what he believed caused him to run afoul of many established politicians and political bosses. This same pattern marked his tenures as a member of the United States Civil Service Commission and as the New York City police commissioner, the assistant secretary of the Navy, and the governor of New York.

Theodore Roosevelt had not wanted to be Vice President, and he owed his office in large part to his political enemies.[24] During his term as governor, he had so aggressively and effectively pursued an agenda of reform that the old-guard bosses of his own party were anxious to be rid of him.[25] "All the high monied interests that make campaign contributions of large size and feel that they should have favors in return are extremely anxious to get me out of the State."[26] Both because of his military exploits during the Spanish-American War and because of his reform program in New York, the forty-one-year-old governor had considerable national popularity, which made putting him on the national ticket in the inconsequential position of Vice President an ideal way of gaining votes while getting rid of the troublemaker.[27] As a result, over his protests that "there is nothing to do as Vice President and there is a great deal to do as Governor,"[28] he found himself nominated at the 1900 Republican Convention.[29] Although he felt that accepting the number-two spot would spell the end of his chances of ever becoming President, he reluctantly accepted after being told that without him on the ticket, the Republicans might lose the West to Democrat William Jennings Bryan.[30] Despite his lack of interest in becoming Vice President, he campaigned hard for the ticket, and the Republicans won easily.[31] Afterwards, he said "I am delighted to have been on the national ticket in this great historic contest for after McKinley and [his political manager Senator Mark] Hanna, I feel that I did as much as anyone in bringing about the result."[32] Then, seemingly to confound his enemies, fate made Roosevelt President.

Roosevelt did not feel bound by McKinley's informal agreement to put Hemenway on the Supreme Court.[33] Accordingly, when Gray suffered a stroke in February 1902, Roosevelt began his own search for a replacement.[34] During the 1884 Republican Convention, Roosevelt had formed a close working relationship with Henry Cabot Lodge in an unsuccessful attempt to secure the presidential nomination for reformer George F. Edwards over the machine-candidate James G. Blaine.[35] Over the years, their friendship had grown, and Lodge, who was now the junior senator from Massachusetts, had become one of Roosevelt's closest friends and political advisers.[36]

Lodge also happened to be a long-time friend of Holmes.[37] In 1867, they had traveled west on a hunting trip, and Lodge had attended Holmes' lectures on constitutional law during Holmes' short time at the Harvard Law School. Most importantly, Holmes had made a point of maintaining his friendship with Lodge when many of Boston's elite had abandoned Lodge because of his decision to support Blaine in the 1884 presidential election.

Henry Cabot Lodge (pictured) became friends with Roosevelt when they worked on the 1884 Republican Convention together. As a junior senator from Massachusetts, Lodge was one of President Roosevelt's closest friends and political advisors. It was he who recommended that Holmes be appointed to Gray's seat.

As noted earlier, Lodge had hoped that a reform candidate would be nominated by the Republicans, but when the reformer failed to be nominated, Lodge, like Roosevelt, felt bound, as a state committee member, to support the party's nominee. Many of Lodge's old friends thought that he had sold his conscience in exchange for a congressional nomination.[38] Holmes, however, felt that, as a gentleman, Lodge had had no other choice. Accordingly, now that Lodge's political star was once more in the ascendancy, he recommended that Roosevelt appoint Holmes to fill Gray's seat.[39]

Although there was a seventeen-year difference in their ages, Roosevelt and Holmes had much in common. Both were from upper-class families: Holmes was from an old New England family, while Roosevelt was descended from one of the colonial Dutch families of New York. Both were named after their fathers, who were men of achievement, and both strove to come out from under their fathers' shadows. Both were graduates of Harvard College and had been members of its Porcellian Club. Both had volunteered to serve as army officers at times of national crisis, Holmes in the Civil War and Roosevelt in the Spanish-American War. Both were avid readers and had written publicly acclaimed scholarly books. Both enjoyed socializing but had married women who preferred privacy.

Perhaps the strongest bond between them was that both men were romantics. According to Holmes: "The great experiences of life are war, women, a storm at sea, and the mountains."[40] "I love the old. I like to have books in my library that were on bookshelves before

America was discovered. I prefer prints that go back two or three hundred years and show the same human feeling that we have today."[41] "We don't go to artists for the discovery of truths but that they should make us feel and realize."[42] "Life is painting a picture, not doing a sum . . . Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal . . . Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole."[43]

To Roosevelt, "life is a great adventure" and "every now and then I like to drink the wine of life with brandy in it."[44] "[I]t is well to have lived so that at the end it may be possible to know that on the whole one's duties had not been shirked, that there has been no flinching from foes, no lack of gentleness and loyalty to friends, and a reasonable measure of success in the effort to do the task allocated."[45] With regard to his days as a rancher and deputy sheriff in the Badlands of Dakota, Roosevelt wrote: "In that land, we led a free and hardy life, with horse and with rifle . . . Ours was the glory of work, and the joy of living."[46] Like Holmes, he had a deep belief in America. "We shall never be successful over the dangers that confront us; we shall never achieve true greatness, nor reach the lofty ideal which the founders and preservers of our mighty Federal Republic have set before us, unless we are Americans in heart and soul, in spirit and purpose, keenly alive to the responsibility implied in the very name of American, and proud beyond measure of the glorious privilege of bearing it." Not surprisingly, Roosevelt was very impressed[47] by Holmes' emotional and patriotic 1895 speech "A Soldier's Faith" in which Holmes said: "[T]he joy of life is living, is to put out all one's personal powers as far as they will go."[48]

Still, the two men were quite different. Roosevelt was ebullient, impulsive, and sure that he had solutions for society's problems. As he grew older, Roosevelt often would attempt to prove that an action or a position was moral by pointing out that it was an action he had taken or a position that he had held.[49] Roosevelt also craved power and thrived on political campaigns. Holmes, in contrast, was reflective and skeptical of governmental panaceas. He disliked reformers who were "cocksure—a frame of mind that makes me puke."[50] While Holmes desired "to be admitted the greatest jurist in the world, . . . I wouldn't do much more than walk across the street to be called Chief Justice instead of Justice."[51]

One area where the two men diverged was on their views of the law. When he decided not to pursue a career in the natural sciences, Roosevelt had thrown himself into the study of law at Columbia College in New York in preparation for a career in government. However, Roosevelt was disappointed with the law's emphasis on logic rather than morality. "Some of the teaching of the law books and of the classroom seemed to me against justice."[52] Later, after the New York Court of Appeals had struck down a piece of reform legislation that he had sponsored, he wrote that "the courts [are] not necessarily the best judges of what should be done to better social and industrial conditions."[53] For Roosevelt, the lesson was to make sure that only persons with the right political view were appointed to the Bench.

Holmes agreed that judges are not in a good position to determine what should be done to better society. However, the conclusion Holmes drew from this premise was that judges should not use their position to impose their views on society. "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong."[54] Accordingly, Holmes would vote to enforce laws regardless of his personal views as to their wisdom and would uphold the rights of unpopular groups such as organized labor even if he had

little personal sympathy for them. As a result, he "loathed most of the things I decided in favor of."[55]

Ironically, Roosevelt mistook Holmes' unwillingness to use his position as a means of advancing his own political views as an indication that Holmes held the same progressive views as Roosevelt and would use his position to advance those views. "The labor decisions which have been criticized by some big railroad men and other members of large corporations contribute to my mind a strong point in Judge Holmes' favor . . . I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients."[56] In fact, Holmes had little personal sympathy with the labor movement but felt that the same legal principles that allowed capital to combine led to the conclusion that it was permissible for labor to combine without judicial interference.[57] "It seemed to me that the trade unions and trusts pointed to a more despotic regime . . . I am not particularly in love with it."[58]

Despite the fact that he saw much to admire in Holmes, Roosevelt had some doubts.[59] In the early part of the twentieth century, Chief Justice John Marshall was going through a popular canonization, and Roosevelt,[60] with little knowledge of Marshall's work, saw the fourth Chief Justice as the ideal jurist. Accordingly, he decided that he wanted a Supreme Court Justice in the mold of John Marshall. Overlooking the fact that Marshall was responsible for making the judiciary independent of the executive branch, Roosevelt was impressed by Marshall's loyalty to his political party. Recently, Holmes, as Chief Justice of the Massachusetts high court, had been pressed into giving a speech honoring the Great Chief Justice on the one hundredth anniversary of his taking his seat as Chief Justice of the United States. Although Holmes praised Marshall, Roosevelt correctly detected that Holmes had a lack of enthusiasm for his subject.[61] "It may seem to be, but is not really, a small matter that his speech on Marshall should be unworthy of the subject, and above all should show a total incapacity to grasp what Marshall did."[62] As a result, Roosevelt wondered whether Holmes valued Marshall as a party man and whether Holmes was "in entire sympathy with our views."[63] Party loyalty was very important to Roosevelt at this point because the Court was considering a group of cases which involved the question of whether the Constitution applied to the new American colonies and Roosevelt wanted to be sure that his appointee would vote his way on this issue.[64]

After assurances from Lodge that Holmes was indeed a good Republican, Roosevelt invited Holmes to visit his house at Oyster Bay, Long Island for an interview.[65] When Holmes arrived on the evening of July 24, 1902, he learnt that the President had gone sailing on Long Island Sound and was mired in a fog. As a result, Holmes found himself having dinner with Roosevelt's children, the oldest present of whom was fifteen. Nonetheless, Holmes soon captivated his hosts. "Presently they discovered that I had been in the Civil War and asked me to tell my adventures. So I told them tales adapted to their years and gathered afterwards that I gave satisfaction."[66] When their father returned the next morning, he too succumbed to Holmes' charm and immediately offered him a position on the Court.[67] Roosevelt agreed with Lodge that Holmes was "our kind—right through."[68]

The appointment was announced on August 11, 1902. Holmes wrote to his friend Sir Frederick Pollock: "The President has offered me a place on the U.S. Supreme Court which I shall accept—subject to confirmation by the Senate. There have been powerful influences against me, because some at least of the money powers think me dangerous, wherein they are wrong."[69]

Leading the opposition was Samuel Hoar, the senior senator from Massachusetts. Hoar had successfully prevented Holmes

from getting a federal district judgeship, and he now had his eye on Gray's seat for his own nephew.[70] In addition, he was outraged that Lodge had gone behind his back to Roosevelt in order to secure the nomination for Holmes. Accordingly, he launched his own campaign against Holmes, pointing out that businessmen feared Holmes and arguing that the members of the Massachusetts bar had told him that they regarded Holmes as an undistinguished judge.[71] However, when Roosevelt made clear that he intended to pursue Holmes' nomination, Hoar capitulated.[72] Accordingly, Roosevelt wrote to Holmes: "I do not believe that a single vote will be cast against your confirmation. I have never known a nomination to be better received."[73] As predicted, the Senate confirmed Holmes unanimously on December 4, 1902.[74]

Press reaction to the appointment was generally favorable. However, Holmes was appalled by their analyses. The editorials made no mention of his highly influential book or that a hallmark of his jurisprudence was neutrality, which prevented him from deciding cases based upon his own political views or the identity of the parties. Instead, the papers reported that the new Justice was the son of the popular poet and essayist of the same name and that he had zealously championed the cause of organized labor.[75] "When Roosevelt nominated me the papers made a good deal of talk of a very friendly sort, but it made me very blue. For I said to myself that for 20 years and more I had been doing my best to produce the first-rate and only one article, so far as I remember, showed the slightest discrimination or notion, favorable or unfavorable, of what my work had amounted to."[76]

By the time he took his seat, however, Holmes was no longer blue. He and his wife Fanny found themselves in the midst of a newly revitalized Washington social scene that centered on the White House. With characteristic energy and enthusiasm, the Roosevelts were in the process of refurbishing the White House, sweeping out the collections of Victorian gloom and restoring the décor of the time of John Adams. First Lady Edith Roosevelt sought to instill a sense of dignity to formal functions; State dinners were now elegant affairs with trumpet calls and catered food.[77] The Roosevelts invited to their social occasions not just the Washington social elite but also novelists, sculptors, historians, philosophers, poets, artists, and the occasional Rough Rider.[78] Conversation ranged over a wide variety of topics from ancient history to current politics, with the President actively participating in if not dominating the conversation. Although he did not participate much in the drinking, he provided four or five wines with dinner as well as champagne.[79]

Taking up residence in a rented house across Lafayette Park from the White House, the Holmeses were frequently invited to join the Roosevelts for dinner or to accompany them to the theater.[80] The President favored the reclusive Fanny Holmes over the grande dames of Washington society, causing much resentment. He liked to exchange war stories and tall tales with Wendell. According to Holmes, Roosevelt liked them because neither "Mrs. Holmes or I want to get anything from him."[81] More likely it was because the President loved good conversation and both Wendell and Fanny could speak with charm, wit, and intelligence.[82] Soon the Holmeses became known as intimates of the President and were sought out by Washington society. As Holmes wrote to one friend, "We are on top of the wave."[83]

Holmes was taken with his new friend.[84] Later, he described Roosevelt as having a manner which gave every person he met "the feeling of being in special personal relations."[85] Accordingly, Holmes sent Roosevelt books and select friends who he thought would interest the President.[86] Still, as befitting Victorian gentlemen, it was always "Mr. President" and "Judge."

Roosevelt found Holmes to be "one of the most interesting men I have ever met."[87]

First Lady Edith Roosevelt oversaw the restoration of the White House, replacing gloomy Victorian furnishings with original Federalist era décor. She also returned elegance and a sense of dignity to State dinners.

More importantly, he saw Holmes as a man he could trust. Roosevelt had little patience with the formalities of diplomacy and would rely on trusted intermediaries outside of the official channels of the State Department to engage in secret negotiations when pursuing his foreign policy agenda.[88] Accordingly, when a dispute with Great Britain flared up, he turned to Holmes, who had many friends among Britain's ruling class.

The dispute concerned the boundary between Alaska and Canada, which was then still a British dominion. In 1896, gold was discovered in Canada's Yukon Territory. However, the best way of getting to the gold strike was the water route through the Alaskan panhandle. Some Canadians were unhappy with this arrangement and—ostensibly based on an 1825 treaty between Britain and Alaska's then-owner, Russia—declared that certain key inlets actually belonged to Canada.

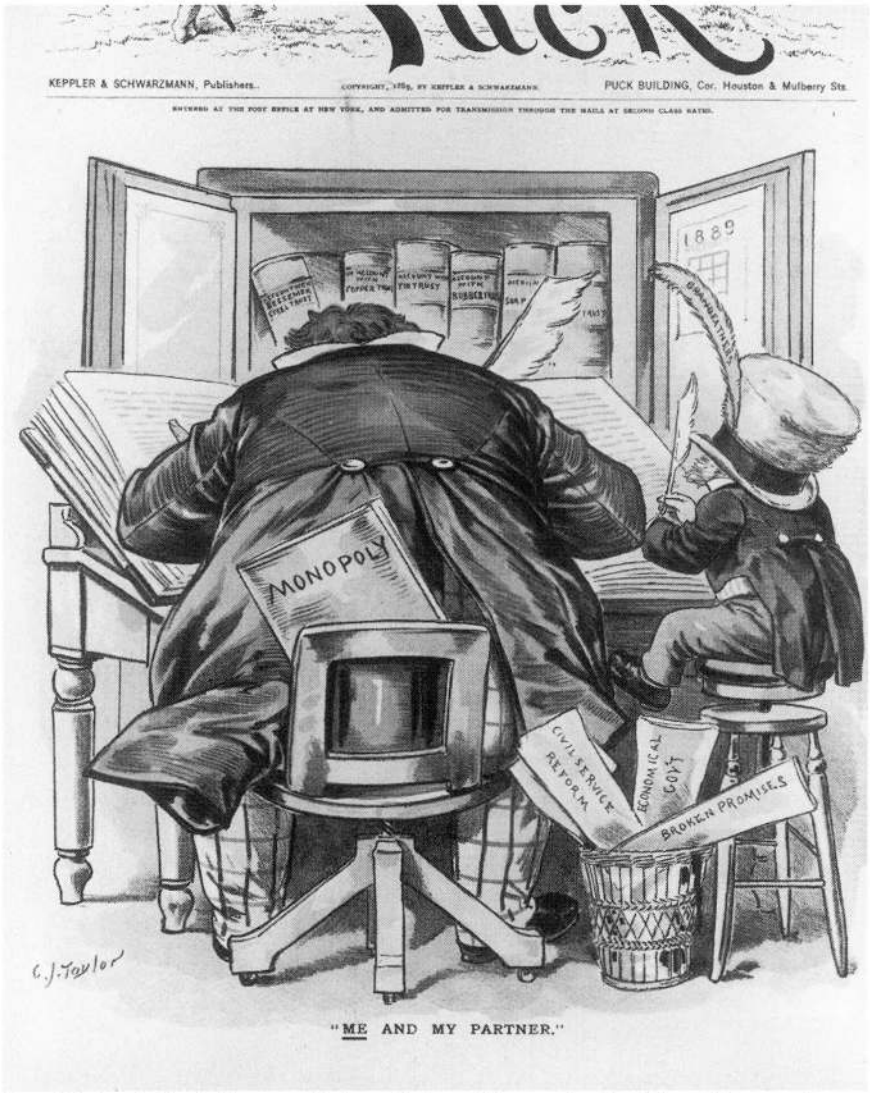
During McKinley's administration, the United States and Britain attempted unsuccessfully to reach a quiet resolution of this dispute. At, first, Roosevelt, unwilling to cause problems for Britain while it was involved in the Boer War, continued McKinley's policy. However, in 1902, Roosevelt focused on the controversy and decided that since all involved had accepted the existing boundaries for some sixty years, "there was literally no Canadian case at all" and it was

President Roosevelt favored the reclusive Fanny Holmes over the grande dames of Washington because of her wit and intelligence, causing much resentment. The Holmeses became known as intimates of the Roosevelts.

"outrageous" for the Canadians to make this claim now that gold had been discovered.[89] Accordingly, Roosevelt sent 800 troops to Alaska to underscore his determination not to make any concessions. Eventually, he was persuaded to arbitrate the dispute before a panel of "six impartial justices." However, to ensure "no possible outcome disadvantageous to us as a nation," Roosevelt selected three close friends and advisors, including Lodge and Elihu Root, to sit on the panel.[90] The British selected two Canadians and the Lord Chief Justice of England.

Concerned that the arbitration would be stalemated and rendered incapable of issuing a decision, Roosevelt turned to Holmes, who was planning to visit with friends in England and Ireland during the summer 1903 recess. Roosevelt explained: "I wish to make one last effort to bring about an agreement through the commission, which will enable the people of both countries to say that the result represents the feeling of the representatives of both countries . . . I wish to exhaust every effort to have the affair settled peacefully and with due regard to England's dignity."[91] Roosevelt instructed Holmes to let it be known that "I meant business" and if the panel were unable to reach a decision, Roosevelt would occupy the disputed area with troops and "run the boundary on my own hook."[92] Shortly after Holmes returned home, the panel announced a decision largely adopting the American position, with the Lord Chief Justice joining with the three Americans. Roosevelt was delighted and told Holmes that his unofficial diplomacy "was not without its indirect effect on the decision."[93] As he saw it, "the clear understanding that the British Government had as to what would follow a disagreement was very important and probably decisive."[94]

What precipitated the end of Roosevelt's friendship with Holmes was an antitrust case. Although he is popularly thought of as a "trust-buster," unlike many progressives, Roosevelt did not view big business as bad per se.[95] There were "good trusts"—a term that was then popularly (although inaccu-



Roosevelt and Holmes' friendship unraveled over their positions on trusts. Although Roosevelt saw well-run trusts as beneficial to the national economy, he was willing to use antitrust laws to attack the bad trusts. Holmes, on the other hand, did not believe in interfering with the trusts, which he viewed as increasing the overall efficiency of the economy by eliminating wasteful duplication.

rately) used to refer to all big corporations—which acted to the benefit of the overall economy. "The captains of industry who have driven the railway system across this continent, who have built up our commerce, who have developed our manufactures, have on the whole done great good to our people. Without them the material development of which we are so justly proud could never have taken place."[96] However, there were also "bad trusts," which were run by bad men with evil motives who abused their economic power.[97] Since there were both good and bad trusts, Roosevelt felt that it was "folly to attempt to prohibit all combinations as is done by the Sherman antitrust law."[98] Instead, "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled" by the national government.[99] Nonetheless, until Congress enacted

Trust-buster Roosevelt defied James J. Hill (left) and J. P. Morgan (right), who formed a stock monopoly called Northern Securities, which controlled railroads in the northwestern states. In 1904 the Supreme Court upheld Roosevelt's order to break up the monopoly, with Justices Holmes and Edward Douglass White dissenting.

his desired regulatory regime, Roosevelt was willing to use the antitrust laws to attack those trusts that he viewed as bad.[100]

Holmes had little use for the antitrust laws. "The American public seems to believe that the Sherman Act and smashing great fortunes are roads to an ideal—which seems to me open to debate."[101] The Sherman Antitrust Act, which had been enacted more than a decade before, was aimed at making everyone fight but forbade anyone to win.[102] Holmes believed that economic forces drove competitors to combine and that such combinations increased overall efficiency by eliminating wasteful duplication.[103] He saw the antitrust laws as based upon the then-popular theories calling for the redistribution of wealth, which he found fundamentally flawed. Consider "the stream of products . . . omit all talk about ownership and just . . . consider who eats the wheat, wears the clothes, uses the railroads and lives in the houses. I think the crowd now has substantially all there is, that the luxuries of the few are a drop in the bucket, and that unless you make war on moderate comfort there is no general economic question."[104] In addition, "if a man makes a great fortune by selling patent medicine to the crowd, that shows that in those circumstances the crowd wants it—and I can see no justification in a government's undertaking to rectify social desires—except upon an aristocratic assumption that you know what is good for them better than they [do]."[105] Accordingly, "I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the grounds for interference is very clear."[106]

Despite his misgivings, however, Holmes saw it as his duty to enforce the antitrust laws.[107] "Of course I enforce whatever constitutional laws Congress or anybody else sees fit to pass—and do it in good faith to the best of my ability—but I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence."[108] Accordingly, in *Northern Securities,* "I really thought I was interpreting the Sherman Anti-Trust Act without regard to prejudices, but no doubt the attitude toward one side is correlated with that as to the other."[109]

The *Northern Securities* case arose out of a dispute over a relatively small but important railroad called the Chicago, Burlington, and Quincy R.R. James J. Hill, the owner of the Great Northern Railroad, which ran from the Great Lakes to the Pacific, and Edward H. Harriman, the owner of the massive Union Pacific, both, saw this railroad as providing an ideal connection between their lines and Chicago.[110] Hill combined forces with his banker, J. Pierpont Morgan—who owned the competing Northern Pacific Railroad—to outbid Harriman for control of the Chicago, Burlington, and Quincy. As a result, Harriman's system was cut off from Chicago.[111] In retaliation, Harriman launched a raid on Northern Pacific's shares, sending the stock market into turmoil.[112]

To avoid a crash, Morgan convened a peace conference at which he proposed creating "a community of interest."[113] Morgan, Hill, and their associate stockholders would form a holding company that would own the securities of Hill's Great Northern and of Morgan's Northern Pacific.[114] To ensure that there would be no attacks on Harriman's railroads, Harriman would have a seat on the holding company's board.[115] The warring factions agreed, and on November 12, 1901, the Northern Securities Company was born.[116]

Northern Securities was modeled on United States Steel, which Morgan had recently formed to bring together under common ownership sixty percent of the nation's steel production.[117] Similarly, John D. Rockefeller had created the Standard Oil Company, which dominated the nation's oil business.[118] To many, it appeared that the nation's resources were becoming concentrated in the hands of a few, and when the formation of Northern Securities was announced there was a general public outcry against this apparent

first step in concentrating all of the nation's railroads.[119]

Roosevelt reacted by asking Attorney General Philander C. Knox whether it would be possible to use the Sherman Antitrust Act to attack Northern Securities.[120] When Knox responded that he thought Northern Securities was a violation of the act, Roosevelt, without consulting the rest of his cabinet, directed him to secretly prepare an action.[121] Accordingly, in February 1902, the Justice Department announced that it was filing a complaint against Northern Securities in the federal court for the District of Minnesota. The stock market fell in reaction to the announcement of the suit.[122]

Morgan felt that Roosevelt should have approached him privately so that the matter could be worked out in a gentlemanly fashion.[123] Concerned that this was just the first step in an attack on his interests, he visited the White House.[124] Roosevelt assured him that he was not under attack. However, Roosevelt was unwilling to go along with Morgan's suggestion that Roosevelt's man could meet with Morgan's man and work things out.[125] "Mr. Morgan could not help regarding me as a big rival operator, who either intended to ruin all his interests or else could be induced to come to an agreement to ruin none."[126]

A trial held before four judges of the Eighth Circuit produced over 8,000 pages of transcript.[127] In the end, the court issued an order in favor of the government, ordering the dissolution of the company.[128] The defendants appealed.

The case was argued before the Supreme Court over two days beginning on December 14, 1903. Since Justice Brown was ill, only eight Justices were present. However, Brown's seat may well have been the only empty seat, as everyone who was anyone in Washington, including the First Lady and Fanny Holmes, were in attendance.[129] Although the Justices listened impassively, most observers felt that Attorney General Knox's argument was unanswerable.[130] At the conference, the vote was five to four to affirm, with the Chief Justice and Justices White, Holmes, and Peckham dissenting. The first Justice John Harlan, who was the senior Justice in the majority, assigned himself the task of writing an opinion for the Court.

The Old Senate Chamber in the Capitol, which was then the courtroom of the Supreme Court of the United States, was again crowded to capacity on March 14, 1904, when the Court announced its decision.[131] Harlan began his analysis by stating his conclusion that the Hill-Morgan combination was a violation of the Sherman Act. "If such a combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between [these two railroads], will be lost, and the entire commerce of the immense territory . . . will be at the mercy of a single holding corporation."[132] Having said why this combination should be a violation of the act, Harlan turned only briefly to its language to show that the combination was indeed a violation. He noted that the statute was written in broad language declaring every contract, combination, or conspiracy in restraint of trade illegal. Thus, the act was not limited to unreasonable restraints of trade but extended to all combinations that had a tendency to restrain interstate commerce. Therefore, a combination that would extinguish competition between competing railroads was prohibited. After this brief statutory analysis, he explained at length how the Commerce Clause gave Congress the power to enact such legislation. Harlan's literalist analysis of the statute is far from satisfactory. Every contract restrains competition to some degree, yet it is unlikely that Congress intended to outlaw all contracts. Thus, the key question that Harlan's analysis skipped over is, how does one distinguish between a contract that is legal under the Sherman Act and one that is unlawful?

Justice Brewer was wavering in his support of the government's position.[133] In the hope of persuading Brewer to change his vote, Chief Justice Melville Fuller asked both

Holmes and Justice Edward White to write dissents. Holmes had not issued a written dissent since joining the Supreme Court; though he was to become known as the "Great Dissenter," he dissented with reluctance and only when a major principle was involved.[134]

Holmes began by attempting to distance the legal question from the emotion surrounding this high-profile case.[135] "Great cases, like hard cases, make bad law." Such cases are called "great," not because of their importance in shaping the law but because of "some accident of immediate overwhelming interest."[136] They are driven by "hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."[137] Thus, in order to avoid distorting the law, this case had to be decided as if it had involved two grocers, rather than J. P. Morgan and Jim Hill. The issue before the Court was merely one of interpreting and applying the words of a statute, the Sherman Act, to determine whether it was unlawful for several men to unite to form a corporation for the purpose of buying more than half the shares of two competing railroads. For purposes of analysis, Holmes was willing to accept that the new corporation was formed for the sole purpose of suppressing competition between the two railroads.

He then noted that the language of the statute was indeed sweeping: "It hits 'every' contract or combination of the prohibited sort, great or small, and 'every' person who shall monopolize or attempt to monopolize, in the sense of the act, 'any part' of the trade or commerce among the several States."[138] While there was a natural inclination to assume that the statute was directed only against great corporations, there is nothing in the language of the statute to so limit its reach. Indeed, the broad language used made it impossible to draw such distinctions.

In order to make sense out of this broad language, Holmes looked to the common law for its meaning. "The words [of the statute] hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade." Under the common law, contracts in restraint of trade were contracts with a stranger to the contractor's business that wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. This provision of the statute "requires that a party's freedom in trade between the States shall not be cut down by contract." Therefore, it did not apply to an arrangement, such as the one between Hill and Morgan, by which competition is ended through a community of interest—an arrangement which leaves the parties without external restriction. Under the common law, combinations or conspiracies in restraint of trade were combinations to keep strangers to the agreement out of the business. Such combinations were against public policy because they monopolized or attempted to monopolize some portion of trade. "It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."[139] Thus, the formation of a partnership that suppresses competition between two former competitors was not unlawful.

To test his conclusions, Holmes candled his interpretation of the act against more everyday situations. If the statute applied to agreements to form a partnership between two competitors, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the states, would be unlawful. This untenable conclusion followed from the fact that the language of the statute declared unlawful every contract, combination, or conspiracy in restrain of trade without limitation. "[T]he act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."[140]

The dissenters were not able to change

Brewer's vote.[141] Still, Brewer felt compelled to distance himself from Justice Harlan's opinion "for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation."[142] Unlike Harlan, Brewer did not interpret the Sherman Act as including all contracts in restraint of trade. However, unlike Holmes, he was willing to read a limitation into the broad language of the statute so that it applied only to unreasonable restraints on trade. Having made this interpretation, he reasoned that if the Hill-Morgan combination were legal, then an arrangement whereby a corporation was formed to buy all the shares of all the railroads in the country would be legal. Since the latter arrangement would be unreasonable, the Hill-Morgan combination must be an unreasonable restraint on trade.

The Court's decision had relatively little competitive effect. The two railroads had cooperated rather than competed for many years.[143] As Holmes had pointed out in his dissent, no one was claiming that it would be illegal for Morgan or Hill to own the shares of the railroads in question; indeed, after the dissolution of Northern Securities, they continued to own and control those railroads. Indeed, Roosevelt later lamented that his major antitrust victories were "of positive advantage to the wrongdoers."[144] However, *Northern Securities* did show that the federal government could successfully take on the trusts in the courts—a showing that Roosevelt believed had to be made because of the Supreme Court's earlier refusal to use the Sherman Act to curtail the Sugar Trust in *United States v. E. C. Knight*.[145] He wrote: "The success of the *Northern Securities* case definitely established the power of the Government to deal with all great corporations. Without this success the National Government must have remained in the impotence to which it had been reduced by the *Knight* decision as regards the most important of its internal functions."[146] Moreover, the decision was a tremendous public-relations success, and Roosevelt knew from experience that favorable public opinion was a valuable commodity that could be applied to further his goals.[147]

However, despite the fact that he had won the case and his popularity had soared in reaction to this win, Roosevelt was furious.[148] Henry Adams, who knew both Roosevelt and Holmes, recorded that when he heard of Holmes' dissent "Theodore went wild about it."[149] Roosevelt saw Holmes' action as disloyalty and a lack of willingness to stand up to Morgan and Hill. "Out of a banana I could carve a Justice with more backbone than that," Roosevelt reportedly said.[150]

Holmes knew that his dissent would not please Roosevelt but thought that their friendship could tolerate a difference of opinion. "I have had no communication of any kind with [the President] upon the matter. If he should take my action with anger I should be disappointed in him and add one more to my list of cynisims [sic] where before was belief. But I have such confidence in his great heartedness that I don't expect for a moment that after he has had time to cool down it will affect our relations. If however his seeming personal regard for us was based on the idea that he had a tool the sooner it is ended the better—we shall see."[151]

Several months later, Holmes was still hoping that everything would blow over. He wrote to his friend Canon Patrick Sheehan that his dissent "caused me some pain at the moment, as I was compelled to express an opinion contrary to what the President ardently desired. The newspapers were full of stories of his wrath, etc., but he is all right and the incident is closed. I say it caused me some pain in the sense that it is always painful when you run against what a personal friend is hoping for and perhaps expecting. Of course such considerations have no effect on the mind of

one who is accustomed to weigh questions impersonally or who is fit for his business."[152]

However, the matter was not closed as far as Roosevelt was concerned. While in public he defended his appointment of Holmes, referring to him as "one of the most distinguished men of the whole country,"[153] Roosevelt wrote to Lodge: "Nothing has been so strongly borne in on me concerning lawyers on the bench as that the nominal politics of the man has nothing to do with his actions on the bench. His real politics are all important. From his antecedents, Holmes should have been an ideal man on the bench. As a matter of fact he has been a bitter disappointment, not because of any one decision but because of his general attitude."[154] Holmes later told Pollock: "We talked freely [after the decision] but it never was the same after that, and if he had not been restrained by his friends, I am told that he would have made a fool of himself and would have excluded me from the White House . . . I never cared a damn whether I went there or not."[155]

Nonetheless, Holmes did continue to attend White House dinners. Sometimes the atmosphere was reminiscent of the days before *Northern Securities*. "We dined at the White House the other day and found the President in his most agreeable humor. But he generally is—although I infer that he has his periods of private melancholy."[156] Other occasions were not as pleasant. At one such event, Holmes responded to a labor leader who was complaining about judges: "What you want is favor—not justice. But when I am on my job I don't care a damn what you want or what Mr. Roosevelt wants."[157] In order to avoid any appearance that he was saying things behind Roosevelt's back, Holmes risked being "a trifle crude" and repeated his words directly to Roosevelt.

Holmes was standing on the White House terrace after a dinner toward the end of Roosevelt's second term when Roosevelt signaled him to come over and join him, Chief Justice Fuller, and William Jennings Bryan.[158] Deciding to tease the populist Bryan, Holmes delivered a discourse on his theories of economics and the folly of breaking up the railroads. Unable to persuade Bryan, Holmes said jokingly: "You are stiff-necked." Bryan responded in words that echoed Roosevelt's reported reaction to the *Northern Securities* dissent: "You are weak-kneed."[159]

Bryan's words left Roosevelt in the uncomfortable position of having to confront Holmes face-to-face with his feelings about *Northern Securities*. However, since this was a matter between the two former friends, he decided to invite Holmes to have dinner with him privately on the following night. "We said one last word about the old No. Securities case & that matter is finished," Holmes wrote to a friend afterwards.[160]

The end of Roosevelt's presidency did not bring an end to the estrangement between the two men. In 1909, Holmes accompanied the other Justices to the inauguration of Roosevelt's handpicked successor, William Howard Taft. "He seems to be speaking frankly and truthfully. Otherwise the address did not seem to me remarkable—though I am told that Mr. Roosevelt called it the best since Lincoln, no doubt because it promised to pursue the reforms of 'my distinguished predecessor.' As I am rather skeptical about the reforms I was less impressed."[161]

By 1912, Roosevelt had become disillusioned with Taft.[162] In the four years since he had left office, Roosevelt's views had become more radical, while Taft's natural conservatism had caused him to retreat from the policies of the Roosevelt administration. Roosevelt now felt that "Taft is utterly hopeless. I think he would be beaten if nominated, but in any event it would be a misfortune to have him in the presidential chair for another term, for he has shown himself an entirely unfit President."[163] After failing to win the Republican nomination, Roosevelt put aside his views about party loyalty and launched a third party

Roosevelt's relationship with Holmes cooled after the *Northern Securities* decision. The Justice was baffled by Roosevelt's pettiness and eventually dismissed his former friend (pictured) as possessing an ordinary mind.

campaign to reclaim the White House. As part of his "New Nationalism," Roosevelt attacked the independence of the judiciary, arguing that "The people should have the right to recall [a] decision if they think it is wrong."[164] Many of Roosevelt's former supporters, like Lodge and Root, found these views too radical and threw their support to Taft.[165]

Another vote Roosevelt could not count on was that of Oliver Wendell Holmes. "I regret the Roosevelt manifestation which has carried away some of my young men, because it seems to me to touch all the sore points of the social consciousness and to make vague and swelling suggestions of cures to come by legislation, which I believe to be blatant humbug . . . . To prick the sensitive points of the social consciousness when one ought to know that the suggestion of cures is humbug, I think wicked."[166] TR was "perhaps unconsciously but wholly cynical in self-seeking."[167] Accordingly, when Williams College conferred an honorary degree upon Holmes, he "took occasion to let out some of my economic beliefs, which I was glad to do with Roosevelt talking about the trusts and the crowd believing what I think fool things."[168] However, Holmes let slip in a letter to Lewis Einstein that his opposition to Roosevelt did not rest entirely on the differences in their economic views. "I should vote for Taft in spite of the fact that he like the rest of them seems to believe in the present legislative tendencies, anti-trust, etc., etc. that I believe to be noxious humbugs."[169]

After Roosevelt's death in 1919, there was a resurgence of interest in the former President, and friends asked Holmes to give his assessment of the man who had appointed him to the high court. However, the pain of the old wound still showed through. To Einstein, he wrote: "You surprise me by your great interest in Roosevelt—not that he is not an interesting and striking figure but because I think he was

entirely right in regarding his intellect as ordinary. I don't doubt that it had some extraordinary qualities—especially, memory, but his reaction on what he knew seemed to me to be commonplace—to be sure I did not follow his political utterances.... So that, delightful as he was, I don't think you ever would have felt that deep stimulus so necessary to make a man count. Of course our relations were chilled after I didn't go the way he wanted in the *Northern Securities* case—but I don't think that has affected my judgment at all. I took his modesty of expression regarding himself as genuine and right, though amusingly irreconcilable with his attitude to any one who didn't do what he wanted—even in the law as to which he knew nothing. I remember hearing a Senator quoted as saying the reason the boys like Roosevelt is that he don't care a damn for the Law. Having made these remarks I have little more to add."[170] He said much the same to Harold Laski: "R. was a more or less great man no doubt but I think he was far from having a great intellect—in the sense in which we ordinarily use that word."[171] To his long-time friend Pollock, Holmes was even more blunt: "He was very likable, a big figure, a rather ordinary intellect, with extraordinary gifts, a shrewd and I think pretty unscrupulous politician. He played all his cards—if not more. *R.i.p.*"[172]

* * * * *

Time has not vindicated either man's position in this dispute. Although Roosevelt won the case, the literalist interpretation of the statute upon which the victory was based was soon discarded by the Court in favor of the Rule of Reason.[173] Holmes' common-law-based interpretation of the Sherman Act never took hold. More broadly, the idea of government regulation as an alternative to antitrust that Roosevelt advocated flowered during the presidency of his distant cousin, but had fallen into disrepute by the time the century closed. Holmes' decisions on antitrust have had less of an impact than have his decisions in other areas of the law.[174] However, his ideas on antitrust have been credited as influencing both the Chicago School/Law and Economics Movement and the antitrust abolitionists.[175]

While antitrust has been subject to many criticisms over the last hundred years, it has never been criticized as causing the end of friendships. Thus, it is surprising that two great men had such a bitter falling out over such an esoteric dispute. Roosevelt's career saw a great number of broken friendships. Some of these falling-outs reflected a cold political calculus. For example, Joseph Choate was an independent reformer who was an old family friend and who had helped, with political support and money, to launch Roosevelt's first political campaign.[176] However, when he asked Roosevelt to support him in his bid to become senator from New York, Roosevelt refused because it might offend Republican party boss Thomas Platt, who was also seeking the Senate seat and with whom Roosevelt was attempting to curry favor at the time. Similarly, Roosevelt told his friend John Chapman, the leader of the Independent Party, that he would be willing also to run on the Independent line if he received the Republican nomination for New York governor in 1898. This led the Independents to work feverishly to build voter support for Roosevelt. However, when Platt insisted that he run only as a Republican, Roosevelt dropped the Independents and ended his friendship with Chapman.[177] As Henry Adams observed, "Theodore betrays his friends for his own ambition."[178] Then, of course, Roosevelt had some very loose notions of what was appropriate when it came to politics. He was willing to accept contributions from the tycoons of big business, while at the same time railing against the trusts. This led financier Henry Clay Frick to complain: "We bought the son of a bitch and then he didn't stay bought."[179]

More often, Roosevelt's friendships ended because his friend failed to live up to expectations, the most glaring example being

the deterioration of his friendship with Taft. In the case of Holmes, Roosevelt felt that a man that he had trusted and brought into his social circle had proved disloyal. For Roosevelt, people were either with him or against him; there was no room for differences of opinion between friends on important issues. He viewed the courts as "the agents of reaction" and the friends of big business, and he could not see beyond this preconceived image.[180]

Holmes was disillusioned that Roosevelt could even think that Holmes would place the President's desires over what he thought the law dictated. At first, he could not accept that Roosevelt would be so petty as to let a difference of opinion over the interpretation of a vague statute affect their friendship. As time went on, Holmes became angry with himself for having misjudged Roosevelt's character and for having let himself be taken in by the President's charisma. He was also hurt that a friend could think he was "a tool of the money power."[181] Accordingly, he came to dismiss Roosevelt as someone who was charming but superficial and—most damnably in Holmes' view—someone possessed of only an ordinary intellect.

ENDNOTES

[1]*See, e.g.,* James M. Strock, **Theodore Roosevelt on Leadership** (Forum, 2001) at 12.

[2]193 U.S. 197 (1904) (hereafter *Northern Securities Co.*).

[3]Sheldon M. Novick, **Honorable Justice: The Life of Oliver Wendell Holmes** (Little Brown, 1989), at 16; Francis Biddle, **Mr. Justice Holmes** (Charles Scribner's Sons, 1942), at 24–25.

[4]G. Edward White, **Oliver Wendell Holmes: Sage of the Supreme Court** (Oxford University Press, 2000), at 40.

[5]OWH, "The Bar as a Profession" (originally published February 20, 1896), reprinted in Sheldon M. Novick, ed., **The Collected Works of Justice Holmes** (University of Chicago, 1995), vol. III, at 387.

[6]OWH, "The Profession of the Law" (February 17, 1886), reprinted in Novick (ed.), **Collected Works of Justice Holmes**, vol. III, at 472–473.

[7]OWH to Sir Frederick Pollock, April 10, 1881, reprinted in Mark De Wolfe Howe, ed., **Holmes-Pollock Letters** (Harvard University Press, 1941), at 16.

[8]Biddle, **Mr. Justice Holmes**, at 34.

[9]OWH to Felix Frankfurter, July 15, 1913, reprinted in Robert M. Mennel and Christine L. Compston, eds., **Holmes and Frankfurter: Their Correspondence** (University of New Hampshire Press, 1996), at 12.

[10]OWH, "Law in Science and Science in Law," 12 *Harv. L. Rev.* 443–452 (1899), reprinted in Richard A. Posner, ed., **The Essential Holmes** (University of Chicago Press, 1992), at 191.

[11]*See* R. Perry Sentell, Jr., "Juristic Giants: A Georgia Study in Reputation," 34 *Ga. L. Rev.* 1311, 1321 (2000).

[12]G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (Oxford University Press, 1993), at 297.

[13]Liva Baker, **The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes** (Harper Collins, 1991), at 339.

[14]White, **Inner Self**, at 299.

[15]White, **Sage**, at 70.

[16]*Ibid.*

[17]White, **Inner Self**, at 299.

[18]White, **Sage**, at 70.

[19]TR to Edward Sanford Martin, November 26, 1900, reprinted in H. W. Brands, ed., **The Selected Letters, of Theodore Roosevelt** (Cooper Square Press, 2001), at 246 (hereafter **Selected Letters**).

[20]Nathan Miller, **Theodore Roosevelt: A Life** (William Morrow, 1992), at 46.

[21]Theodore Roosevelt, **An Autobiography** (Macmillan, 1913), at 18–21, 25.

[22]H. W. Brands, **TR: The Last Romantic** (Basic Books, 1997), at 63, 64.

[23]TR, **Autobiography**, at 97.

[24]TR to Andrew Dickson White, December 3, 1890, reprinted in Brands, ed., **Selected Letters,** at 249; James G. Barber, **Theodore Roosevelt: Icon of the American Century** (National Portrait Gallery, 1998), at 45; Strock, **Theodore Roosevelt on Leadership**, at 39–40.

[25]TR, **Autobiography**, at 317; Brands, **Last Romantic**, at 389.

[26]TR to Lodge, quoted in Miller, **Theodore Roosevelt: A Life**, at 337.

[27]TR, **Autobiography**, at 332.

[28]TR to Anna Roosevelt Cowles, April 30, 1900, reprinted in Brands, ed., **Selected Letters,** at 238; *see also* TR to Mark Hanna, April 3, 1900, reprinted in Brands, ed., **Selected Letters,** at 238.

[29]TR to Anna Roosevelt Cowles, June 25, 1900, reprinted in Brands, ed., **Selected Letters,** at 241; Brands, **Last Romantic**, at 391–394.

[30]Miller, **Theodore Roosevelt: A Life**, at 341; TR to

White, December 3, 1900, reprinted in Brands, ed., **Selected Letters**, at 249.

[31]Brands, **Last Romantic**, at 399–404.

[32]TR to Lodge, November 9, 1900, reprinted in Brands, ed., **Selected Letters,** at 244.

[33]Baker, **Justice from Beacon Hill**, at 340; White, **Inner Self**, at 299; White, **Sage**, at 71.

[34]White, **Sage**, at 71.

[35]Miller, **Theodore Roosevelt: A Life**, at 159; Edmund Morris, **The Rise of Theodore Roosevelt** (Modern Library, 2001), at 249–250; Barber, **Icon of the American Century**, at 24; Novick, **Honorable Justice**, at 178.

[36]Miller, **Theodore Roosevelt: A Life**, at 173; Donald F. Anderson, "Building National Consensus: The Career of William Howard Taft," 68 *U. Cin. L. Rev.* 323, 329 (2000).

[37]Baker, **Justice from Beacon Hill**, at 342; *see also* OWH to Harold Laski, May 21, 1925, reprinted in Mark DeWolfe Howe, ed., **Holmes-Laski Letters** (Harvard University Press, 1953), vol. I, at 741.

[38]Morris, **The Rise of Theodore Roosevelt**, at 767.

[39]White, **Inner Self**, at 299–301; Novick, **Honorable Justice**, at 178–179; Edmund Morris, **Theodore Rex** (Random House, 2001), at 129–130; OWH to Laski, May 21, 1925, reprinted in Howe, ed., **Holmes-Laski Letters**, vol. I, at 741.

[40]OWH to Lady Castletown, August 9, 1897, quoted in Baker, **Justice from Beacon Hill**, at 186.

[41]OWH to Pollock, November 5, 1923 reprinted in Howe, ed., **Holmes-Pollock Letters**, vol. II, at 123.

[42]OWH to Laski, February 25, 1921 reprinted in Howe, ed., **Holmes-Laski Letters**, vol. I, at 315.

[43]OWH, "Class of '61" (June 28, 1911), reprinted in Novick, ed., **Collected Works of Justice Holmes**, vol. III, at 504–505.

[44]TR, quoted in Strock, ***Theodore Roosevelt on Leadership,*** at 57–58.

[45]TR to OWH, December 5, 1904, reprinted in Elting G. Morison, ed., **The Letters of Theodore Roosevelt** (Harvard University Press, 1951), vol. IV, at 1059.

[46]TR, **An Autobiography**, at 103–104.

[47]White, **Inner Self**, at 299.

[48]OWH, "A Soldier's Faith" (May 30, 1875), reprinted in Novick, ed., **Collected Works of Justice Holmes**, vol. III, at 486.

[49]Morris, **Theodore Rex**, at 302, 462.

[50]OWH to Pollock, March 24, 1916, reprinted in Howe, ed., **Holmes-Pollock Letters,** vol. I, at 234.

[51]OWH to Patrick Sheehan, December 15, 1912, reprinted in David H. Burton, ed., **Holmes-Sheehan Correspondence** (Fordham University Press, 1993), at 77.

[52]TR, **Autobiography**, at 61.

[53]TR, **Autobiography**, at 82; Miller, **Theodore Roosevelt: A Life**, at 145.

[54]OWH, "Law and the Court," Speech to Harvard Law School Association (February 15, 1913), reprinted in Novick, ed., **Collected Works of Justice Holmes**, vol. III, at 507.

[55]OWH to Felix Frankfurter, December 23, 1921, reprinted in Mennel and Compston, eds., **Holmes and Frankfurter**, at 132.

[56]TR to Lodge, July 10, 1902, reprinted in Brands, ed., **Selected Letters**, at 279.

[57]*Vegelahn v. Gunter,* 167 Mass 92, 104 (1896) (Holmes J. dissenting); Spencer Weber Waller, "The Modern Antitrust Relevance of Oliver Wendell Holmes," 59 *Brook. L. Rev.* 1443, 1450 (1994); Alfred S. Neely, "A Humbug Based on Economic Ignorance and Incompetence: Antitrust in the Eyes of Justice Holmes," 1993 *Utah L. Rev.* 1, 41 (1993).

[58]OWH to Laski, July 28, 1916, reprinted in Howe, ed., **Holmes-Laski Letters**, vol. I, at 8.

[59]Baker, **Justice from Beacon Hill**, at 346; White, **Sage**, at 72–73; White, **Inner Self**, at 300; Brands, **Last Romantic**, at 440–441; Biddle, **Mr. Justice Holmes**, at 115.

[60]White, **Inner Self**, at 298.

[61]*See* OWH to Laski, January 11, 1928, reprinted in Howe, ed., **Holmes-Laski Letters,** vol II at 1015; OWH to Laski, May 21, 1925, reprinted in Howe, ed., **Holmes-Laski Letters** vol. I at 741; Baker, **Justice from Beacon Hill**, at 347.

[62]TR to Lodge, July 10, 1902, reprinted in Brands, ed., **Selected Letters**, at 279; Brands, **Last Romantic**, at 441.

[63]TR to Lodge, July 10, 1902, reprinted in Brands, ed., **Selected Letters**, at 279.

[64]William H. Rehnquist, **The Supreme Court** (Knopf, New ed., 2001), at 215–217; Baker, **Justice from Beacon Hill**, at 346–347; White, **Inner Self**, at 300–301.

[65]Baker, **Justice from Beacon Hill**, 349; White, **Inner Self**, at 301.

[66]OWH to Nina Gray, August 17, 1902, quoted in White, **Inner Self,** at 301.

[67]White, **Sage**, at 74.

[68]Quoted in White, **Sage**, at 88; Morris, **Theodore Rex**, at 130.

[69]OWH to Pollock, August 13, 1902, reprinted in Howe, ed., **Holmes-Pollock Letters,** vol. I, at 103.

[70]Baker, **Justice from Beacon Hill**, at 350; White, **Sage**, at 74–77.

[71]White, **Inner Self**, at 304–305.

[72]*See* TR to George Frisbie Hoar, July 25, 1902, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 301; TR to Hoar, July 30, 1902, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 302; TR to Hoar, August 11, 1902, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 312.

[73]TR to OWH, August 19, 1902, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 315; *see*

also TR to OWH, August 21, 1902, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 319.

[74]White, **Inner Self**, at 306.

[75]Baker, **Justice from Beacon Hill**, at 353.

[76]OWH to Lewis Einstein, March 25, 1927, reprinted in James Bishop Peabody, ed., **The Holmes-Einstein Letters** (St. Martin's Press, 1965) at 265; OWH to Pollock, September 23, 1902, reprinted in Howe, ed., **Holmes-Pollock Letters**, vol. I, at 106.

[77]Barber, **Icon of the American Century**, at 57–60.

[78]Miller, **Theodore Roosevelt: A Life**, at 413; Strock, **Theodore Roosevelt on Leadership,** at 74–75.

[79]Miller, **Theodore Roosevelt: A Life**, at 429.

[80]Novick, **Honorable Justice**, at 259–262.

[81]Baker, **Justice from Beacon Hill**, at 390.

[82]*Ibid.*, at 371.

[83]OWH to Ellen Curtis, February 7, 1903, quoted in Novick, **Honorable Justice**, at 261

[84]OWH to Baroness Moncheur, September 9, 1910, quoted in Novick, **Honorable Justice**, at 261.

[85]OWH to Einstein, January 17, 1928, reprinted in Peabody, ed., **Holmes-Einstein Letters**, at 276.

[86]Baker, **Justice from Beacon Hill**, at 390.

[87]Quoted in Morris, **Theodore Rex**, at 291.

[88]Miller, **Theodore Roosevelt: A Life**, at 386; Morris, **Theodore Rex**, at 177.

[89]TR to Cecil Spring Rice, November 9, 1903, reprinted in Brands, ed., **Selected Letters**, at 340; TR to Arthur Hamilton Lee, December 7, 1903.

[90]TR to Theodore Roosevelt, Jr., October 20, 1903, reprinted in Brands, ed., **Selected Letters**, at 332.

[91]TR to OWH, July 25, 1903, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 529.

[92]TR to Theodore Roosevelt, Jr., October 20, 1903, reprinted in Brands, ed., **Selected Letters**, at 332; TR to OWH, July 25, 1903, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 529; Miller, **Theodore Roosevelt: A Life**, at 398.

[93]TR to OWH, October 20, 1903, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. III, at 634; Baker, **Justice from Beacon Hill**, at 390.

[94]TR to Theodore Roosevelt, Jr., October 20, 1903, reprinted in Brands, ed., **Selected Letters**, at 332.

[95]Brands, **Last Romantic**, at 437–438.

[96]TR, First Annual Message to Congress 1901, reprinted in Mario R. DiNunzio, ed., **Theodore Roosevelt, An American Mind: A Selection from His Writings** (St. Martin's Press, 1994), at 128.

[97]Brands, **Last Romantic**, at 438.

[98]TR, Eighth Annual Message to Congress 1908, reprinted in DiNunzio, ed., **Theodore Roosevelt**, at 132.

[99]TR, First Annual Message to Congress 1901, reprinted in DiNunzio, ed., **Theodore Roosevelt,** at 130.

[100]Baker, **Justice from Beacon Hill**, at 394.

[101]OWH to Felix Frankfurter, April 8, 1913, reprinted in Mennel and Compston, eds, **Holmes and Frankfurter**, at 8.

[102]Baker, **Justice from Beacon Hill**, at 403.

[103]Novick, **Honorable Justice**, at 268; Baker, **Justice from Beacon Hill**, at 402–403; OWH to Pollock, May 25, 1906, reprinted in Howe, ed., **Holmes-Pollock Letters**, vol. I, at 123; Waller, "The Modern Antitrust Relevance of Oliver Wendell Holmes," at 1450.

[104]OWH to Pollock, May 25, 1906, reprinted in Howe, ed., **Holmes-Pollock Letters**, vol. I, at 123.

[105]OWH to Laski, July 23, 1925, reprinted in Howe, ed., **Holmes-Laski Letters**, vol. I, at 761.

[106]*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (Holmes J. dissenting).

[107]*See* Spencer Weber Waller, "The Antitrust Philosophy of Justice Holmes," 18 *S. Ill. U. L.J.* 283, 308 (1994).

[108]OWH to Pollock, April 23, 1910, reprinted in Howe, ed., **Holmes-Pollock Letters**, vol. I, at 163; OWH to Sheehan, April 16, 1913, reprinted in Burton, ed., **Holmes-Sheehan Correspondence,** at 88.

[109]OWH to Franklin Ford, May 3, 1907, reprinted in David H. Burton, ed., **Progressive Masks: Letters of Oliver Wendell Holmes, Jr. and Franklin Ford** (University of Delaware Press, 1982) at 43.

[110]Miller, **Theodore Roosevelt: A Life**, at 367.

[111]Novick, **Honorable Justice**, at 267.

[112]*Ibid.*, at 267, Miller, **Theodore Roosevelt: A Life**, at 367.

[113]Novick, **Honorable Justice**, at 268; Miller, **Theodore Roosevelt: A Life**, at 367; Morris, **Theodore Rex**, at 60–61.

[114]*Northern Securities Co.*, 193 U.S. at 321–322.

[115]Novick, **Honorable Justice**, at 268.

[116]Miller, **Theodore Roosevelt: A Life**, at 368.

[117]Rehnquist, **The Supreme Court**, at 103.

[118]Novick, **Honorable Justice**, at 268.

[119]Miller, **Theodore Roosevelt: A Life**, at 368; Brands, **Last Romantic**, at 435; Joseph Bucklin Bishop, **Theodore Roosevelt and His Times** (Charles Scribner's Sons, 1924), vol. I, at 183; Morris, **Theodore Rex**, at 64.

[120]TR, **Autobiography**, at 468; Morris, **Theodore Rex**, at 87–89.

[121]Bishop, **Theodore Roosevelt and His Times**, at 182–183.

[122]Baker, **Justice from Beacon Hill**, at 394; Biddle, **Mr. Justice Holmes**, at 114; Morris, **Theodore Rex**, at 90.

[123]Miller, **Theodore Roosevelt: A Life**, at 364; Brands, **Last Romantic**, at 437.

[124]Baker, **Justice from Beacon Hill**, at 394; Morris, **Theodore Rex**, at 91–92.

[125]Barber, **Icon of the American Century**, at 54; Brands, **Last Romantic**, at 437.

[126]TR quoted in Miller, **Theodore Roosevelt: A Life**, at

369; *see also* Brands, **Last Romantic**, at 437; Bishop, **Theodore Roosevelt and His Times**, at 185.

[127]Novick, **Honorable Justice**, at 269.

[128]*United States. v. Northern Securities Co.*, 120 F. 721 (C.C.D. Minn. 1903).

[129]Baker, **Justice from Beacon Hill**, at 397.

[130]Morris, **Theodore Rex**, at 304–305.

[131]*Ibid.*, at 314–315.

[132]*Northern Securities Co.*, 193 U.S. at 327.

[133]Baker, **Justice from Beacon Hill**, at 398.

[134]*Ibid.*, at 401.

[135]*Northern Securities Co.*, 193 U.S. at 400–411 (Holmes, J., dissenting).

[136]*Ibid.* at 400.

[137]*Ibid.* at 401.

[138]*Ibid.* at 402.

[139]*Ibid.* at 403–404, 406, 405

[140]*Ibid.* at 407.

[141] Baker, **Justice from Beacon Hill**, at 360–364.

[142]*Northern Securities Co.*, 193 U.S. at 364 (Brewer, J., concurring).

[143]Morris, **Theodore Rex**, at 92.

[144]TR, **Autobiography**, at 472.

[145]156 U.S. 1 (1895).

[146]TR, **Autobiography**, at 470.

[147]Morris, **Theodore Rex**, at 206–207, 316.

[148]Biddle, **Mr. Justice Holmes**, at 116.

[149]Adams to Elizabeth Cameron, March 20, 1904, quoted in White, **Inner Self,** at 307.

[150]Quoted in Rehnquist, **The Supreme Court**, at 217; *see also* Baker, **Justice from Beacon Hill**, at 405; White, **Sage**, at 87.

[151]OWH to Ellen Curtis, March 8, 1904, quoted in Novick, **Honorable Justice**, at 272.

[152]OWH to Sheehan, September 6, 1904, reprinted in Burton, ed., **Holmes-Sheehan Correspondence**, at 24.

[153]TR to Knute Nelson, April 14, 1908, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. VI, at 1007; *see also* TR to Mark Sullivan, May 13, 1907.

[154]TR to Lodge, September 4, 1906, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. V, at 1906.

[155]OWH to Ellen Curtis, February 7, 1903, quoted in Novick, **Honorable Justice,** at 266.

[156]OWH to Einstein, October 21, 1906, reprinted in Peabody, ed., **Holmes-Einstein Letters**, at 27; *see also* TR to OWH, August 2, 1904, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. IV, at 879; TR to OWH, October 21, 1904, reprinted in Morison, ed., **Letters of Theodore Roosevelt**, vol. IV, at 989.

[157]OWH to Einstein, April 1, 1928, reprinted in Peabody, ed., **Holmes-Einstein Letters**, at 278.

[158]Novick, **Honorable Justice**, at 288.

[159]OWH to Baroness Moncheur, May 12, 1908, quoted in Novick, **Honorable Justice**, at 288.

[160]OWH to Nina Gray, May 30, 1908, quoted in Novick, **Honorable Justice**, at 288.

[161]OWH to Pollock, March 7, 1909, reprinted in Howe, ed., **Holmes-Pollock Letters**, vol. I, at 151.

[162]Barber, **Icon of the American Century**, at 76, 91–92.

[163]Miller, **Theodore Roosevelt: A Life**, at 521.

[164]*Ibid.*, at 522.

[165]*Ibid.*, at 522–523.

[166]OWH to Einstein, September 28, 1912; OWH to Sheehan, November 23, 1912, reprinted in Burton, ed., **Holmes-Sheehan Correspondence**, at 73.

[167]OWH to Einstein, November 25, 1912, reprinted in Peabody, ed., **Holmes-Einstein Letters**, at 75.

[168]OWH to Pollock, July 9, 1912, reprinted in Howe, ed, **Holmes-Pollock Letters**, vol. I, at 193.

[169]OWH to Einstein, October 28, 1912, reprinted in Peabody, ed., **Holmes-Einstein Letters**, at 73.

[170]OWH to Einstein, January 17, 1928, reprinted in Peabody, ed., **Holmes-Einstein Letters**, at 276.

[171]OWH to Laski, May 21, 1925, reprinted in Howe, ed., **Holmes-Laski Letters**, vol. I, at 741.

[172]OWH to Pollock, February 9, 1921, reprinted in Howe, ed. **Holmes-Pollock Letters**, vol. I, at 63.

[173]*See Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911).

[174]However, *see Nash v. United States,* 229 U.S. 373 (1913); *Swift & Co. v. United States,* 196 U. S. 375 (1905).

[175]Waller, "The Modern Antitrust Relevance of Oliver Wendell Holmes," at 1456–1470.

[176]Miller, **Theodore Roosevelt: A Life**, at 247; Morris, **The Rise of Theodore Roosevelt**, at 579.

[177]Morris, **The Rise of Theodore Roosevelt**, at 710; Miller, **Theodore Roosevelt: A Life**, at 314.

[178]Quoted in Morris, **Theodore Rex**, at 91.

[179]Miller, **Theodore Roosevelt: A Life**, at 440.

[180]TR, **Autobiography**, at 463.

[181]*See* OWH, "Law and The Court" (February 15, 1913), reprinted in Novick, ed., **Collected Works of Justice Holmes**, vol. III, at 505.

John Marshall Harlan II, Associate Justice of the Supreme Court 1955–1971: Remembrances by his Law Clerks

NORMAN DORSEN and AMELIA AMES NEWCOMB, EDITORS

These recollections were originally published in October 2001 in a limited circulation book, conceived and edited by Norman Dorsen and Amelia Ames Newcomb.

Preface: Norman Dorsen

This project was conceived by Amelia Newcomb, granddaughter of Justice Harlan, who is the education editor at *The Christian Science Monitor*. Fortuitously, Amelia raised the idea while I was organizing a reunion of the Justice's former clerks to commemorate the thirtieth anniversary of his retirement from the Supreme Court in September 1971. Amelia subsequently sent me a letter addressed to "the law clerks of Associate Justice John Marshall Harlan." The letter read in part:

> The 30th reunion of the law clerks will soon be upon us. As Justice Harlan's granddaughter, I would like to mark the occasion by gathering your reminiscences of the time you spent working with the Justice. Your memories are of interest to everyone in this association, and I would like to compile them in a book to be distributed, if possible, at the law clerks' dinner in October 2001. I have heard all my life of my grandfather's devotion to all of you, and have enjoyed hearing stories from a number of you about your association with him. I am hopeful that this coming year, with your help, I can bring this idea to fruition.

I immediately consulted my fellow law clerks about the project, and when a number of them responded enthusiastically we decided to proceed. When the book appears, we will make it available to members and friends of the

Harlan family, law libraries, and Justices of the Supreme Court, including Justice Stephen Breyer, who kindly agreed to speak at the reunion dinner.

The remembrances of the law clerks reflect the respect and affection that all of us had for Justice Harlan. Whether or not we agreed with his particular rulings, or indeed with his overall judicial philosophy, we are united in recognizing his superb professionalism, his rare sense of fairness, his estimable character, and his humanity. This largely explains the willingness of every former law clerk to contribute to this volume of reminiscences, which, to our knowledge, is the only book of its kind. My one regret is that Paul Bator, an early law clerk to Justice Harlan and one of those closest to him, has passed away and could not participate in this cooperative effort.

Norman Dorsen
New York City

Preface: Amelia Newcomb

It has been a great privilege for me to work on compiling the reminiscences of my grandfather's law clerks. I have long been interested in their views of a man who loomed large in my own life, and who clearly had a lasting impact on all those who worked with him.

What has resulted from this project is a highly engaging record of an individual whose warmth, humanity, and commitment to the highest standards has been an enduring source of inspiration to many. I have enjoyed reading the thoughtful and often humorous recollections of the clerks, whom my grandfather regarded as his own family. The memories range from the Justice's very personal interactions with clerks' families to professional appreciation for his reverence for the law and the work of the Supreme Court.

I would like to extend my sincere thanks to everyone who contributed to the success of this endeavor. I would especially like to thank Norman Dorsen for his enthusiasm and dedication, without which this project could not have been completed.

Amelia Ames Newcomb
Boston

Justice John Marshall Harlan II

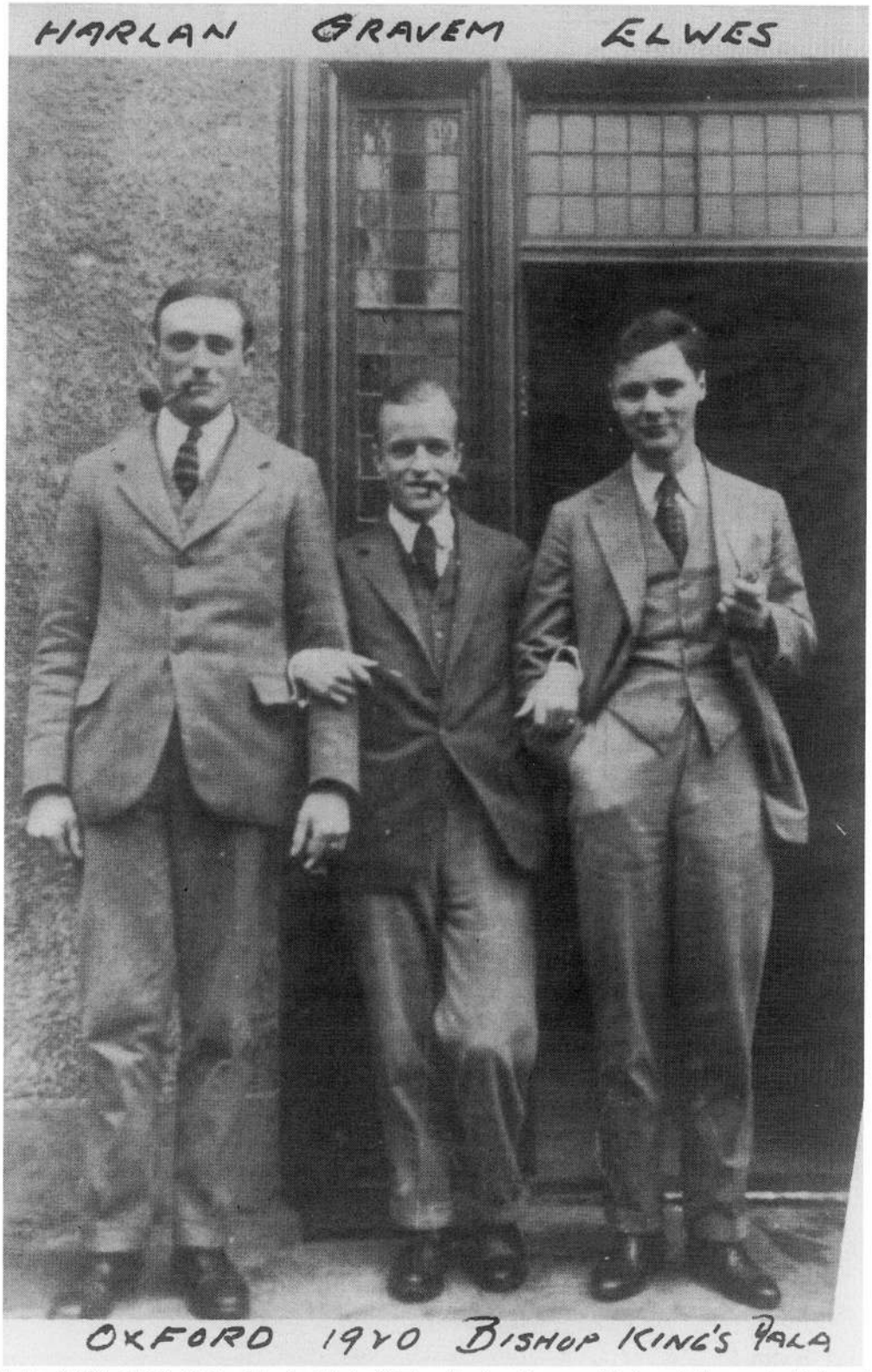
John Marshall Harlan was born in Chicago on May 20, 1899, into a family distinguished in the law. His great-grandfather was a lawyer; his grandfather, for whom he was named, was a Justice of the Supreme Court of the United States for thirty-four years; an uncle was chairman of the Interstate Commerce Commission; and his father was a lawyer.

Harlan studied at Princeton University and was a Rhodes Scholar for three years at Balliol College, Oxford, where he began the study of law and formed personal attachments that he maintained throughout his life. Harlan completed his legal education at New York Law School and was admitted to practice in New York in 1925.

Harlan began his career with Root, Clark, Buckner & Howland, a large Wall Street firm. When a senior member of the firm, Emory R. Buckner, was appointed United States Attorney for the Southern District of New York in 1925, Harlan became his assistant and participated in several noted matters, including the prosecution of Harry M. Daugherty, former United States Attorney General, for official misconduct. Shortly after returning to their law firm in 1927, Buckner and Harlan left again to serve as special prosecutors in a state investigation of municipal graft. During this period, on November 10, 1928, Harlan married Ethel Andrews. They had a daughter, Eve, and five grandchildren. Harlan was made a partner in the Root, Clark firm in 1931, and after the death of Buckner in 1941 he became its leading trial lawyer.

During World War II, Harlan rendered conspicuous service to the country. He headed

On the eve of his joining the Court, Justice and Mrs. Harlan were photographed for *Life* magazine with their daughter Eve, their son-in-law Wellington Newcomb, and their granddaughter Alice.



Harlan (left) in 1920 with two friends at Oxford University where he was a Rhodes scholar, earning B.A. and M.A. degrees in jurisprudence at Balliol College.

Harlan (seated at center) at Princeton University attended a Welcome Home party for alumni veterans in 1946. He served as chief of the Operational Analysis Section of the Eighth Air Force, a section comprised of mathematicians, physicists, architects, electricians, and lawyers that provided technical advice on bombing raids. Harlan volunteered for a daylight bombing raid in 1943, sitting as a waist gunner. He was awarded the Croix de Guerre of France (pictured) and the Legion of Merit.

Campagnes pour la libération de la France

(Juin - Décembre 1944)

Décision N° 343

Le Général de Gaulle,

Président du Gouvernement Provisoire de la République Française.

Cite à l'Ordre DE L'ARMEE :

Colonel John M. HARLAN, 0528110, Hq 8th AF

" *Pour services exceptionnels de Guerre rendus au cours des opérations de libération de la France.*"

Cette Citation comporte l'attribution de la Croix de Guerre avec PALME

PARIS, le 29 Janvier 1945

the Operational Analysis Section of the Eighth Air Force, based in London, which was composed of handpicked civilians in mathematics, physics, electronics, architecture, and law. For his wartime work, Harlan was awarded the United States Legion of Merit and the Croix de Guerre of Belgium and France.

On his return to the law firm in 1945, Harlan was soon recognized as a leader of the New York bar. Several of his cases became landmarks in the fields of corporate and antitrust law.

Harlan soon was again called to public service. From 1951 to 1953, he acted as chief counsel for the New York State Crime Commission, which Governor Thomas Dewey had appointed to investigate the relationship between organized crime and state government. Harlan was also active in professional organizations, serving as chairman of important committees of the Association of the Bar of the City of New York and later as vice president of the Association.

Not long after his work on the Crime Commission ended in January 1954, Harlan was appointed a judge of the U.S. Court of Appeals for the Second Circuit. After less than a year's service, President Eisenhower appointed him to the Supreme Court of the United States on November 8, 1954. Harlan was confirmed on March 17, 1955, and he took his seat on March 28, 1955.

As a member of the Supreme Court, Harlan rendered opinions on a wide range of constitutional and other issues. His performance was universally recognized as intelligent, diligent, professionally skillful, and, above all, principled. Professor Paul Freund wrote that even students who disagreed with Harlan's position "freely acknowledge that when he has written a concurring or dissenting opinion they turn to it first, for a full and candid exposition of the case and an intellectually rewarding analysis of the issues."[1] And Chief Justice Earl Warren, who served with him for many years, said on his retirement that "Justice Harlan will always be remembered as a true scholar, a talented lawyer, a generous human being, and a beloved colleague by all who were privileged to sit with him."[2]

Justice Harlan retired on September 23, 1971, and he died on December 29, 1971, in Washington, D.C.

Norman Dorsen

The Law Clerks of
Justice John Marshall Harlan II

1955	William T. Lifland, E. Barrett Prettyman, Jr.
1955–1956	Wayne G. Barnett, Leonard M. Leiman
1956–1957	Paul M. Bator, Norbert A. Schlei
1957–1958	Norman Dorsen, Henry J. Steiner
1958–1959	Henry R. Sailer, Stephen Shulman
1959–1960	Jay A. Erens, Howard Lesnick
1960–1961	Charles Fried, Philip B. Heymann
1961–1962	Nathan Lewin, John B. Rhinelander
1962–1963	Richard J. Hiegel, David L. Shapiro
1963–1964	Kent Greenawalt, Lloyd L. Weinreb
1964–1965	Michael M. Maney, Charles R. Nesson
1965–1966	Michael Boudin, Matthew Nimetz
1966–1967	Charles Lister, Matthew Nimetz, Bert W. Rein
1967–1968	Louis R. Cohen, Charles Lister, Thomas B. Stoel, Jr.
1968–1969	Bruce A. Ackerman, Paul Brest, Thomas B. Stoel, Jr.
1969–1970	Charles L. Fabrikant, William T. Lake, Robert H. Mnookin
1970–1971	Marvin L. Gray, Jr., Thomas G. Krattenmaker, Martin D. Minsker
1971	James R. Bieke, Allen R. Snyder

WILLIAM T. LIFLAND

Partner, Cahill, Gordon & Reindel, New York City

Law Clerk 1955

John Harlan became a judge of the Court of Appeals for the Second Circuit in 1954 and later that year was nominated to the Supreme Court. I was one of his two law clerks in the Court of Appeals. You might perhaps have expected other judges to be slightly jealous of his rapid rise in the judiciary. But I never saw any sign of this. On the contrary, he was warmly regarded by all his colleagues in Foley Square.

One recollection that stands out is of Judge Learned Hand, then still on the bench. He was giving an uncomplimentary appraisal of a former judge. He ended with the remark: "He was the kind of fellow who would suggest changes in your opinion." Judge Harlan did not say anything, but his eyes said, "Message received."

I also remember an elevator ride we took with one of the senior district judges, who said with a broad smile, referring to no particular case, "John, if I'm reversed one more time by the Second Circuit, I'm taking my business elsewhere."

Another district judge who was fond of Judge Harlan was Judge William Bondy, who was about thirty years his senior and had become quite hard of hearing. Judge Bondy had a car and driver and would sometimes give us a lift uptown in the evening. Judge Harlan warned me that everyone had to be careful to pitch his voice at a level that would be comfortable for Judge Bondy. He said that when he returned from military service after World War II and resumed his practice, one of his first appearances was before Judge Bondy. He remembered that the judge was hard of hearing and so he made it a point to keep his voice up and watch for a troubled look indicating that his argument was not getting through. On seeing the telltale look, he raised his voice a notch, but when the troubled look did not go away he raised it again and again. Finally Judge Bondy interrupted and said, "Mr. Harlan, I wish you'd keep your voice down. I've got a hearing aid and you're overpowering it."

Justice Harlan frequently told me that his approach to his law practice was to fill his mind totally with the facts of a case and when the case was over to "pull the plug" to make room for the next. On his nomination to the Supreme Court, that seemed to change. While awaiting confirmation and during the early months of his tenure, he read widely on the history of the Court. He wanted his opinions to reflect that history as well as the right result on the facts of the case. He also wanted, as the junior Justice, to earn the respect of his colleagues. In both objectives, as we all know, he was highly successful.

E. BARRETT PRETTYMAN, JR.

Partner, Hogan & Hartson, LLP, Washington, D.C.

Law Clerk 1955

My introduction to John Harlan was over the phone and under trying circumstances. The first Justice I had served, Robert H. Jackson, had died unexpectedly a month before, and President Eisenhower had nominated Harlan, then a Second Circuit judge, to succeed him. Justice Frankfurter had suggested that Harlan would benefit from having a clerk already at the Court, particularly since the Court was wrestling with, among other things, the decree in *Brown v. Board of Education.*

Harlan was most gracious over the phone, solicitous of my feelings at losing a Justice, but then, fully expecting to be confirmed, he very quickly turned to the business at hand. What was the status of pending cases? In particular, what thoughts did I have about the *Brown* decree? Neither of us realized, of course, that it would take over four months for the Senate to confirm him. I began at once to send him memos, and he would call when he had questions or wanted additional

research. I once had to interrupt this flow of business to tell him that a man from Florida had telephoned with the allegation that Harlan had run over and killed a friend of his while intoxicated—a charge that of course proved wholly fictitious but that nevertheless shook me up considerably.

I finally met the Justice, and what an imposing figure he was—tall, handsome, quiet, studied, but with a kindly smile that belied the craggy countenance. It was quickly apparent that while he intended to make friends and occasionally enjoy a laugh, most of his waking hours would be devoted to legal issues posed by cases. He loved discussions about every aspect of the law. It made no difference whether Bill Lifland, the clerk he brought with him from New York, and I agreed with each other but disagreed with him; he seemed to gain sustenance from the interchange.

Thus I began to watch him grow in the job. I later saw him off the job, with barely any sight left, such as when he was my guest at the Alfalfa Club Dinner in the year of his death, 1971. But it took no work experience or social affairs for me to recognize that he was truly a great lawyer, a great judge, and a great man.

WAYNE G. BARNETT

Professor of Law Emeritus, Stanford Law School

Law Clerk 1955–1956

When Judge Harlan (as he then was) interviewed me for a clerkship for the 1955 Term, there were two uncertainties: his appointment to the Supreme Court had not yet been confirmed (it was being held up by Senator Eastland); and I had completed less than two years of a three-year tour of duty in the Army JAG Corps. No one doubted that Harlan would ultimately be confirmed, but there was a substantial doubt whether I could get a release from the Army in time to serve as his clerk. (The Army regulations, as I remember, authorized an early release if it served the "national interest" or alleviated a "personal hardship." I planned to invoke both grounds.) Harlan seemed not at all bothered by the uncertainty. At the end of the interview, he said I could be his clerk (1) if he was confirmed and (2) if I could get out of the Army, graciously phrasing it as if those were equal uncertainties. Needless to say, I did get out of the Army and I did serve as a clerk in the 1955 Term. It was a wonderful year, and I'll be forever grateful to the Justice for making it happen.

Early in the Term, the Justice asked me to give him a suggested outline for an opinion he'd been assigned to write. In due course, I presented him with an outline. I also told him, though, that I was lousy at outlining: I did my best thinking in the process of writing, and whenever I'd first done an outline I'd invariably ended up abandoning it. So what I'd done on this occasion to produce a useful outline was *first* to draft an opinion and *then* to outline it. The Justice's response was to smile and say, well, I might as well give him the draft. And that's what I did for the rest of the Term. I've never asked what the Justice's practice was in later years, but if he routinely let his clerks write draft opinions I'll claim some of the credit for it!

LEONARD M. LEIMAN

Partner, Fulbright & Jaworski LLP, New York City

Law Clerk 1955–1956

The school segregation decree had been issued during the previous Term. Early on, I was busily preparing memos on appeals in public-park and swimming-pool cases, trying to bring them within the education-based sociological reasoning of the *Brown* opinion. The struggle ended when the Justice took me aside and gently told me that, despite appearances, "we decided those cases last year," so that further creative work would be unnecessary. I learned something about the Court from that, of course, but more important was that the Justice managed not to make me feel

like a fool. He dealt with the clerks in a considerate way that made me appreciate his warmth, and somehow made me bigger than I was. This must have been the way he had treated the young lawyers in his firm. It won our respect, loyalty, and affection, and it is the way I will always remember him.

Much has been made of the Justice's "lawyerly" approach on the Bench, which produced some great opinions, of which his 1961 dissent in *Poe v. Ullman* is my favorite. He certainly was independent and open-minded, no small advantage that first full year when he was being actively courted from different perspectives by the Chief Justice and Justice Frankfurter. A small example of his objectivity was *De Sylva v. Ballentine* in 1956, where he upset long-standing trade practice under the copyright act. The bar had adopted interpretations of the renewal provisions in the copyright law that made its application easier but not necessarily more sensible. Justice Harlan rejected the argument that the trade practices resulting from the copyright bar's interpretations should override the words and policy of the statute. His decision must not have been a popular one.

NORBERT A. SCHLEI

Law offices of Norbert Schlei, Santa Monica, California
Retired Partner, Hughes Hubbard & Reed, Los Angeles
Law Clerk 1956–1957

My problem in writing about Justice Harlan is to stem the flow of words and the flood of reflections. My clerkship with him was and remains a high point of my professional life.

The work of the Court was to Justice Harlan not just important but sacred. No amount of effort was too much to get the opinion just right—to make sure each sentence hit the mark and contained nothing that was inadvertent. When I began my clerkship, Justice Harlan had just completed his first full Term on the Court. He had not yet worked out fully what his relationship with his clerks should be and what functions they should perform. In a matter that arose at the beginning of the Term and required an opinion, he drafted it himself, asking my co-clerk, Paul Bator, and me to make comments, and this led me to believe he would draft all of his own opinions. Later in the Term, however, when the number of required opinions increased, the Justice asked us for drafts. I presented my first draft opinion with great trepidation, hoping the Justice would find it satisfactory. The next day, I was downcast when I saw that he had written out an opinion in the case in longhand and given it to his secretary to type. When I read the typescript, however, I was amazed to find that he had changed nothing! What he had done was to copy out every word of my draft in order to force himself to think through every word, every sentence, to make sure it said what it should say and nothing else. Whether the Justice always used this laborious technique during our Term or later I do not know, but he certainly used it often throughout our year. He felt that the Court's work had a profound effect on many people and was of historic import, so it had to be done as close to perfection as possible.

Of course, Justice Harlan cared greatly not just about the text of opinions but also about the merits of cases. However, he understood that the Court would not always agree with him, and he believed that what was important was carrying out carefully and diligently the processes of the Court as an institution. The Justices he respected most were not necessarily those who agreed with him most often but those who felt as he did about the importance of the work of the Court and gave their all to it.

The only remotely negative aspect of my clerkship was that it implanted in me the idea that judges could be expected to exhibit some semblance of the qualities of dedication and intellectual honesty I had seen in Justice Harlan. In this I have often been greatly disappointed. Justice Harlan was a unique public

servant as well as a good and kind man whom I will always feel privileged to have known.

NORMAN DORSEN

Stokes Professor of Law, New York University School of Law
President, American Civil Liberties Union 1976–1991
Law Clerk 1957–1958

From the beginning of my clerkship I was struck by Justice Harlan's courtly manner, which reflected his background. He treated all people, whatever their station, with consummate politeness and consideration. An unusual aspect of the Justice's civility was that, to the best of my recollection, in our entire year together he never personally criticized another Justice or anyone else. To be sure, he often objected, sometimes strenuously, to certain legal conclusions or reasoning. And on occasion he would signal perplexity or disapproval by the quizzical lifting of an eyebrow. But I never heard him say a disparaging word about anyone's capacity or motivation, even though he sometimes was provoked, as when he received a proposed opinion from another Justice in a complex federal jurisdiction case that, to put it kindly, was difficult to comprehend.

I may also have pressed him at times by my outspokenly liberal preferences on some cases. I can still remember some of those instances, when he patiently listened to my arguments even though his earlier rulings or unmistakable inclinations suggested that I had little hope. I came to learn that this attentiveness reflected open-mindedness as well as courtesy because, after discussion, the Justice sometimes altered his position on an aspect of a case or on a cert petition. These qualities made our chambers a wonderful place to work, and some of the law clerks to other Justices were openly envious.

During the year the Justice rarely showed emotion in discussing pending cases, whether he was in majority or dissent. He was entirely professional. Not until several years later, when he spoke at the annual reunion dinner, did I fully appreciate how deeply the Court's work affected him. I believe it was early 1963 or 1964, not long after Justice Goldberg's arrival following Justice Frankfurter's retirement fundamentally changed the Court's direction. At earlier dinners, the Justice tended to speak rather blandly, referring perhaps to the size of the docket, the health of his older Brethren, and an amusing incident or two. On this occasion, however, he told us at length and with evident feeling that the Court was going through a worrisome stage. Except for the current clerks, the audience could not know what decisions he alluded to because they had not yet become public, but it was obvious that the Justice was severely distressed by what turned out to be the beginning of the Warren Court's most activist years. He brightened as he singled out Justice Black for being "a man of the institution" for not allowing things to get completely out of hand, praise that astonished some of the older clerks who remembered Justice Black until then as a frequent adversary of our chambers. I loved the Justice for his willingness to open himself to us in this way.

HENRY J. STEINER

Jeremiah Smith, Jr. Professor of Law, Harvard Law School
Law Clerk 1957–1958

What struck me most forcefully about Justice Harlan during our year together was his grasp of this country's history, his democratic faith in the basic good sense and decency of the people and their elected representatives, his belief in the integrity of our political process. That process would function best if facilitated by a judiciary that kept its calm and observed the constraints on adjudication stemming from separation of powers, federalism, and the shaping ideology of the rule of law. Such were the deep beliefs that seemed to characterize this American patrician, so familiar

through ancestors and acquaintances with the country's holders of power.

What a contrast my own background and views provided. During my adolescent years, the abominations committed during the Second World War became public knowledge. I felt little confidence about evil being averted through political processes informed by common decency. Rather, I thought of the world's lurking barbarity, the insanity that led to the genocidal Holocaust and the slaughter of countless other millions. My perspective within my Jewish tradition was that of the minority ever at risk, less risk in this country than many others, but present nonetheless.

The 1957 Term wrestled with weighty human-rights issues. McCarthy was dead, but McCarthyism remained everywhere. The battle for racial justice was underway. Many such issues came to the Court from state judiciaries. A principal focal point for the Justice's beliefs and faith sketched above could be found in the pull of federalism, in respect for states' powers and decisions. Two of the Justice's opinions during my clerkship stand out as illustrating his beliefs in action.

I disagreed with *Lerner v. Casey*, where the Justice wrote for the Court in upholding New York's dismissal of a subway conductor who had pleaded his privilege against self-incrimination in refusing to reply to a question about Communist Party membership. The opinion's reasoning was complex, and I thought labored, in working from this refusal to the formal and approved basis for the state's dismissal.

But as counterweight to this deference to state decision-making, as balance to his more sanguine view of America's history and prospects, the Justice brought to his work a powerful sense of justice and of the country's ideals. At times he pointed the way for the Court in developing basic constitutional and human rights. For example, Harlan wrote for the Court in *NAACP v. Alabama*, a constitutional challenge to Alabama's requiring the NAACP to disclose its full state membership. The opinion's convincing demonstration of the state's duplicity and lack of justification overcame notions of deference and respect. Its argument gave powerful expression to the developing right to association and related standing doctrines, thereby strengthening the young civil rights movement. Similar significant decisions advancing human rights, some truly innovative and bold, continued over the years. Such opinions enhance our appreciation of the Justice's struggles and contradictions. They dissuade us from any monotonic characterization of Harlan as a traditional judicial conservative.

It was easy for me to love this generous, warm, wonderful man who gave to his law clerks such time, insights, warmth, and respect. As the year moved on, it became easier for me to recognize our deeper common commitments. These beliefs in basic rights and constitutional ideals dwarfed our different histories. They put into perspective our different understandings of the American polity and the Court's role within it.

HENRY R. SAILER

Retired Partner, Covington & Burling, Washington, D.C.
Law Clerk 1958–1959

For me, there is not much point in talking or writing about Justice Harlan. It goes without saying that he was a gallant man and exemplary judge, who tried his level best to be disinterested (some successors please copy). As to the rest, this is a prototype of "you had to be there." Fortunately, a number of others with more felicitous writing skill than mine were at various times in those chambers too, and are hence available to lend their talents to this project, although I don't think I can let them speak for me.

The last few times I spent with the Justice, usually accompanied by Michael Boudin, were heart-wrenching and produced to me a remarkable event. After learning quite accidentally that he had entered the Naval

Justice Harlan pitching for law clerks against Covington & Burling in 1958.

Hospital, and tracing him over the formidable obfuscatory measures of Ethel McCall to the George Washington University Hospital, I confidently (having seen him mildly unwell little more than a month before) entered his sickroom to find him almost mute and comatose from pain in his mortal illness. After kissing him and stroking his forehead, I left only to burst into tears just outside the door. Through the days that followed there was a trickle of visitors, perhaps the most faithful being Potter Stewart, whom I always held in particular esteem thereafter.

Now to the startling (to me) event associated with these visits. My memory tells me that the Justice was usually unable to articulate a comprehensible sound during this time. One day, however, he began to whisper, gaspingly and somewhat urgently. It turned out he was talking about the prospect of two new Justices on the Court and was seeking reassurance that the nominees would be suitable. Fortunately, it was possible for us generally to reassure him and he relapsed once more into final muteness.

STEPHEN SHULMAN

Partner, O'Connor & Hannan LLP, Washington, D.C.

Law Clerk 1958–1959

My recollection of clerking for Justice Harlan starts from an abiding conviction of his great intellectual strength and integrity. It includes a sense that he used his clerks in a manner that gave him the best they had to offer and gave them the maximum experience. I have a clear feeling that the Harlan clerkship was the prize clerkship.

Justice Harlan was a real patrician, but he was also a man of humor and good fellowship. Two experiences I had with him show these qualities and are, I believe, worth recording in our collective thoughts.

The first took place during the clerkship itself. Justice Harlan invited [my wife] Sandy and me to go to the symphony with him at Constitution Hall. He advised me that I would feel "more comfortable" if I went in black tie. And so, of course, I did. My distinct recollec-

tion is that Justice Harlan and I were the only two people in black tie at the symphony.

The second experience took place two years after the clerkship. I was working as executive assistant to then–Secretary of Labor Arthur Goldberg. Secretary Goldberg moved my admission to the bar of the Court. He departed from the strict litany, "I move the admission of [blank] from the state of [blank]; I am satisfied he/she possesses the necessary qualifications." Instead, he added after my name the words: "my executive assistant and former law clerk to Mr. Justice Harlan." Following the swearing in, I stayed on to listen to oral argument. Justice Harlan sent me a note from the Bench. It was addressed to "the executive assistant to the Secretary of Labor, formerly Steve Shulman."

Justice Harlan's commitment to black tie as defining the symphony and his capacity to capture the fun in a bending of the strict rules of admissions practice illustrate his unique personal qualities. They combined with his patient scholarship to produce a judicial career that will have lasting significance.

For a final touch of humor, I should add that when Secretary Goldberg was nominated to the Supreme Court, he called me in and asked if I knew where Justice Harlan bought his shirts.

JAY A. ERENS

Partner, Foley & Lardner, Chicago

Law Clerk 1959–1960

I have often been asked what was the most important thing I gained from my clerkship with the Justice. My answer has always been the same. It was not so much the knowledge gained on important legal subjects, nor the challenge of working with some of the finest legal minds in America, nor the exhilaration of experiencing and being a part of the inner workings of a unique and venerable institution. To be sure, each and every one of those had significant impact.

But the one thing that clearly stood out from all the rest was the experience of being exposed to John Marshall Harlan, the person. His qualities as a human being were, to me as a rather young and inexperienced man, unique and formidable. The descriptive terms "patrician," "humane," and "of large spirit" come to mind. He represented an inspiring role model, first as a magnificent human being, and derivatively as a professional in the highest sense, whose human qualities shaped and enhanced his professional qualities. The influence of his persona has remained with me long after other memories have faded.

Lest this remembrance take on too solemn a tone, I will relate an incident that occurred some time in November of my clerkship year. I was alone in the clerks' office when the Justice entered, looked straight at me, and said, "Well, you had better get going." I was utterly electrified and paralyzed, thinking I had just been fired for some unknown offense. After agonizing seconds of silence, the Justice added, "Haven't you looked out the window?" I looked out to see a few scattered snowflakes falling. What I did not know at the time is that Washington (unlike Chicago, where I came from) could not handle snow, and that at the slightest flurry workers were customarily sent scrambling home. I have no idea what I said to the Justice at that point, but apparently I left with at least my dignity intact.

HOWARD LESNICK

Jefferson B. Fordham Professor of Law, Pennsylvania Law School

Law Clerk 1959–1960

October Term 1959 was within the early years of the "Warren Court," when Justice Harlan was often part of a five-Justice majority on the conservative side of many issues on which the Court was divided. To say that, however, is to leave the story untold. His practice as a judge bears eloquent witness to the impoverishment, in the years since his death, of terms

like "judicial conservative" and "judicial restraint."

Harlan had a strong sense of fair-mindedness, and a healthy skepticism about ideology, which extended to that which he embraced as well as that which he found unattractive. Committed to a jurisprudence that was grounded on a fair amount of trust in those exercising power, he would readily, albeit sadly, repudiate governmental actions that seemed to him disreputable. He took no pleasure in upholding—as he often would—acts of injustice, and if the means were available to set them aside without overstepping the judicial role as he conceived it, he would use them.

Among many examples, one "routine" case sticks in my mind. *Goldsby v. Harpole* involved a state's petition for certiorari to the Court of Appeals for the Fifth Circuit, which had set aside the conviction and capital sentence of a black defendant on the ground that blacks had been systematically excluded from jury service. The defendant's attorney had not raised the objection before trial, but the Fifth Circuit held that, because it was well known that most attorneys in Southern communities would not raise this claim for fear of reprisal against them and their clients, the defendant was not bound by his attorney's action, and could litigate the claim in federal court.

Justice Harlan could not accept that reasoning. To him, barring seriously inadequate representation, a client was properly held bound by his or her attorney's tactical decisions, and he would not have voted to recognize an exception for all-white juries in Southern courts. Nonetheless, he readily joined the Court in denying the petition, leaving the Fifth Circuit decision intact without expressing Supreme Court approval of its reasoning. He recognized the fact that racially motivated exclusion was endemic, and that informal sanctions made challenges to it most difficult. While he was "conservative" enough to believe that the legal rule should not be changed to take account of that reality, he was quite content to have the Southern judges of the Fifth Circuit make the change.

This judgment was fueled by his antipathy to the death penalty. The idea that the death penalty was unconstitutional would never have occurred to him in 1960 (and when it did, he readily avowed its permissibility), but he viewed it with abhorrence, and certainly believed that justice was done on all counts by allowing the conviction and capital sentence to be set aside.

In this, as in many other decisions, Justice Harlan—Republican, patrician, Wall Street lawyer that he was—illustrated the difference between his brand of conservatism and that of some of his self-proclaimed successors.

CHARLES FRIED

Beneficial Professor of Law, Harvard Law School
Solicitor General of the United States 1985–1989
Law Clerk 1960–1961

To have known Justice Harlan is to have been made a better man. He exemplified virtue in such a compelling way that it called you to change and follow. The virtue Justice Harlan exemplified was courtesy. I do not mean pretty manners or a considerate manner. I mean a thoroughgoing, elegant grace that put you at ease because he was at ease and that did not condescend because it would never occur to him to claim some special, higher status. This courtesy was compelling because, though he did not puff himself up in the slightest, he felt, expressed, and insisted upon strong commitments and the most exacting standards. He did not insist because he thought they were his due, but because the very nature of things required them—of himself as much as others.

His love for the Court and for the rule of law are, of course, legendary. If he was demanding of his clerks and magisterial in his judgment, it was never for himself but be-

cause he believed the law required it. It required it of him as much as it did of those whose work he directed or judged.

The Spanish writer Ortega y Gasset has said that "La claridad es la cortesia del autor." Justice Harlan demanded, and strove for, clarity in his judgments out of this courtesy, the sense that if we exercise power over others, the least we owe them is the best and clearest explanation of why reason requires us to conclude as we do. A rhetorical glide over a gap or fault in reasoning, an imperious *ipse dixit* were not only professional lapses but to him a profound lack of courtesy towards those who must study, follow, and live with the consequences of what the Court decreed.

PHILIP B. HEYMANN

James Barr Ames Professor of Law, Harvard Law School
Deputy Attorney General of the United States 1993–1994
Law Clerk 1960–1961

I have always admired John Harlan the man even more than Justice Harlan the judge. He took such pleasure in the company of a wide variety of people that he seemed to treasure life for that alone. When my mother-in-law came to visit he took her with Ann and me to lunch at the Court, leaving her charmed for years. He felt like a father to his clerks yet didn't have a patronizing moment with half-grown twenty-somethings. He gloried in their later triumphs as if they were his.

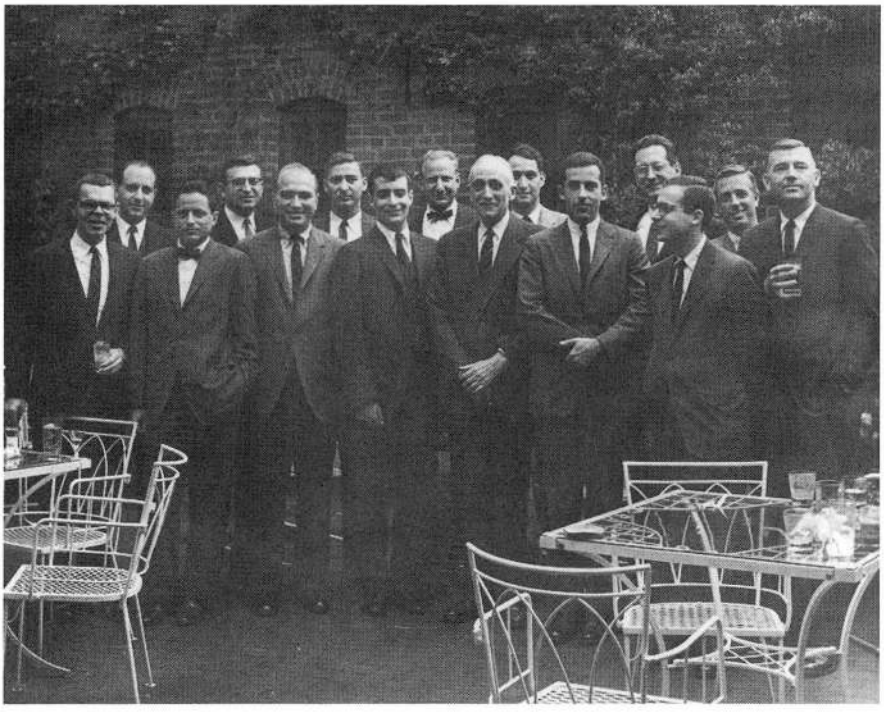
He was deeply and instinctively democratic; his working staff were treated with unfailing respect as well as warmth. He seemed to spend time daily in the clerks' office picking up rubber bands that Charles Fried and I had shot at each other, a task that could have been left for the janitors or even for us. He cared more about individuals than groups and about both more than about causes.

He was a gentle man as well as a gentleman. In a contentious Court, I can't remember him criticizing a colleague. He seemed fearless but wholly unintimidating. He abounded in good humor; he could be earthy but not without laughing at himself as he was. He seemed to lack both any conceit and any fear of inadequacy. His personal stories had to be coaxed out of him.

The traits that made him such an admired judge even decades later were based in that character. He loved the work that he thought of as bringing a good mind to work hard and honestly on an important problem that he knew had both institutional and human dimensions. He wasn't pursuing a cause, although he saw the "causes" of racial equality and personal privacy as constitutional commands demanding increased attention. He never saw disagreement with even his most cherished views as apostasy and followed the practice, with rare exceptions, of treating a decision from which he had dissented as fully entitled to his personal deference, as a precedent, after six months.

He believed deeply in the Supreme Court as a critically needed check on our democracy, but he could see it simultaneously, without losing respect, as a collection of somewhat raucous egos. He had and wouldn't abandon common sense about the human condition and human behavior. (In *United States v. White*, for example, he asked who wouldn't behave differently, wouldn't surrender his spontaneity, if he knew the person to whom he was talking was taping him?) Above all, he wanted the arguments that formed his opinions to be transparent, never hiding a premise or sliding over a fallacy or ignoring an ellipsis to reach a result. (In *Katz v. United States*, he demanded to know what made an expectation of privacy in a phone booth "reasonable," not satisfied that he instinctively recoiled at secret monitoring of such a conversation.) That a scrupulously honest process of decision be reflected in his opinion was his overriding value as a judge.

Many justices since have wanted to be considered the Justice John Marshall Harlan of their Court. Many of us who knew him



A reunion of Harlan clerks circa 1961. Above are Wayne G. Barnett, Stephen Shulman, Henry R. Sailer, Howard Lesnick, Norman Dorsen, Leonard M. Leiman, Philip B. Heymann, Henry J. Steiner, Justice Harlan, Charles Fried, Paul M. Bator, William T. Lifland, Jay A. Erens, E. Barrett Prettyman, Jr., and Norbert A. Schlei. Below are clerks at the same luncheon photographed with their wives. Mrs. Harlan stands directly in front of the Justice, and to her left is Ethel McCall, the Justice's longtime secretary.

have wanted most to be like the man, John Harlan.

NATHAN LEWIN

Partner, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, D.C.

Law Clerk 1961–1962

My exhilaration over being recommended as the Justice's clerk was mixed with trepidation. I had been told that clerks were on duty on Saturdays. I have always been a Sabbath-observer, and if attendance was truly mandatory, I couldn't do the job.

When I came to Washington to meet the Justice, I unburdened myself of the concern that had been gnawing at me round-the-clock: "I have to tell you, Mr. Justice, that I'm an Orthodox Jew, and when winter comes, I have to leave by sundown on Fridays and I can't come in at all on Saturdays." I expected the kind of grilling I had received from law-firm recruiters. They had demanded to know why I couldn't get a dispensation for essential litigation deadlines. A Supreme Court Justice, I thought, would surely tell me how important the Court's work is and request that I find some way to bend the rule.

The Justice did none of that. He smiled and said, "Are you ready to work on Sundays?" I told him I definitely was, and that I was planning to take an apartment a few blocks from the Court so that I could walk home on Friday afternoons if an emergency kept me at the Court until the last minute before sundown. He replied, "Well, I've got two clerks, and if your colleague is ready to take the Saturday shift and you're here on Sundays, that's fine with me." My co-clerk was John Rhinelander, scion of a family renowned in the Episcopal Church, and he graciously accommodated this schedule.

On weeks when the Court heard oral argument, the Justices met in conference on Friday mornings. Justice Harlan would swing straight out of these conferences into meetings with his clerks. Then winter came, and the sun was going down as early as 4:30 p.m. During several postconference Friday meetings, the Justice spontaneously turned to me and said, "Nat, the sun's going down soon. It's time for you to be on your way home." I rushed to my apartment for Sabbath preparations with enormous gratitude for the characteristic grace with which the Justice had ensured that I not feel uncomfortable.

The Justice would have enjoyed hearing that fifteen years later this experience was invoked *pro bono publico*. I was at a meeting at the Bureau of the Budget arguing for the constitutionality of a bill that allowed federal employees who needed time off for religious observance to work "compensatory time" so that they could save annual leave for family vacations. The Justice Department opined that the bill violated the Establishment Clause because it gave religious observers a benefit denied to other employees.

My technical constitutional arguments were having no effect. I then recounted how the Justice had responded to my Sabbath observance. My final line was: "When Justice Harlan told me to go home on Friday afternoons because the sun was setting, do you think he ever imagined that he was violating the Establishment Clause?"

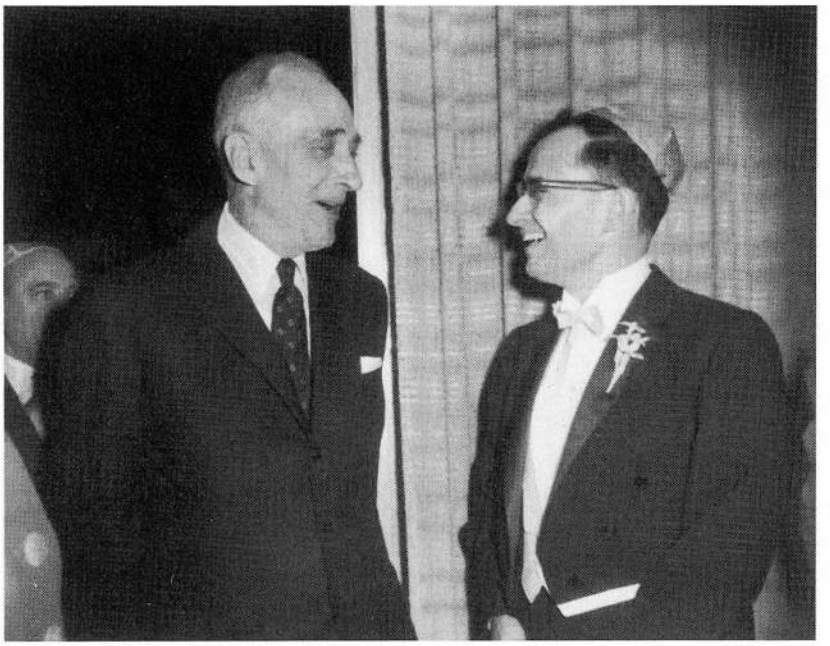
I was told later that this anecdote overwhelmed the opposition. The Carter Administration supported the bill, which is now 5 U.S.C. §5550a and facilitates religious observance by federal employees.

JOHN B. RHINELANDER

Senior Counsel, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.

Law Clerk 1961–1962

I was in my cluttered law review office in Charlottesville in the fall of 1960 when Ethel McCall telephoned and said the Justice wanted to speak with me. He opened our conversation with, "John, do you still want to clerk for me?" I was stunned and could not



Justice Harlan with Nathan Lewin at his wedding, and Nathan Lewin and his bride, Ricky, with Mr. and Mrs. Harlan. Justice Harlan permitted Lewin, an Orthodox Jew, to observe the Sabbath by coming into work on Sundays instead of Saturdays. On Fridays, Harlan was always concerned that Lewin leave early enough to be home by sunset, as early as 4:30 in winter.

reply immediately. Virginia Law School had sent few clerks to the Supreme Court and none within ten years. I finally said, "Yes, of course," or words to that effect.

Thus began that extraordinary experience of clerking for Justice Harlan, together with Nat Lewin, for one too-short year. Nat and I covered the Court seven days a week. The Justice was amused that full-Court, ecumenical coverage was provided by the grandson of an Episcopal Bishop of Pennsylvania and later First Warden of the College of Preachers at the National Cathedral and the grandson of the Chief Rabbi of Rzeszow, a significant Jewish community in pre-Holocaust Poland. He introduced several visitors to the Chambers by referring, with a twinkle in his eyes, to our grandfathers. (As Nat recalls, the Justice was sensitive to grandfatherly reputations.)

One of Justice Harlan's early opinions in the 1961 Term was *Hoyt v. Florida*. The Court unanimously upheld Florida's statute permitting women to exclude themselves from jury duty solely because of their sex. Ethel McCall threatened not to type the Justice's opinion, which, notwithstanding efforts by Nat and me to tone down the dicta, contained a sentence that was the "Quote of the Day" in the *New York Times*:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.

The Justice was civil to all in a wonderful, old-fashioned way. I asked whether Jeanne could attend the annual law clerks' reunion even though we would not be married until July. He wrote a formal note that my lady friend would be welcome.

I can remember the Justice showing his emotions only once while in his judicial robes. It was during the Court's announcement of the decision in *Baker v. Carr*. Justice Harlan's voice broke when he rejected the applicability of the Equal Protection Clause and decried the Court's entry into the political thicket. When *Bush v. Gore* this past December decided the outcome of the presidential election in lieu of allowing the awkward but explicit process in the Constitution to come into play, I was certain that Justice Harlan would have dissented were he still on the Court.

But the world changes, as we all know and are reminded afresh by **Some Memories of a Long Life, 1854–1911**, the memoirs of Malvina Harlan, the Justice's grandmother, who was the wife of the first Justice John Marshall Harlan. This recently discovered treasure is now public because of the persistent efforts of Justice Ruth Bader Ginsburg, the second female Justice on the Court.

RICHARD J. HIEGEL

Retired Partner, Cravath, Swaine & Moore, New York City

Law Clerk 1962–1963

Clerking for Justice Harlan in the 1962 Term of the Court was far and away the most exciting thing I had done in my life to that point—and probably to the present point as well. So many of the cases heard that Term seemed immensely important and were very controversial, both inside and outside the Court. The Justice brought his clerks into the thick of the fray in all these cases, and we felt that we were at the epicenter of the legal world. We discussed in detail the various viewpoints within the Court on each case, as well as his own, of course, and he listened to our views with apparent interest and respect. After the cases were decided at the Conference, he described the positions taken by the Justices and the outcome, and we discussed what he intended to do. Then we tried our best to help him do it.

The Justice was the most wonderful person I ever worked for, in both his personal and

his intellectual qualities. He was kind and considerate to his clerks at all times, and mindful of the workload the two of us bore, even though his own burden was far greater. He was also very warm and welcoming to our spouses, inviting them to attend argument at the Court, taking all of us to the theater and having us to dinner at his home with his lovely wife, Ethel. The Justice had a delightful sense of humor, inexhaustible patience, and a fierce determination. He stuck to his judicial principles despite long years of holding a minority view on many issues.

It was a great privilege and joy to serve him.

DAVID L. SHAPIRO

William Nelson Cromwell Professor of Law, Harvard Law School

Law Clerk 1962–1963

My father was a lawyer—a lawyer who came to this country as a boy, never graduated from high school, worked his way through Fordham Law School at night, and managed to become a successful attorney in New York City, representing his fellow immigrants in the restaurant business. He shared with many of those with similar backgrounds a political and social radicalism of the '30s, '40s, and '50s that regarded a vote for the Democrats as a pragmatic compromise at best. Thus, while he was proud of my selection by Justice Harlan to be one of the Justice's law clerks in 1962–63, he had serious doubts about the ideology of my new boss, and felt that he had nothing in common with a man of such an aristocratic and WASP-ish heritage. Small wonder, then, that he regarded a Saturday lunch that I had painstakingly arranged for the two lawyers to meet as sure to come off badly.

On the appointed day, when I ushered my father into the Justice's chambers, the Justice immediately put all his papers aside and greeted my father with an enthusiasm that said he could think of no more pleasant way to spend some time. From then on, I participated only as a spectator. As we strolled over to the Methodist cafeteria next door, brought our trays to a window table, and ate our sandwiches, the Justice and my father shared their differing but overlapping experiences of practicing law during the prewar years, laughed at the foibles of the New York courts and their bureaucracy, and traded anecdotes about all kinds of things. When they parted, my father's face was wreathed in a smile, and he walked with a spring in his step that I hadn't seen in years.

What touched me most about this event was not simply the interest that the Justice took in my father and his work, but the genuineness of that interest. No actor could dissemble that well, and the secret was that there was no dissembling. The Justice was loved by all who knew him because he really cared about others, because he respected their ideas and smiled benignly at their eccentricities. Every one of his family of clerks rejoiced in that warmth and respect, and the enduring quality of our affection is underscored by our gathering some thirty years after the Justice's death to renew our bonds and to share our memories.

KENT GREENAWALT

University Professor, Columbia Law School

Deputy Solicitor General of the United States 1971–1972

Law Clerk 1963–1964

When I bring to mind Justice Harlan's extraordinary blend of qualities—his friendliness, good humor, wit, patience, courage, generosity of spirit, lively intelligence, and integrity—I recollect incidents that didn't happen more than those that did. In situations in which some fumble of mine could easily have caused irritation or in which he might have become exasperated as Lloyd Weinreb or I pressed an argument uncongenial to him, he was never less than considerate and patient. He accepted tensions within the office with

surprising equanimity (perhaps a little more than would have been ideal). We heard no word of self-pity or complaint about his failing eyesight. And when he discussed drafts with us, he never suggested adding or retaining lines that might carry rhetorical force but did not stand up to careful analysis.

Despite legal disagreements that nearly always left him in the minority, he expressed good feelings about the other Justices, declining, as many people would, to personalize disputes of substance or to attribute unwise judgment to stupidity or bad faith. His belief in the process seemed unaffected by his low percentage of success in the cases about which he cared most. Perhaps he expressed a sense of disappointment, frustration, or bitterness to others, but I doubt it.

During the clerkship, I imagined that some of his virtues of character came with full maturity. The older I've become, the more I understand how rare they are in anyone of any age, and how difficult to attain.

LLOYD L. WEINREB

Dane Professor of Law, Harvard Law School

Law Clerk 1963–1964

It is almost forty years since I clerked for Justice Harlan. Many of the particulars have faded in detail, but the large place of that year in my life remains undiminished.

Reflecting then and later on the Justice's decisions, I am struck by the consistency and coherence of his jurisprudence. At bottom, he believed that responsibility resides in the individual. That led him, on one hand, to the conclusion that the individual is entitled as of right to protection from encroachments on his responsibility, whether by other individuals or by the community, and, on the other, to the conclusion that the individual is not entitled as of right to much affirmative assistance to exercise his responsibility.

Justice Harlan believed that there is an area of private conduct that the government may not ordinarily regulate or impede, even to accomplish a social objective, and an area of public life, in which what is perceived to be the common good might, within reason, prevail. So, in two cases that from another, simpler perspective might appear to be at odds, he did not approve a state's exaction of a fee for access to a divorce, but he thought that a state could burden the right to vote by a poll tax. The limitations that he observed on public obligation to alleviate private misfortune were tempered in his own conduct by awareness of and compassion for others, but he also regarded that as a matter of individual responsibility. Whether his views about the relationship between the individual and society were a matter only of the law (and, particularly, the Constitution) or reflected a personal philosophy as well, I am not certain, but I believe that it was the latter.

Few of us who were privileged to work as closely with him as his clerks did can have been unaffected by the man as well as the Justice. He was wise, generous, firm, understanding. He rarely spoke philosophically, but his conduct bespoke his philosophy, and observing him was deeply and permanently instructive. There are a few persons whose presence in my life has been a gift and a touchstone for the rest. I knew when my year as law clerk ended that Justice Harlan was such a person. The years since have made that knowledge more certain.

MICHAEL M. MANEY

Partner, Sullivan & Cromwell, New York City

Law Clerk 1964–1965

Someone once described the Justice as a person who had all of the positive characteristics of good breeding and none of the negative ones. One of his greatest virtues was how considerate he was, yet how demanding he could be on matters of intellectual integrity. Two in-

cidents that took place during the 1964 Term remind me of those qualities.

It was the Justice's practice in those days to stop by the clerks' office as he was leaving for the day, hat perched on his head with the brim often turned up, and chat with us for a few minutes. In the spring of 1965, I had been struggling over a draft opinion, working alone during most of the day as my co-clerk, Charlie Nesson, was buried in an office upstairs, which was loaded with maps of the coast of California. He was working on *United States v. California*, relating to the extent of a state's territorial waters, and needed the extra space that an original action requires.

I had finished the draft of the opinion I was working on and had passed it in to the Justice via Ethel McCall. For a couple of days the Justice would stop by in the evening and chat with us, with nary a comment about my draft opinion. As he was leaving on the third day he stopped at the door, turned back and said, in substance, "Michael, I know you gave me a draft opinion in the *Levin* case. I have been working with Charlie on *California* and have just not had a chance to turn to *Levin*, but I didn't want you to think I had any problems with your work." What a relief that was for me, and how thoughtful the Justice was to sense that I might be worried about the opinion if he said nothing!

The second incident involved an opinion for the Court in what the Justice referred to as one of the "pee wee" cases, namely a case which excited little passion from any of the Justices. The conference had voted 9–0 one way, and I had been unable to reach that result in the writing, so I brought a draft in to the Justice and explained that the case "would not write." He questioned me intensely, having me read from all the cases being cited (and quite a few not cited), over a period of more than two hours. More than once I thought to myself, "Why am I arguing with this great man? Just give up and write the case the other way!" At the end of this seemingly endless discussion, he said, in substance, "All right, Michael, circulate the opinion as a dissent, indicating that I came out differently. I agreed with your analysis after a couple of minutes, but wanted to be sure it would withstand analysis." P.S. The Court agreed with the opinion 9–0.

CHARLES R. NESSON

Weld Professor of Law, Harvard Law School

Law Clerk 1964–1965

Entering the Justice's chambers once in response to his call to come in, I found him bent so far over his desk that his nose was nearly touching a book open on his desk. As I approached his desk he raised his head, his eyes wildly magnified by glasses with lenses that were hemispheres the size of split ping-pong balls. He smiled mischievously, took the glasses off and passed the book across the desk to me. "Read this to me, would you?" he said. The book was **The Housewife's Handbook on Selective Promiscuity**, one of the books involved in *Ginzburg v. United States*, an obscenity case that was before the Court.

I was familiar with the book, having studied the record in the case. It is a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. Ginzburg had been convicted for sending it through the mails, from Intercourse and Blue Ball, Pennsylvania. Harlan wanted to dissent from the majority's affirmance of the conviction. He believed that under the First Amendment the federal government could ban only "hardcore pornography." He needed to determine for himself whether the **Handbook** was hardcore. To make this determination, he felt he had to read the book—or have someone read it to him.

His smile was for my hesitation. Could I sit there and read pornography to a Supreme Court Justice who had impressed me as the most dignified, genteel man I had ever met?

Justice Harlan, with several of his law clerks. Front row: Henry R. Sailer, E. Barrett Prettyman, Jr., David L. Shapiro; back row: Lloyd L. Weinreb, Paul M. Bator, Leonard M. Leiman, Wayne G. Barnett, Philip B. Heymann, Kent Greenawalt, Charles R. Nesson.

Yes indeed! I read it to him in as businesslike fashion as I could muster. He urged me not to be embarrassed, told me that his eye operation made reading difficult for him, slow and tiring, and explained that dealing with obscene material came with the job of judging. He thanked me when we were done, acknowledging and sharing with me the amusement of the scene. The episode is etched in my memory like a photograph in an album.

Etched with similar sharpness is my memory of saying goodbye to him when he was dying. I visited him in the hospital very shortly before his death. I recall looking down

at him, lying in his hospital bed, clearly with not much time to go. He had had a stroke. One side of his body was entirely paralyzed. One side of his face was dead. He recognized me immediately. The live side of his face showed animation. His mind was clearly there. His generous spirit showed through, even at this extreme point. He was outgoing, curious about my life. I realized that I was having trouble engaging with him as a still live and vibrant person, realized that initially I felt more comfortable looking at his dead eye than his live one, but felt myself drawn by his life force to his live side, his live eye. When I thanked him and left him, I felt I had been given the gift of his example, right to the end.

MICHAEL BOUDIN

Chief Judge, U.S. Court of Appeals for the First Circuit

Law Clerk 1965–1966

Small events and sights make up one's memory of JMH and, lying like a veil over them, the sense of encountering a complete man.

First, a shake of the kaleidoscope. JMH's invariable dark navy blue tie from Brooks Brothers. The friendly warning (it had apparently once happened) not to leave draft opinions on the Coke machine in the public area of the building. The invitation to the clerks to use the Harlan box at the symphony, coupled with the suggestion that they would "feel more comfortable in black tie." His grandfather's curve-back bench chair in the outer office. A cellophane bag of barbecued potato chips—a weakness of one clerk—left on the clerk's pillow during the year-end visit to Weston. A rueful shake of JMH's handsome head, but no further comment, when reporting some outré event at the Friday conference.

Beyond these fragments is a recollection of appearance and character so woven together that it is hard to make out the line of the seam. JMH was an archetype of the judge: a master of his own passions; more ready to listen than to speak; calmly self-confident, not about answers but about his capacity to find answers; and in all things, dignity without pretension. The tempests of individual cases and doctrines are now forgotten, but what abides is the image of a man who grappled head on with great issues and dispatched them with craft and intelligence and judgment. It is a rare legacy.

MATTHEW NIMETZ

Partner, General Atlantic Partners, Greenwich, Connecticut

Counselor to the State Department and Undersecretary of State 1977–1980

Law Clerk 1965–1966 and 1966–1967

Justice Harlan's love for the law and the Court remains the most vivid memory of my clerkship. The 1965 and 1966 Terms were marked by dissents in most important cases, as he watched the Court move further away from the constitutional base that he found agreeable. During that period his eyesight deteriorated markedly, so much so that we clerks spent several hours a day reading to him. And to add another burden, Mrs. Harlan's health took a turn for the worse as she developed a condition that today would probably be diagnosed as Alzheimer's. In that context one would expect Justice Harlan to have been discouraged, even depressed. Not so. He came to work each day with enthusiasm, excited about the challenge before him.

When we would receive a draft circulated by another Justice, we would often read it aloud to save him the strain of reading it. He would listen without expression and then invariably say, in a positive way, "Well, Matt, I think we should start on a dissent." He would work on his opinions with relish. Because of failing eyesight he would wear special glasses, writing large almost illegible words on a legal sized pad. Sometimes these sheets would have cigarette holes in them, evidencing his attempt to read them closely while smoking. Some of his best sentences were

written in that fashion, to the point and evidencing real conviction.

Although he could be sharp on substantive matters, never did he ever say a harsh personal word about one of his colleagues, or indeed about anyone else.

The Justice had a wonderful sense of humor. Once I introduced a humorous reference into a draft opinion. As he read it he laughed out loud and then promptly struck it out. "Very good, Matt," he said, "but not appropriate for an opinion." He once required me to record chapters of the notoriously obscene book **Fanny Hill** so that he could listen to it. The typeface was too small for his eyes, and, as he adhered to Justice Stewart's obscenity standard, "I know it when I see it," he was obliged to study the text to decide the case. I dutifully recorded pages of graphic pornography, to which he listened while vacationing in Connecticut. His only comment when he returned: "Matt, I could hear you panting in the background."

For yet another obscenity case, the Justice watched several pornographic movies on a screen set up in his darkened chambers. Wearing special glasses, he placed himself within inches of the screen, on which women were gyrating suggestively. His only comment: "Remarkable, remarkable." Whether he was referring to the case, the process, or the women on the screen was left unsaid.

The Justice looked at the law as a calling, not a business. "Judging is not a business," he once told his accountant when pressed to take a tax deduction. He could not imagine a better life than the one he led, and our lives are so much richer for having known and worked with him.

CHARLES LISTER

Partner, Covington & Burling, London
Law Clerk 1966–1967 and 1967–1968

Many who claim the Justice as an intellectual forebear, and certainly those who decide cases by ideological rote, have little in common with the man I remember. The man I knew was not an ideologue. He never pretended to direct revelations from the Founders, or even Adam Smith. He had fixed points, of which due process and federalism were most important, but they were landmarks and not fences. He was always open to argument. If his mind changed, he acknowledged it. He was conservative, but in the lower case, and by temperament, not ideology. His conservatism came from what he was. It was not borrowed from someone's theory. Its roots were craftsmanship, honesty, and intellectual modesty. He struggled to get it right, not Right.

As honest craftsmen are, he was a particularist. If he began from any single idea, it was fairness as he saw it. Fairness is factual, and he had a litigator's fastidiousness about the record. Unlike other Justices, I never saw him distort the record to achieve a result. Indeed, fairness and the facts sometimes led him to results that offended the ideology some attributed to him. After the Justice's death, Chief Justice Burger told me that in the end the Justice recanted two opinions that did not fit the Chief Justice's orthodoxy. I did not believe him. The claim said more about the Chief Justice, and the uses others make of the Justice, than about the Justice himself.

What was best about him was what he was. He taught lessons beyond law. One was discipline. He was an obsessive worker who, as his eyes grew weaker, stubbornly worked harder. Another was intellectual honesty. His corners were always square. I remember him angry only once, when Justice Black, a man for whom he felt something like love, disingenuously altered an opinion. But chiefly he exemplified civility and tolerance. Acerbic personal references to other Justices, now featured in some opinions, would have distressed him. Always calm and dignified, he drew both qualities from others. But nothing about him was pretentious. He laughed easily, and regarded life, law clerks, and his formida-

ble secretary with affectionate tolerance. He enjoyed hearing views different from his own. He once said that he preferred sitting on the Bench beside Justice Douglas, with whom he shared little, because of the unexpected ideas he heard. Some of my warmest memories are of his close relationship with Justice Black, with whom he so often disagreed. They became more brothers than Brethren, and I was not surprised when he delayed his resignation so the day's headlines would all be Justice Black's.

Whatever scholars may make of the Justice's ideas in fifty years, they are likely to underestimate the man. His human qualities are becoming less common, and perhaps less valued. He was an antique Roman, in Shakespeare's sense, and we should not expect to meet his like again.

BERT W. REIN

Partner, Wiley Rein & Fielding LLP, Washington, D.C.

Law Clerk 1966–1967

Working with Justice Harlan on a day-to-day basis was the ultimate clerkship experience. The word "character" always comes to me when I think of him. He was dignified—indeed, patrician—without being the least bit stuffy. He was immensely kind and considerate in an effortless way. He demanded that "little bit extra" by demonstrating his own commitment to excellence under the most trying physical circumstances. He gave substance to the word "gentleman."

In drafting opinions, I thought I was making a significant analytical contribution. Rereading them, I see how seamlessly they fit into Harlan jurisprudence. I never sensed that the Justice was imposing a rigid judicial philosophy. Nevertheless, he always conveyed how a matter should be resolved and how that conclusion should be supported if it were to be a Harlan opinion.

Three incidents capture the Justice's special qualities.

A snowstorm in the winter of 1967 closed the Court early. As the Justice and Paul were leaving, he noticed that I was still hoping to catch my bus to Prince George's County, 180 degrees away from Georgetown. He unhesitatingly told me that Paul would take me home and he would not hear any suggestion that we drop him off first. I think he was concerned about my worried wife, then 22 and newly arrived in Washington. He instinctively realized how much she needed and appreciated his fatherly interest, and was exceptionally gracious to her. She adored him, but that was hardly unique among law clerk spouses.

The Court originally reviewed *Roth v. United States* in the 1966 Term. *Roth* involved distribution of some low-quality pornographic films at a time when "I know it when I see it" obscenity doctrines required first- hand review of the allegedly offending material. The Chief had arranged a showing of the *Roth* materials, and Justice Harlan felt obligated to attend, although there was no chance, because of his impaired eyesight, that he could actually see the grainy film. I then had a singular movie-going experience, sitting among seven participating Supreme Court Justices and narrating the actions on the screen. The Justice took the whole thing somberly, making it plain that no impediment or embarrassment would deter him from doing everything his job entailed.

In late summer of 1971, the Justice was taking radiation treatment. John Rhinelander and I visited him one August afternoon. We came into his room just when he was returning from treatment, obviously exhausted and in pain. He lay quietly and listened to us as we tried to make small talk. Seeking to distract him, I mentioned that my son had very recently been born. Without hesitation, but with an enormous effort, the Justice raised himself on one elbow and reached out to shake my

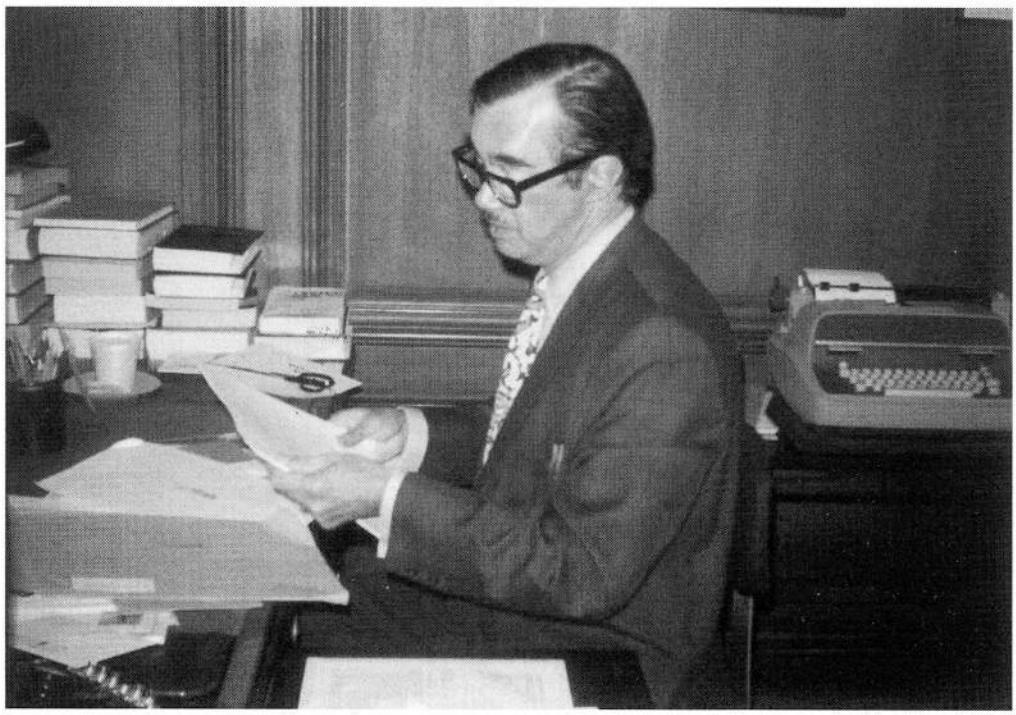
hand and congratulate me. I can still see his frail arm emerging from the hospital sheet. I realize now that he had to do this because he always did the right thing.

LOUIS R. COHEN

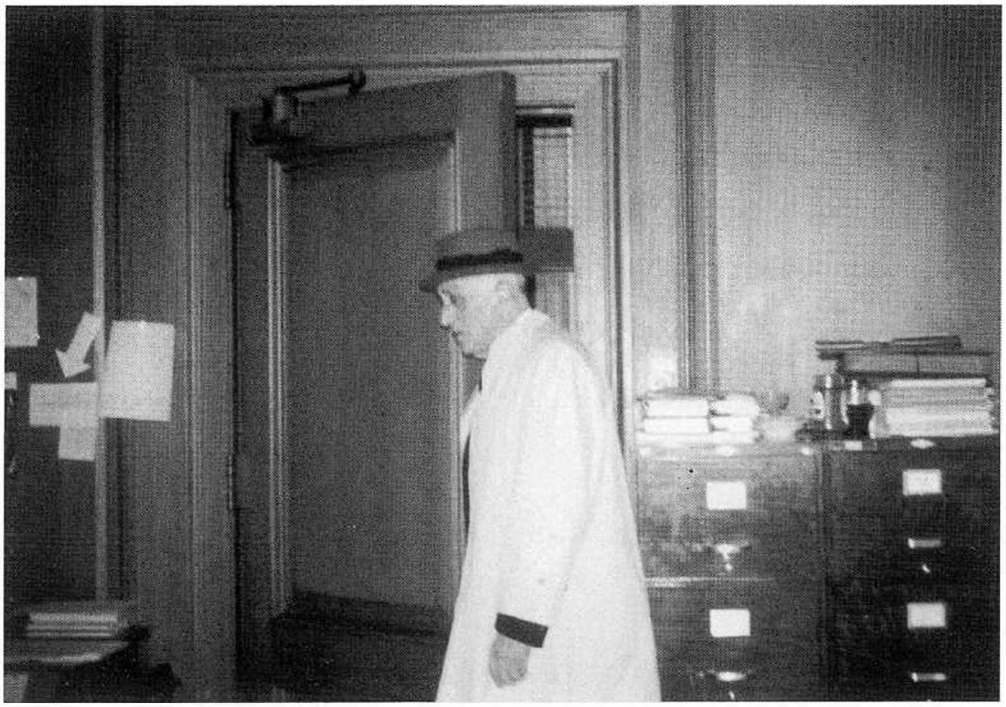
Partner, Wilmer, Cutler & Pickering, Washington, D.C.
Deputy Solicitor General of the United States 1986–1988
Law Clerk 1967–1968

During my clerkship, my wife and I lived in Georgetown, a block from the Harlans, and I went there every morning for coffee with the Justice and Mrs. Harlan and to wait for Paul (the Justice's messenger) to take us to the Court. Conversations ranged fairly widely and sometimes veered in surprising directions because Mrs. Harlan, while still beautiful and always welcoming even at breakfast, had by then a very erratic memory.

One morning in the spring of 1968, we all said nice things about Ladybird Johnson, then the First Lady, who was responsible for filling Washington's public spaces with the flowers that were suddenly coming up. When either the Justice or I mentioned her predecessor, Jacqueline Kennedy, Mrs. Harlan suddenly looked distressed and after a moment said to the Justice, "Who is that, dear? I can't seem to remember." I wanted to disappear: Jackie was then on two or three magazine covers every week, and I was sure Mrs. Harlan's lapse of memory in my presence was very painful for the Justice. I also wondered how we were going to get past the moment, since the "public" Jackie did not seem to stir a memory. The Justice, however, simply looked over at Mrs. Harlan and said, "You remember, dear. Janet Auchincloss's daughter." The personal connection produced an immediate smile of recognition from Mrs. Harlan, and the moment passed—but not without my realizing that I had just witnessed an instant of extraordinary grace.



Paul Burke, Justice Harlan's longtime messenger.



The Justice, in his familiar coat and hat, arriving at work in 1970. Each morning he would enter through the clerks' office, saying "Good morning, boys!"

THOMAS B. STOEL, JR.
Environmental Attorney and Consultant, Washington, D.C.
Founder and Former Senior Attorney, Natural Resources Defense Council
Law Clerk 1967–1968 and 1968–1969

My most enduring memory of Justice Harlan is of the way he usually entered his chambers in the morning. The door to the law clerks' room would open, and there would be the Justice, tall and a bit stooped, in his gray hat and three-piece suit. Doffing the hat with a little sweep and bowing slightly, he would grin and say: "Good morning, boys! How are you this morning?"

The Justice's even temper and unfailing good cheer made it a pleasure to work for him. When I stopped to recall that he was legally blind due to what I now assume was macular degeneration, and that his wife suffered from the terrible symptoms of Alzheimer's disease, I realized how remarkable the Justice's demeanor was. Yet on a day-to-day basis I took it for granted.

The Justice's near-blindness made him especially dependent on his law clerks, and when he was in Chambers, he spent virtually all his time with one or more of us. Like the other clerks, I would preview with him the docket for the Court's weekly conference, go over cases prior to oral argument, read to him from previous opinions that were relevant to current cases, and talk with him about the pros and cons of decisions, sometimes watching him change his mind two or three times as he weighed the merits and decided how to vote. After drafting an opinion, I would read the scrawled changes and comments he laboriously entered on the draft and sit with him while he explained the additional modifications he wanted. He always listened patiently to my views, even when they differed from his.

One reason why this substantive work was so rewarding was Justice Harlan's unwavering integrity. He refused to vote in elections. He wouldn't clap when presidents announced initiatives in the State of the Union address. He seemed unconcerned about how the outside world might view him as a result of his judicial opinions.

I especially remember *Street v. New York*, a 1969 case in which a man burned an American flag in public to protest the shooting of civil rights leader James Meredith in Mississippi. Justice Harlan and I talked for a long time about that case. Although he was labeled a conservative, the Justice concluded that the First Amendment protected this form of demonstrative speech. A majority of the Court agreed at conference, and the opinion was assigned to Justice Harlan. Justice Harlan never wavered, though others did. After his opinion was circulated, the majority at conference melted away, and it looked as though the Court would hold that flag burning wasn't constitutionally protected. Finally, a majority joined Justice Harlan's revised opinion holding that Street might have been convicted because he violated a provision of the relevant New York statute forbidding anyone to "cast contempt upon [the flag] by words." Four Justices—Warren, Black, White, and Fortas—dissented, declaring emphatically that flag burning was not protected speech. The flag-burning issue wasn't resolved until 1989, when the Court upheld Justice Harlan's view of the First Amendment in *Texas v. Johnson*.

BRUCE A. ACKERMAN

Sterling Professor of Law and Political Science, Yale Law School
Law Clerk 1968–1969

I worked with Justice Harlan in one of his last years on the Court. He was struggling against multiple adversities. His eyes were dim; his personal life was unsettled; his jurisprudence was in eclipse. And yet he was full of joy. He genuinely welcomed my endless efforts to debate the fundamentals of his philosophy. Never once did he show the slightest impatience as I sought—with the sublime confidence of youth—to persuade him to abandon convictions of a lifetime. He listened quietly, responded forcefully, and waited for more. The more we talked, the more I listened.

I often had breakfast with him and Justice Black. Jurisprudential adversaries, they had become fast friends, and their conversation taught me new possibilities: gentleness, gentlemanliness, and genuineness. One day, at breakfast, the Justice casually remarked that he had never voted since he became a judge. It was wrong, he thought, for a member of the Supreme Court to think of himself as a Democrat or Republican, even for the minute it took to cast a ballot. I forget what Justice Black said, but I was silent. A proud product of Yale Law School, I was surprised by such expressions of naivete from such august presences. A new prospect opened: Could it be that the Constitution might provide a connection that might bond all three of us—a Princeton aristocrat, a Southern populist, a Bronx Jew—together?

PAUL BREST

President, The William and Flora Hewitt Foundation
Dean, Stanford Law School 1987–1999
Law Clerk 1968–1969

The year that I clerked, Iris's and my daughter, Hilary, was three years old. Justice Harlan invited her to visit one afternoon when the Court was not in session. After having tea in his chambers, we went into the courtroom. The Justice placed Hilary in the Chief Justice's seat and then stood at the lectern making an oral argument to her. Whether from direct recollection or from its frequent retelling, this experience remains vivid for Hilary—now a lawyer—thirty years later.

Among the cases argued during the October 1968 Term was *Stanley v. Georgia*, in which the defendant was convicted for pos-

sessing pornographic films in his own home. Though the case was ultimately decided on grounds of privacy, this did not deter several of the Justices and all of the clerks from viewing the films, which included some porn classics, in the basement of the Court. I recall Justice Marshall, who was obviously familiar with the repertoire, watching with gusto; and Justice Stewart watching straight-faced and uncomfortable to determine whether he knew it when he saw it. Of course, Justice Black didn't watch, since he was committed to the constitutional protection of pornography whatever its content. And Justice Harlan did not watch because he couldn't have seen the screen. In fact, he was at home that day, but no sooner had I returned to chambers than he phoned and asked for a report. With some embarrassment, I reported in generalities, and he pressed for what turned out to be literally a blow-by-blow description, occasionally interrupting with his most common interjection, "Extraordinary!" What clinched the decision on the merits for Justice Harlan was that if the authorities could intrude in Mr. Stanley's home in this manner, they could intrude in his lunch club as well.

CHARLES L. FABRIKANT

Chairman and CEO, Seacor Smit, Inc., New York City

Law Clerk 1969–1970

The Justice was a Gentleman with a capital "G," and he was also a gentle person. He had a rare combination of intellectual depth, analytical skill, a sense of fairness, an appreciation for history and politics, a wry sense of humor, and a warm and caring personality. The most prominently featured artwork on the Justice's door was his grandson's drawing with the comment, "You may be a judge, but I made the decision to send you this birthday card."

I was fortunate to live around the corner from the Justice. I could always hitch a ride with him in his Buick, the only car with a roof high enough to allow him to ride without removing his hat. It was also my good fortune to eat breakfast in his home quite frequently. I can't recall if breakfast included bacon, but without fail he had two boiled eggs and toast. In one of the Justice's many moments of wry humor he decided to compute how many boiled eggs he had eaten in his life. He had eaten 36,000 boiled eggs, give or take. It was a staggering number. On reflection, the Justice pronounced this "disgusting."

Very often my day also ended at the Justice's house. Around 9:00 at night, Justice Harlan would call to check up on his bachelor clerk's social life. When he found me home, he invariably extended an invitation to drop by the house. After about twenty minutes of conversation the Justice would ask if I wanted to join him for a glass of bourbon. The recipe was precise: to the best of my recollection it required two or three cubes of ice, a pour of Rebel Yell, measured from the bottom of the glass to the first joint in my finger, and water to the top of the glass. (Maybe another clerk recalls the recipe more accurately.) We were now prepared for discussion, about pending cases, politics, and sometimes reminiscences about the Justice's career as a prosecutor busting prohibition violators. We were also fortified to cure winter colds. The Justice had a lot of faith in bourbon as a cure for just about any ailment.

Looking back on my association with this extraordinary individual, it is hard to isolate one lesson or insight about justice, law, and life from the many that he imparted. However, there is one remarkable pronouncement that is still vivid in memory, and which I have repeated to friends on many occasions. I distinctly recall watching television with the Justice one day. I can't say now if we were watching a confirmation hearing (ours was the year of the Haynesworth confirmation hearings) or if it was a year after my clerkship, on one of the occasions when I dropped by to pay a neighborly visit. He observed (with some license for paraphrasing), "Mark my words, by the time you are a middle-aged

man, few people of quality and integrity will want to run for public office in America." As usual, the Justice demonstrated extraordinary insight.

WILLIAM T. LAKE

Partner, Wilmer, Cutler & Pickering, Washington, D.C.

Law Clerk 1969–1970

Late in Justice Harlan's time at the Court, his friendship with Justice Black seemed to grow in importance even as their philosophical differences became more plainly etched. The October 1969 Term was the Justice's penultimate full Term on the Court. A number of cases that Term brought to the fore the differences in the two Justices' approaches to the Constitution—with Justice Harlan continuing to dissent from decisions that applied the Bill of Rights to the states, but joining in rulings that breathed content into particular Amendments that Justice Black asserted could not be found in the Amendments' plain text.

These differences did not impair the special bond that existed between the two Justices. Only to Justice Black's chambers did the Justice send his law clerks as emissaries to explain a difference, to advocate a position, or to explore possible common ground. And only from Justice Black's chambers did we receive such delegations. Both Justices enlisted their clerks in their efforts to bridge differences when possible and to explain them and soften their emotional impact when they could not be bridged. I remember noting with surprise that very few such exchanges seemed to occur among the members of the Court generally. The Harlan-Black dialogue seemed the exception, born of strong personal affection and respect.

The affinity between the two Justices found particular expression during their final illnesses in 1971. They had adjoining suites at Bethesda Naval Hospital, which opened into a common area that became on late afternoons the site of "happy hours" in which the two Justices would chat with family, former law clerks, and friends. It seemed clear that Justice Harlan welcomed the proximity to his friend and the opportunity to buoy Black's spirits through his own unflagging good humor.

Of the other Justices, Potter Stewart also was a great source of comfort to the Justice at that time—Stewart could be found on many afternoons sitting at Harlan's bedside describing in detail the issues in the current cases and the doings at the Court. But there was a particular rightness in Justice Harlan's sharing his twilight months with his dear friend Hugo. Though their illnesses did not "succumb to a bit of bourbon," as tough legal issues had done earlier on more than one occasion, the sting of those illnesses was reduced by the opportunity of the two friends to face them together.

ROBERT H. MNOOKIN

Williston Professor of Law and Chair, Program on Negotiation, Harvard Law School

Law Clerk 1969–1970

What a marvelous year I spent with the Justice. Bill Lake, Chuck Fabrikant and I were given the chance to work on an extraordinarily interesting array of cases with an inspirational mentor. The Justice was gracious and courtly without ever being stuffy; he combined seriousness and high standards with a wonderfully wry sense of humor.

By our Term, the Justice's life was almost exclusively focused on the Court and his work. Because of his impaired eyesight, we spent many hours reading him various materials. And because of Mrs. Harlan's illness, the Justice's outside social life was substantially diminished. All of this meant more time with his clerks. It also meant that every day he demonstrated patience and grace in the face of adversity.

The nation was in turmoil because of the Vietnam War. My first assignment for the

Justice was to prepare a memorandum, which was later circulated to the entire Court, on several cases that presented questions relating to the appropriate treatment under the Selective Service Act and the Constitution of persons who opposed the war but were not religious, at least in the conventional sense. The Conference accepted Justice Harlan's recommendation to review *United States v. Sisson* and *Welsh v. United States*. In *Sisson*, the Justice subsequently wrote a full opinion interpreting the Criminal Appeals Act and dismissing the government's appeal in a case in which Judge Charles Wyzanski (with the Solicitor General's assist) had tried to foist jurisdiction upon the Court. In *Welsh*, the Justice wrote a separate concurring opinion suggesting that limiting the draft exemption "to those opposed to war in general because of theistic beliefs" would run "afoul of the religious clauses of the First Amendment."

Our small office included Paul Burke (the Justice's very capable messenger, who acted as a general assistant) and Ethel McCall (the Justice's formidably controlling secretary). Mrs. McCall was proud of the fact that she lived in the elegant Watergate apartments (not yet a household word) along with Attorney General John Mitchell and other Nixon luminaries. Outside the Court, there were many protests and marches in Washington and beyond. I would tease Mrs. McCall by suggesting that living in the Watergate was a big mistake because, in my words, "come the Revolution, the Watergate, like the Bastille, will be the first to fall."

One day, late in the Term, Mrs. McCall came into our office and said to me "I had to give them your name." "Give my name to whom?" I asked. "To the FBI," she said with a straight face. There had been some sort of bomb threat with respect to the Watergate, and as a consequence she claimed the FBI had gone door-to-door to ask residents if they had ever heard anyone make threatening comments about the Watergate. To this day, I don't know whether she was kidding. Someday I may use the Freedom of Information Act to see whether, as a result of my clerkship, I have an FBI record.

MARVIN L. GRAY, JR.

Partner, Davis Wright Tremaine LLP, Seattle

Law Clerk 1970–1971

When Justice Harlan wanted someone to work with him at home in the evenings, he usually called on me, as I was the only bachelor among his clerks during the 1970 Term. Justice and Mrs. Harlan lived in a gracious townhouse in Georgetown; I was particularly fond of the designs from the Unicorn Tapestries that were stenciled on the staircase wall.

Evening working sessions were preceded by cocktails and dinner; the Justice's preferred drink was Rebel Yell. After dinner we worked in a small upstairs study littered with volumes of the **United States Reports**.

On the occasion that I remember best, the Justice wanted to review the record in *Clay v. United States*, Muhammed Ali's effort to obtain reversal of his conviction for draft evasion. The only ground for reversal was if the record showed "no basis in fact" for rejecting Ali's claim to be a conscientious objector. This standard of review was extraordinarily deferential.

Justice Harlan asked me to read him the transcript of Ali's appearance before the Justice Department hearing examiner (who himself had found Ali to be a qualified and sincere conscientious objector, but whose recommendation had been rejected). As he listened to Ali's testimony, the Justice said, "You know, there's the ring of sincerity in what he says." Later he said, "I'm going to talk to Black about this case." Ultimately the Court voted unanimously to reverse Ali's conviction. I always felt that that result came out of that evening's work.

The 1970 Term was an extraordinary

one. The Court had lacked a ninth member for well over a year, as a result of the Fortas/Haynesworth/Carswell episodes. Many significant cases on which the Court was equally divided were reargued and decided that Term, as Justice Blackmun's arrival had finally provided a full Court. Other major cases, such as the eighteen-year-old vote case, *Oregon v. Mitchell*, and the Pentagon Papers case, *New York Times v. United States*, arose that Term on their own.

At the time these all seemed to be monumentally important cases, and in some respects perhaps they were. With the benefit of thirty years of hindsight, however, I am not sure how the world would have changed if these cases had been decided differently. The one decision of the Court that year that I am confident made a difference was the reversal of Ali's conviction, which made him eligible to regain his status as heavyweight boxing champion and ultimately permitted him to become one of the world's best known and most respected athletes. That reversal would not have occurred but for Justice Harlan's humanity, courage, and sense of justice.

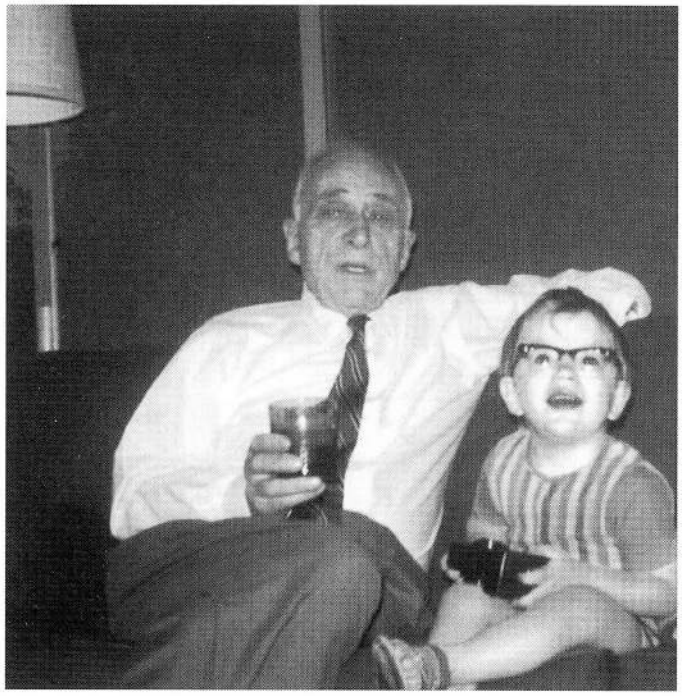
THOMAS G. KRATTENMAKER

Partner, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC, Washington, D.C.

Law Clerk 1970–1971

"To Tom and Bevra and Kenny . . . I shall miss you." That's how Justice Harlan inscribed his portrait photograph that he presented to me as I ended my clerkship with him for the 1970 Term. Of course, the "Tom" is me. "Bevra" is my wife. "Kenny" (now Kenneth) is our son. He was then less than three years old. Yet the Justice saluted Kenny just as he did me.

That inscription is only the most tangible example I have of what Mr. Justice Harlan displayed the entire year I worked for him—a deep and sincere care, not only for those who worked closely with him but for those close to those who worked for him. We saw this with many people, but it was most dramatic with Kenny. When our then two-year-old first came to visit at the Court, Justice Harlan knew just what to do: he pulled out that vest pocket watch he carried every day and dazzled



Clerk Tom Krattenmaker's son Kenneth, age 2, was entertained by Justice Harlan, who would spin his pocket watch to amuse him.

Kenny with lessons in how to spin it. Every time he came to the office again, Kenny went straight to the Justice and his pocket watch. He was never turned away.

Near the close of the Term, my wife and I invited the Justice to dinner. His eyesight by this time was almost completely gone, so the Justice was somewhat less than a perfectly neat diner. Crumbs would occasionally fall unnoticed from his plate to the table. Bevra and I were startled and embarrassed when we heard Kenny pipe up with, "Mr. Justice, you should not be spilling your soup on the table cloth!" Justice Harlan did not miss a beat. He turned to the little fellow, smiled, and very kindly replied, "You're right, Kenny; I should not have done that."

The day after the Justice died, Bevra and Kenny were traveling in our car. A newscaster reported that Justice Harlan had died. Kenny, who had not yet learned of this, burst into tears. He thought he had lost one of his best buddies. Kenny was right; he had lost a very good friend. And the fact that Justice John M. Harlan took the time to be a pal to my little boy is one of the things I remember best about the man. It's one of many reasons—but a very big one—why I remain very proud and honored that I had the privilege to serve the Justice for a short time.

MARTIN D. MINSKER

Partner, Baker Botts LLP, Washington, D.C.

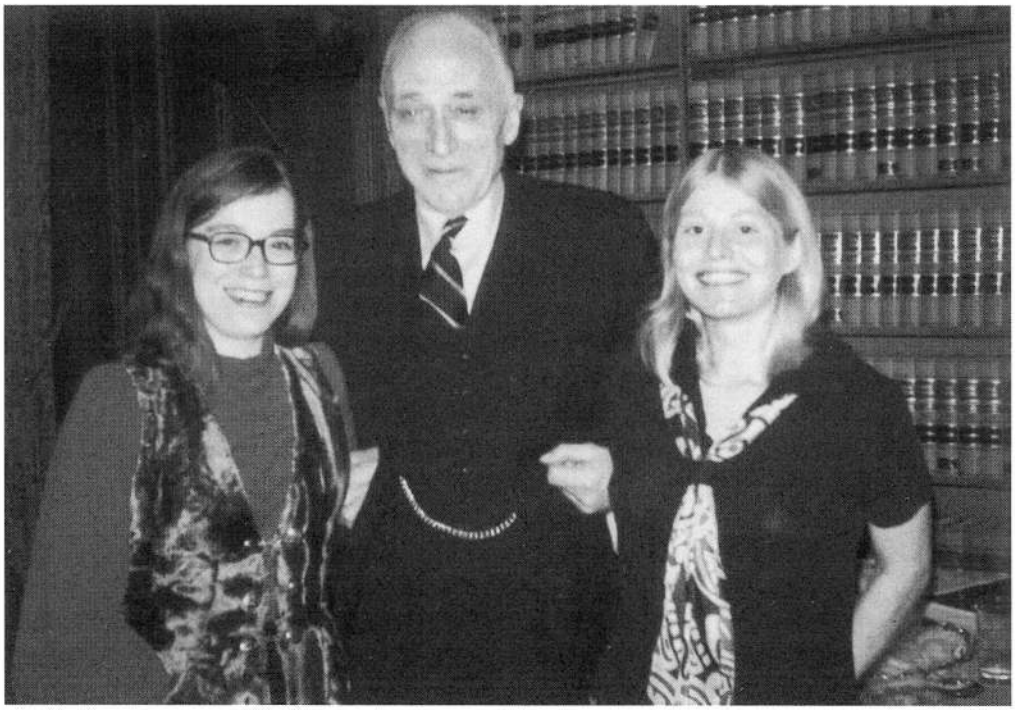
Law Clerk 1970-1971

I have two special recollections of the Justice.

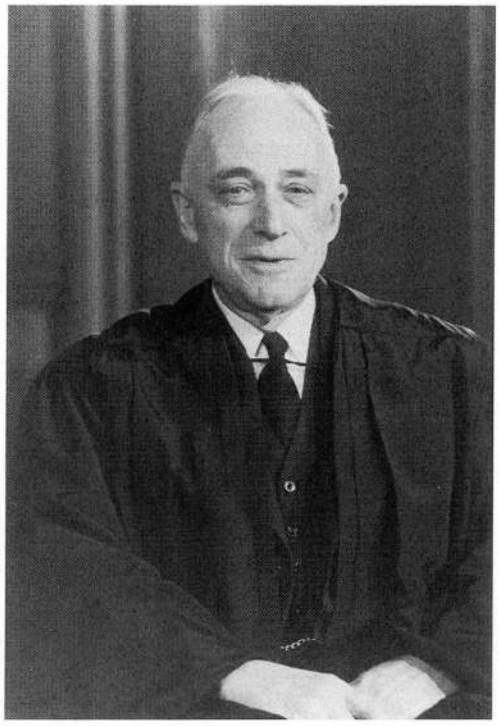
(1) This is a story that Justice Harlan told me about Learned Hand. When Justice Harlan entered the practice of law in the firm led by Emory Buckner, his initial assignment was to prepare a brief in the Second Circuit in a case for an important client. When the case was called for oral argument, Buckner, Harlan, and the client were all in the courtroom.

At the outset, just as Buckner was beginning to address the court, Judge Learned Hand interrupted and asked, "Mr. Buckner, who wrote this brief for your client?" Buckner replied, "My associate John Harlan did, Your

The 1970 Christmas party in Chambers with Paul Burke, the Justice, Loretta Burke, and Ethel McCall.



The Justice and his clerks, Martin D. Minsker, Marvin L. Gray, Jr., and Thomas G. Krattenmaker, in 1970, in what turned out to be Harlan's penultimate term. The Justice and wives Bevra Krattenmaker and Judy Minsker are pictured below.



Justice Harlan, hospitalized with bone cancer, postponed announcing his retirement in 1971 so as not to distract the nation's attention from the news that his close friend Hugo L. Black was retiring. "You see, . . . Hugo is a truly great man," he informed his clerk.

Honor." Judge Hand then threw the brief across the courtroom, remarking, "Well, you can just take it back, because it is too long and I won't read it."

Needless to say, Harlan, as a neophyte in the practice of law, was devastated. Right in front of one of the firm's most important clients, the appellate court had rejected his brief, thereby apparently depriving the client of a key point of access to the court's deliberations.

Buckner, however, immediately rose to the occasion. After Hand finished, Buckner responded, "Well, if the Court doesn't read the brief, it's the Court's loss, because it happens to be an excellent brief." He then went on with the argument. To Judge Hand's credit, at a later time he called Harlan into his chambers, apologized for his display of judicial distemper, and said that he had read the brief and that it was indeed excellent. (No, I don't recall the outcome of the case.)

I never had the privilege of arguing a case before Justice Harlan, but I have been told that he was a consummate gentleman with advocates. I have often thought that a small part of his commendable judicial demeanor might be attributable to the memory of his early encounter with Learned Hand.

(2) I served as a clerk during Justice Harlan's last complete Term. He asked me to stay for the coming year, so I was one of his law clerks during the summer of 1971, when he took ill and went into the hospital. Justice Black was hospitalized at the same time.

Eventually, Justice Harlan decided he had to retire because of his medical condition. He informed me in advance so that I could assist with certain administrative matters.

When we were in this phase, I went to visit Justice Harlan at the hospital. He told me he had decided to postpone the announcement of his retirement. He explained that he had learned that Justice Black was also about to retire because of health. He did not want to do anything that would divert the full attention of the American people from Justice Black. In further explanation, he said something that

struck me at the time as remarkable, in light of his fundamental jurisprudential differences with Justice Black: "You see, Marty, Hugo is truly a great man." Admiring the Justice as I did, my instinct was to reply, "But you're a great man too." However, I restrained myself and said nothing.

JAMES R. BIEKE

Partner, Shea & Gardner, Washington, D.C.

Law Clerk 1971

We were Justice Harlan's last law clerks. In mid-summer 1971, Allen Snyder and I joined Marty Minsker (a holdover from the 1970 Term) in the expectation of serving as clerks for the 1971 Term. Unfortunately, our period of service lasted only a few months.

I first met Justice Harlan in the fall of 1970, while I was clerking for Judge Lumbard, then Chief Judge of the Second Circuit. Judge Lumbard decided to drive Justice Harlan to the Second Circuit Judicial Conference in Lake Placid, and he asked me to accompany them. Judge Lumbard drove, with his wife in the front. Justice Harlan and I sat in the back while I read newspaper articles to him. Shortly thereafter, I applied to be the Justice's clerk for the 1971 Term. Lacking confidence that an expertise in newspaper reading would be a sufficient qualification, I also applied to a few other Justices. During the interviews, Justice Blackmun suggested that, while he would like to offer a clerkship, I might want to wait for Justice Harlan since "he is much greater than I." I waited; and Justice Harlan offered a clerkship, but warned that since he was getting old, there were no guarantees of a full Term. I accepted, feeling that there could be no better experience than the chance to clerk for JMH.

I arrived in Washington in July 1971. Justice Harlan had offered to let me stay in his home in Georgetown until he returned from Westport in September. I did so and have many fond memories of that brief period. My wife reminds me that we ate figs from his fig tree—the first time that we had tasted fresh figs. At the Court, we reviewed cert petitions, prepared Bench memos, and kept in touch with the Justice by phone.

The Justice returned in August because he had not been feeling well, and entered Bethesda Naval Hospital for tests. (Justice Black was in the next room.) For the next month, we made frequent trips to the hospital, bringing him applications and other Court papers, going over them, and getting signatures. We also smuggled in Lark cigarettes, which he smoked constantly, and Rebel Yell bourbon, which he consumed sparingly after we transferred it to hospital cups with straws so the nurses couldn't tell.

By September, it became clear that the Justice would not be able to continue, and he retired. He also transferred to George Washington University Hospital. Throughout the fall, we continued to work in the chambers, dealing with correspondence and the like (not to mention the formidable Ethel McCall), and we made frequent visits to the hospital. The Justice's condition worsened, and he passed away in December.

In the meantime, I asked Justice Stewart if I could return as his law clerk for the next Term. He agreed, and I spent the 1972 Term as his clerk.

Although my time with Justice Harlan was brief, I'm glad to have had the opportunity to know him and work with him even for a short period. As Justice Blackmun recognized, he was one of the great Justices in recent times.

ALLEN R. SNYDER

Partner, Hogan & Hartson, Washington, D.C.

Law Clerk 1971

My service as Justice Harlan's last law clerk was, of course, a great honor, but one dominated by a sense of grief and loss—not just for me but for the Court and the country.

I had met the Justice only briefly before starting my clerkship, but was immediately struck at that time (his interview of me) by his special combination of an elegant, patrician bearing with a truly warm and caring manner. I arrived for work at the beginning of August 1971, filled with excitement and enthusiasm. The Justice was on vacation the first week of August when Jim Bieke and I started, and our co-clerk, Marty Minsker—who had clerked for the Justice the prior year—showed us the ropes so we could get started on the usual pile of accumulated cert petitions and other work to prepare for fall arguments.

Within about a week or two, we learned that the Justice was returning to check into Bethesda Naval Hospital to have doctors there run some tests to try to diagnose the cause of some back pain he had been experiencing. We visited him there and he seemed to be doing fine. We had the impression it was nothing too serious. Indeed, we quickly got into the pattern of regular visits to Bethesda to work with him on Court business—reading to him our cert memos, discussing upcoming cases and issues he wanted us to research for fall arguments. While the hospital room setting was certainly unusual, it seemed to be the beginning of the type of personally and intellectually rewarding experience I had envisioned. The Justice's intellect and warmth were evident even as he was spending most of his time with medical procedures.

As we all know, however, within a relatively short time, the doctors discovered that what at first seemed like relatively minor back pain was an early symptom of bone cancer, and the Justice soon announced his retirement. All of us were in shock. The Justice seemed to handle this with more aplomb and grace than anyone.

I continued on as clerk to the retired Justice, visiting him regularly in the hospital and trying to help with a number of matters in the chambers. In late December, when Justice Rehnquist was confirmed, he contacted me and asked me to clerk for him, which I did for the remainder of the Term.

Thus, I had only a tiny glimpse of the true Harlan clerkship experience. I saw enough to know what a thoughtful and insightful legal mind he had, and what a warm and thoroughly decent man he was. Indeed, whenever I looked into those twinkling eyes, which had difficulty seeing the mundane, it was obvious that they could see easily the more important things in life.

I wish we had all had more time with him.

ENDNOTES

[1]Paul Freund, foreword to **The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan**, xiii, xiv (David Shapiro, ed., 1969).

[2]Earl Warren, "Mr. Justice Harlan, As Seen by a Colleague," 85 *Harv. L. Rev.* 369, 370–71 (1971).

The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court

LAURA KRUGMAN RAY*

Introduction

Readers of Supreme Court opinions have become so accustomed in recent years to the multiple concurrences and dissents that accompany important opinions that it is difficult to recall that this is a relatively recent phenomenon. It is only in the past century that the Court's traditional balance of the institutional and the personal has shifted from an insistence on presenting what Learned Hand termed "monolithic solidarity" to the world.[1] That insistence began with Chief Justice Marshall's determination that the Court should resolve its cases, not *seriatim*, with each Justice writing separately, but instead in a single, unified opinion.[2] The resulting culture of the Court, one that discouraged both dissenting and concurring opinions as assaults on this unified front, persisted from Marshall's day into the 1930s.[3] The Court in the nineteenth and early twentieth centuries thus deliberately submerged the idea of a personal voice in the fiction of a collective voice, one that spoke for the institution rather than for the Justice who served as its designated scribe.

The monolith began to splinter in the early decades of the twentieth century and today is barely recognizable. With the dramatic upsurge in the number of dissents and concurrences written by the Justices since the late 1930s,[4] there has been no lack of opinions that speak directly—even emotionally—about their authors' individual positions. At the same time, however, those inside and outside the Court still value the ideal of a majority opinion that speaks for all the Justices who have joined it. The consequence for the Court of this tension between institutional and individual authorship is a more complicated and more finely calibrated jurisprudence, one in which Justices feel free to pick and choose among the parts of a colleague's opinion, joining only those that they wholeheartedly

endorse and writing separately to detail their points of divergence.

This shifting balance between the impersonal and the individual is evident as well in the history of what was traditionally the most impersonal variety of opinion, the per curiam, which suppressed not only the identity of its author but the idea of attributed authorship itself. In its earliest appearances, the per curiam was true to its name, authored anonymously and presented "by the Court" rather than by a designated Justice, to express a result that enjoyed full institutional support.[5] The subtext of a per curiam was clear: this case is so easily resolvable, so lacking in complexity or disagreement among the Justices, that it requires only a brief, forthright opinion that any member of the Court could draft and that no member of the Court need sign. The per curiam was not, however, insulated from the shift in the Court's opinion writing process from impersonality to individual expression. Rather, the per curiam has functioned as a microcosm of that shift, reflecting in its evolution the increasing tendency of the Justices to assert their personal views even in the most impersonal context.

Thus, in the late 1930s, as concurrences and dissents proliferated, the role of the per curiam also changed. Per curiam opinions increasingly came with dissents attached, creating an oxymoronic form, one that simultaneously insisted on both institutional consensus and individual disagreement. In the 1950s and 1960s, the Court also found that the impersonal nature of the per curiam made it the ideal instrument for a variety of strategic purposes, from the efficient resolution of urgent cases to the evasion of controversial issues to the making of new law by indirection. By the 1970s, the Court had adapted the per curiam to a purpose diametrically opposed to its original use, producing per curiam opinions accompanied by as many as nine separate opinions, each asserting a strong and independent position.

Viewed against the backdrop of the Court's increasingly individualized opinion writing, the story of the per curiam encapsulates the larger history of the Court's refinement of its decisionmaking role. An examination of the ways in which the Court has adapted the per curiam to its changing needs will also chart the uneven course of the Court's continuing struggle to balance its institutional role as an agent of consensus against the demands of its Justices for individual expression.

I. The History of the Per Curiam Opinion as a Form of Judicial Expression

A. The Background: An Instrument of Consensus

The Supreme Court's first officially designated per curiam opinion to be published appeared in 1862, when the Court in *Mesa v. United States*[6] proclaimed "Let this appeal be dismissed" for failure to file a transcript within the congressionally prescribed time.[7] The opinion was a bare forty-two words and, beyond its initial command, contained only one other sentence. It resolved a motion, apparently without oral argument, and occupied less than a page in **U.S. Reports**. It was, in short, an efficient method of disposing of a routine matter with a minimum of judicial exertion. However, *Mesa* was not the Court's first use of the heading. That honor belongs to *West v. Brashear*, a motion decision restoring a case to the docket, that somehow was overlooked when it was issued in 1839.[8] Fifty years later, *West* was published in the appendix to Volume 131 as one of the "Omitted cases now reported in full."[9]

In the years that followed *Mesa*, the Court found additional uses for per curiam opinions in resolving such routine matters as dismissals for lack of jurisdiction, grants or denials of certiorari petitions, and a range of motion decisions. Some twenty-five years after *Mesa*, the Court began to include on oc-

casion a brief explanation of the basis for its result. In 1889, in *Sherman v. Robertson*,[10] the Court for the first time cited to precedent as the ground for reversal in a per curiam opinion,[11] a practice that soon became entrenched and continues to the present.

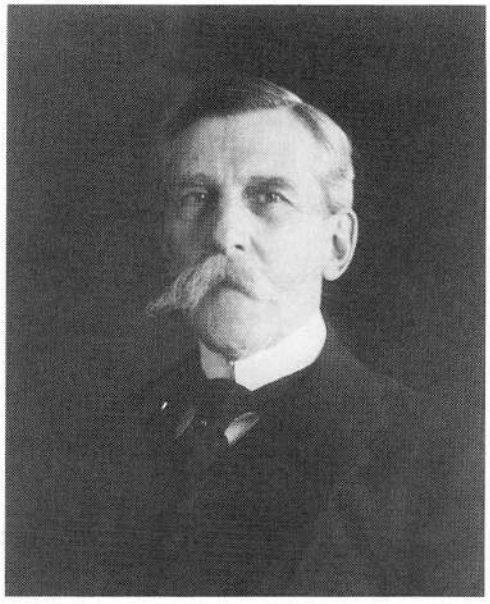
By the early years of the twentieth century, the Court routinely used the per curiam to dismiss cases and to affirm or reverse decisions below. All of these opinions were quite brief, often not even a complete sentence; on rare occasions, a decision might contain more than a single paragraph, although not a sustained argument. For example, the per curiam opinion for *United States v. Marvin*[12] covers three pages, but most of the text consists of a quotation from the findings of fact and conclusion of law of the court below.[13] In a half page, the Court does, uncharacteristically, summarize the positions submitted in writing by counsel, but the Court's own resolution consists of two sentences: the first citing to the cases in which "[t]he various applicable statutory provisions will be found" and the second accepting the lower court's use of precedent and affirming its judgment.[14] Though lacking in sustained argument, the opinion nonetheless signals a shift from cursory case resolution toward the more fully developed opinions of argued cases.

That shift was significantly advanced when, in the 1934 Term, the Court began using the per curiam to resolve cases on the merits. Volume 295 of **U.S. Reports** contains four cases, all argued to the Court, which are either affirmed or reversed by per curiams issued within two weeks of oral argument. Two of these opinions, one slightly less than two pages and the other a half page, directly address the substantive issues raised by the decisions below.[15] In *Stanley v. Public Utilities Commission*,[16] the Court discussed the discretion appropriate to a state legislature in regulating carriers for hire and found no transgression.[17] The second opinion, *Texas & New Orleans R.R. Co. v. United States*[18], addressed the merits more succinctly and found orders of the Interstate Commerce Commission adequately supported by the Commission's findings.[19] The decisions are unexceptional in themselves, but they represent the adaptation of the per curiam to a new use: the resolution of significant issues in a condensed format. It is worth noting that both cases deal with aspects of the Court's New Deal agenda, the reach of regulatory power in legislatures and administrative agencies. The per curiam allowed the Court at once to signal that these cases warranted some exposition but were nonetheless so easily decided that they did not require the more elaborate presentation of a signed opinion.

The shifting role of the per curiam is reflected as well in the changing placement of the opinions. The early per curiams appeared in the rear section of **U.S. Reports**, together with other briefly noted resolutions of motions, under the heading "Decisions Announced Without Opinions." The per curiams became more numerous, and they were given a section of their own for the first time in the October 1902 Term, designated simply "Opinions Per Curiam."[20] Almost twenty years later, per curiams began to appear in the main section of the volume as well, although it took another decade before that became a regular practice. In *United States v. Malcolm*,[21] for example, the Court set forth in its entirety a certification from the court below before succinctly answering the questions;[22] the opinion appeared immediately before the separate section used for the briefer per curiams. Per curiams coexisted in both the main section of the volume and their own separately labeled section at the rear until the 1957 Term, when the heading was dropped, although per curiams continued to appear, grouped together, at the rear of volumes for several years thereafter.

B. The Transformation: The Decline of Consensus

Changes in the length and placement of per curiams, though notable stages in their evolu-



The first dissent from a per curiam was authored, appropriately, by the Great Dissenter himself, Oliver Wendell Holmes, Jr. (left), in the 1909 case involving the *Chicago, Burlington and Quincy Railway Company* (below is a CBQR engine).

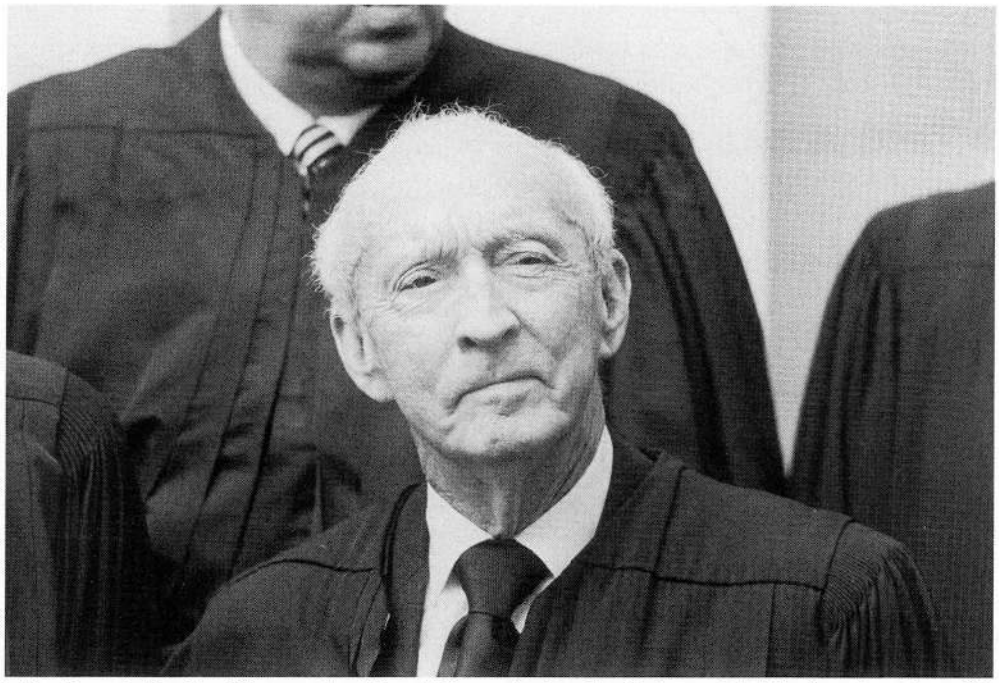
tion, pale in significance beside the dramatic shift from an opinion, however brief, supported by the entire Court to an opinion that carries on its face the disagreement of some Justices. For much of its history, the per curiam was unaccompanied by any indications of such divergence. The first dissent from a per curiam was authored, appropriately, by the Great Dissenter himself, Oliver Wendell Holmes, in the 1909 case of *Chi-*

cago, Burlington and Quincy Railway Company v. Williams,[23] before the Court on a certificate from the Eighth Circuit Court of Appeals. In its per curiam, the Court spent three pages setting forth the questions of law certified by the lower court before concluding that the certificate before it was "essentially the same as that disposed of" when the case had earlier been heard by the Court and that the present matter should be dismissed based on the earlier resolution. In his one-paragraph dissent, joined by Justices White and Moody, Holmes initially noted his reluctance to dissent "when it does not seem that an important principle is involved or that there is some public advantage to be gained from a statement of the other side."[24] He had therefore joined the Court's determination, when the case was first before it, that the questions certified were not within the statute giving the Court jurisdiction to resolve them. Since, in his view, the present certificate contained questions of pure law, the Court had jurisdiction and should respond.[25] Holmes thus at the same time assumed the modest stance of a reluctant dissenter and, *sub silentio*, changed the per curiam from a decision of absolute consensus to one of asserted disagreement.

Holmes' groundbreaking gesture of writing separately in a per curiam case was, surprisingly, not followed for more than two decades, and then in a significantly less emphatic manner. In a unanimous opinion authored by Justice Stone, the Court had dismissed the writ of certiorari in *Broad River Power Company v. South Carolina*[26] for lack of jurisdiction. On rehearing, the Court announced in its per curiam that it had reached the same result but that "the members of the Court differ in the reasons which lead to that decision."[27] Two separate statements followed, each supported by four Justices, with one Justice not participating. Instead of opinions written in the first person, each statement was formulated in the third person. Thus, "Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler concur in this disposition of the case, upon the rehearing, for the following reasons," while "The Chief Justice, Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone adhere to the views expressed" in the Court's prior opinion.[28] In *Broad River Power*, the impersonality of the per curiam became instead a thin mask for the clearly articulated disagreement of equal blocs of Justices.

Although a few intervening cases carried terse third party statements of disagreement,[29] the first full-fledged dissenting opinion attached to a per curiam appeared early in 1938, only three months after its author, Justice Black, joined the Court.[30] In *McCart v. Indianapolis Water Co.*,[31] the Court's per curiam opinion, authored by Chief Justice Hughes, spent barely four pages affirming an appeals-court decision that ordered further district-court review of water rates set by the Public Service Commission of Indiana.[32] In a solitary dissent of almost eighteen pages, Justice Black strongly attacked the Court's result on several grounds, most prominently the limited role assigned the federal courts in reviewing regulation of rates for intrastate utilities.[33] "I believe," he concluded, "the State of Indiana has the right to regulate the price of water in Indianapolis free from interference by federal courts."[34] Unsurprisingly, Black's dissent also carried populist overtones in its concern for the people of Indianapolis who, in his view, "are already compelled to pay an unjustifiable price for their water on account of previous judicial over-valuation of this property."[35] The boldness of the lengthy dissent to the Chief Justice's per curiam provoked concern on the Court, prompting Justice Stone to send Hughes the mysterious message that "I see in Justice Black's dissent the handiwork of someone other than the nominal author."[36] Black's subsequent record as author of concurrences and dissents indicates that Stone had misjudged his colleague.

As a new arrival from the Senate, where he passionately supported the New Deal



Justice Hugo L. Black's willingness to stake out his own territory in effect completed the transformation of the per curiam from its original role as an instrument of consensus to its new role as one more judicial battleground.

agenda, Black showed none of the tendency of Justices in their first Term on the Court to proceed cautiously and accept the guidance of their senior colleagues. A figure of great energy and ambition, Black launched his judicial career by writing a lengthy and detailed refutation of an opinion the other seven participating Justices thought required little elaboration or argument. Black brought to the Court a powerful sense of judicial individuality and a reluctance to submerge his own views. In the first paragraph of his opinion, he notes that "The importance of the questions here involved leads me to set out some of my reasons for" his position.[37] Black's willlingness to stake out his own territory effectively completed the transformation of the per curiam from its original role as an instrument of consensus to its new role as one more judicial battleground for the ideological battles to follow on the Roosevelt Court and its successors.

The first Roosevelt appointee to the Court, Black was followed to the Bench in quick succession by Stanley Reed in 1938, Felix Frankfurter and William O. Douglas in 1939, Frank Murphy in 1940, James F. Byrnes and Robert H. Jackson in 1941, and Wiley Rutledge in 1943.[38] Although most of Roosevelt's choices were strong-willed and highly individualistic, Black and Douglas were the two Justices who consistently appended dissents or, less frequently, concurrences, to per curiam opinions. In his thirty-four years on the Court, Black authored twenty dissents and three concurrences, while Reed, for example, added only one dissent in nineteen years and Frankfurter added seven dissents and seven concurrences in twenty-three years. However, even Black's substantial numbers pale before Douglas' performance. In his thirty-six year tenure on the Court, the longest of any Justice, Douglas wrote seventy-one dissents from per curiams, twenty-one concurrences, and five opinions simply labeled "separate." Together, Black

and Douglas led the Court toward a model of decisionmaking that never hesitated to disturb consensus opinions with statements of individual views.

As the practice of adding separate opinions to per curiams became established, the Justices in the 1940s added other refinements to their use of the per curiam. Not all separate opinions were conventionally labeled. In one 1943 case, for example, three Justices joined in a brief third-party statement disagreeing with the Court but not using the word "dissent," while Justice Jackson wrote a separate concurrence referring to the three as "the dissenting Justices."[39] Other variations included a separate opinion labeled neither dissent nor concurrence,[40] jointly authored separate opinions,[41] a per curiam announced by Justice Douglas, who had also authored a signed opinion for a related case,[42] and the growing tendency of Justices to join one another's separate opinions.[43] This tendency finally led in the 1960s to a per curiam opinion issued by the most closely divided Court possible: in *Niukkanen v. McAlexander* the Court issued a per curiam but nevertheless divided five to four, with three Justices joining a dissent by Douglas.[44]

At the same time, a complementary tendency of some Justices to fine-tune their separate views in per curiam cases emerged. By 1963, the practice of appending opinions that both concurred and dissented had begun. In a case that year, Justice Harlan filed an opinion concurring in part and dissenting in part; he believed that certiorari should not have been granted, accepted the Court's result, but disagreed with its rationale.[45] The Justices also began to note partial agreement, as in a 1964 opinion by Justice Douglas concurring in part with the Court's per curiam.[46] By the 1970s, when separate opinions had begun to proliferate, the Court decided cases in which all nine members of the Court registered views beyond the scope of the per curiam.[47]

What may be the most delicate refinement of a Justice's separate response to a per curiam came in 1965 when, in *O'Keefe v. Smith, Hinchman, & Grylls Associates, Inc.*,[48] Justice Douglas appended an opinion *dubitante* to a per curiam upholding a ruling by the Deputy Commissioner of the Bureau of Employees' Compensation.[49] Douglas noted that, unlike the Court, he would not be "inclined to reverse a Court of Appeals that disagreed with a Deputy Commissioner over findings as exotic as we have here."[50] It is not surprising that Douglas, the most supremely individualistic Justice of this century, is the author of one of the handful of opinions *dubitante* recorded in **U.S. Reports**, but it is significant that the anomaly appears in a per curiam case, signaling that even a Justice who doubts his own tentative position is more inclined to express it in writing than to join a supposedly clear-cut opinion.

II. The Per Curiam and the Idea of Individualism

A. The Emergence of the Separate Voice

It is no coincidence that the per curiam, originally an instrument of pure consensus, first became another judicial vehicle for individual expression during the Roosevelt Court. In its earliest years, the Supreme Court had functioned as a highly individualistic body, with the Justices writing their opinions *seriatim* and leaving the determination of the Court's holding, as in the English system, to the readers of the Justices' multiple opinions. With the arrival of John Marshall as Chief Justice, that potent individualism was reined in by a leader who insisted on speaking for a unified Court, even at the cost of vigorously suppressing the disagreement of colleagues. Marshall's disciplined leadership solidified and increased the Court's power, but it also shaped a Court that continued to value its collective institutional power above the independent voices of its members and thus, into the start of the twentieth century, to discour-

age dissent. Even Holmes, who achieved a popular reputation as a ready dissenter, expressed his distaste for the practice and in fact contributed only seventy-two dissenting opinions over a Court career of almost thirty years.[51]

This traditional model for the Court—eight Associate Justices accepting the guidance of a respected Chief Justice and working toward consensus—continued into the twentieth century under the tenure of Charles Evans Hughes, regarded by many who served under him as an exemplary leader. Hughes was celebrated for running the Justices' conferences with a strong hand, shaping the discussion of cases with his introductory remarks and limiting the time for discussion of independent views. The result was a lean, efficient process, one that Hughes could describe to Congress, in the heat of the court-packing battle, as keeping the Court abreast of its docket despite the advanced age of many of its members.[52] Hughes' leadership was not, however, universally appreciated. As an Associate Justice, Harlan Stone, a former academic who enjoyed extended debate, chafed at the restrictions imposed under the Hughes regime. When Roosevelt elevated Stone to succeed Hughes in 1941, the new Chief implemented his own preferred approach, allowing extended debate at conferences that dragged on over several days, often to the despair of his otherwise sympathetic colleagues. Unlike the Hughes Court, the Stone Court put individual voice before institutional efficiency.

In this respect, the administrative aspect of the Court reflected the substantive divergences that marked the Court in the 1930s, especially, of course, the deep rifts between conservatives and liberals that were resolved—though not ended—by the constitutional revolution of 1937. That story—which has been told many times, most masterfully by William Leuchtenberg—chronicles the bitter divisions on the Court between the conservative Four Horsemen and their opponents, the Justices who endorsed an expanded vision of federal legislative power.[53] The Roosevelt Justices, many of whom came from government positions or academia, brought to the Bench their strong personalities, personal ambitions, and reluctance to compromise.[54] They clashed with such stalwarts of the prior generation as Justice McReynolds, whose abrasive personality and conservative views made him a difficult colleague, but they clashed as well with one another. Even as Roosevelt populated the Court with nine appointees, the anticipated return to consensus remained elusive. As the 1930s gave way to the 1940s, the Roosevelt Court itself divided between separate alliances—Black and Douglas, Frankfurter and Jackson—that precluded the tempering of individual views in the service of institutional harmony.[55]

B. The Pursuit of Consensus

The convergence of these three strains—the jurisprudential, the administrative, and the temperamental—combined to reconstitute the Court as a confederation of individualists. In the absence of a strong and respected Chief Justice—the state of affairs during the brief tenure of Fred Vinson—there was little chance of achieving consensus on a controversial issue such as school desegregation.[56] When *Brown v. Board of Education* came before the Vinson Court, the tentative vote revealed such a serious division that the best option for the Justices hoping to strike down school segregation as unconstitutional was a maneuver to have the case put over for reargument.[57] After Vinson's unexpected death led to Earl Warren's appointment as Chief Justice, the Court acquired a strong and politically savvy leader who commanded the respect and even the affection of the Justices. Even so, Warren's determination to achieve a unanimous decision in *Brown* required a prolonged and delicate campaign executed with the consummate skill of an experienced politician, rather than the *ex cathedra* style of leadership that had worked for Marshall and, in a modified form, for Hughes as well.

The culmination of that campaign—the wooing of Stanley Reed as the ninth vote essential for unanimity—reveals the blending of the institutional and the personal in shaping Court consensus by the middle of the twentieth century. Since Warren understood that Reed, a Kentuckian, did not believe that the doctrine of separate but equal was unconstitutional, Warren's approach to his colleague was more personal than jurisprudential. He arranged a series of lunches, most attended by Justices Burton and Minton, the least threatening among a Bench of imposing and largely intransigent Justices, at which he tried to persuade Reed to accept the position of his colleagues. When Reed remained unconvinced, Warren couched his final appeal in the language of institutional need. As recounted by Bernard Schwartz, Warren presented Reed with the stark choice between undermining the Court's authority on an explosive issue or holding to his own position: "'Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the country.'"[58] Reed voted with the Court, but he did so out of institutional responsibility and regard for Warren, not personal conviction. The episode is a moving one (Reed reportedly had tears in his eyes as Warren read the unanimous opinion from the Bench[59]), not least because it harks back to a variety of institutional decisionmaking not often seen in the years since. As Chief Justice, Warren was less interested in the authenticity of Reed's commitment to the Court's position than he was in the consequences of a desegregation decision carrying a single dissent by a Southerner. Like John Marshall before him, Warren understood the potential harm to both the country and the Court that a splintered decision could provoke and succeeded in conveying that message to the Court's last holdout. Reed's willingness to follow Warren by sacrificing one form of integrity for another—personal conviction for institutional solidarity—stands as one of the last triumphs of the earlier model that placed consensus above individualism.

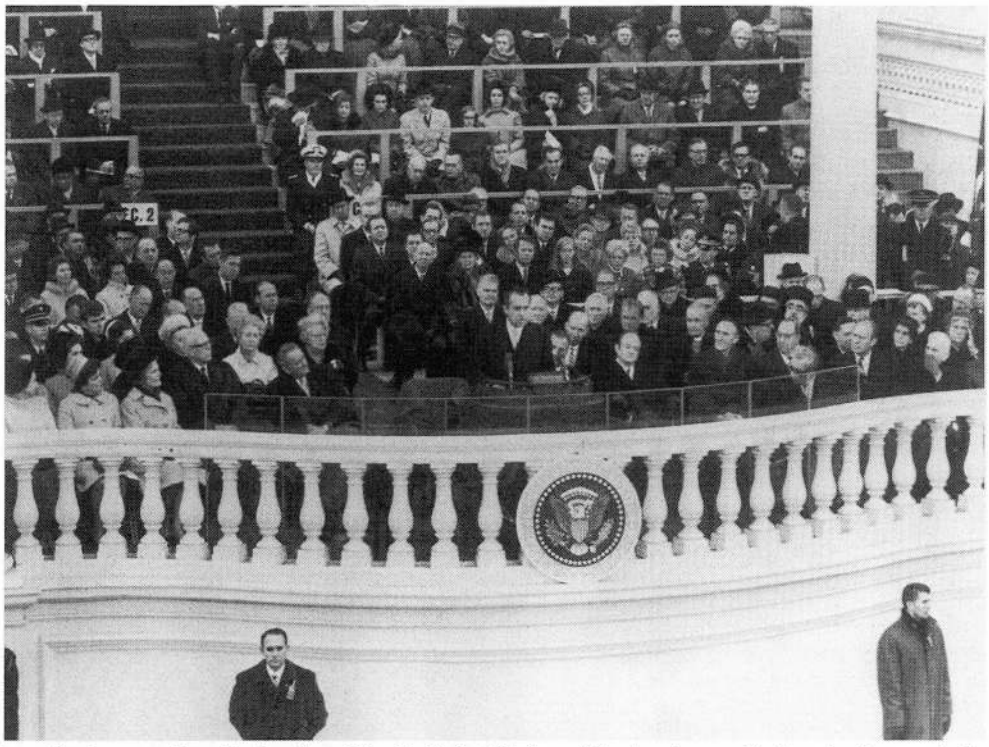
Justice Stanley Reed voted with the Court in *Brown v. Board of Education* (1954), but he did so out of institutional responsibility and regard for Chief Justice Earl Warren, not personal conviction.

The next great effort to achieve judicial unanimity in a potentially explosive case came twenty years later, when President Nixon challenged the Court's authority to order him to release the Watergate tapes, and illustrates the progress of the Court's shift from consensus to individualism. The first striking difference between *Brown* and *United States v. Nixon* is that the successful effort was led not by the Chief Justice but by blocs of Associate Justices working against him to secure a solid and persuasive opinion.[60] Although the Justices agreed among themselves that the decision had to be unanimous, they rejected Brennan's original suggestion that it be signed by all nine Justices rather than by a single author.[61] Once Chief Justice Burger assigned the case to himself, his colleagues could only counter what they considered his confused and inadequate drafts with their own versions, circulated among themselves and presented to him as their preferred text. Burger ultimately acquiesced, accepting most of

their contributions and claiming others as his own, but he emerges as the pawn of the Associate Justices, not their leader—the obstacle to consensus, rather than its architect.[62]

The second striking difference is the nature of the opinion produced. Although the opinion in *Brown* has occasioned a great deal of comment and some criticism for its approach to the constitutional issue posed by segregation, no one has questioned the coherence of Warren's vision. Warren instructed his law clerk that the opinion was to be "'short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory,'" and the final product clearly matches that description.[63] It is, in short, the work of a single mind with a clear strategic goal. The Court's opinion in *United States v. Nixon*, on the other hand, has been aptly described by one Justice as the work of a committee.[64] Its doctrine is incompletely explained, its various sections seem at times to have been (as they were) written by different hands, and it is internally inconsistent in its varying emphases on presidential privilege and judicial authority. The cost of achieving consensus, even in the face of the Watergate crisis, was clearly steep, and the effort of bringing together Justices who differed significantly in the degree of respect they were willing to accord presidential power appears in the sometimes strained and never fluent text. By 1974, consensus was no longer a shared goal; rather, it was an occasional political necessity that the Justices struggled among themselves to forge from the diversity of their individual positions.

The transformation of the Court's ruling principle from consensus to individualism also transformed the per curiam from an impersonal judicial instrument to an opinion form useful precisely because it permitted the widest possible display of divergent opinions. In the 1970s, the Court began to use the per



According to one author, the Court's opinion in *United States v. Nixon* has been aptly described by one Justice as the work of a committee. Above is President Nixon at his swearing-in; the Watergate scandal would lead to his resignation in 1974.

curiam not, as in its early years, just for the simplest, least disputed matters, but for the most controversial as well. A brief per curiam might be accompanied by as many as nine strongly worded separate opinions;[65] a lengthy per curiam might explore in detail a complicated case and still be joined by several separate opinions.[66] The per curiam thus became its own antithesis, the vehicle for cases clearly incapable of being resolved easily and harmoniously by the Court.

III. The Per Curiam as a Strategic Device

Within this larger history of the per curiam's transformation is a smaller history that illustrates the Court's expanding interest in the potential of the per curiam as an adaptable judicial tool. Faced with challenging issues to decide and internal conflicts to navigate, the Roosevelt Court found the per curiam useful in meeting a number of strategic goals. Since the per curiam traditionally carried a message of clear-cut resolution and consensus, the Court increasingly found that packaging a case in per curiam form allowed it to communicate that comfortable message while engaging in more complicated acts of decision-making. As the Roosevelt Court of the 1940s gave way to later Courts, the per curiam played a steadily more prominent role in the strategic presentation of cases of considerably more than routine interest.

A. Achieving Efficiency

The Court began experimenting with the per curiam as a strategic device in the 1940s, adapting it in *Ex parte Quirin*[67] to the unusual demands imposed by the war. When eight German saboteurs were captured in the United States and scheduled for trial by a military commission, they sought to file habeas corpus petitions challenging the constitutionality of a military trial. Responding to what Chief Justice Stone characterized as "the urgency of the case,"[68] the Supreme Court granted certiorari before judgment, heard oral argument at a special Term on July 29 and 30, 1942, and only one day later—on July 31—

When eight German saboteurs were captured in the United States and scheduled for trial by a military commission, they sought to file habeas corpus petitions challenging the constitutionality of a military trial. Responding to what Chief Justice Stone characterized as "the urgency of the case," the Supreme Court granted certiorari before judgment, heard oral argument at a special Term on July 29 and 30, and only one day later—on July 31—released a brief per curiam upholding the validity of military trial. Two of the saboteurs, Herbert H. Haupt (left) and John Dasch (right), were photographed awaiting trial in 1942.

released a brief per curiam upholding the validity of military trial. The petitioners' sentences—including six executions—were carried out only a few days after the issuance of the per curiam. Stone, who as usual was summering in New Hampshire, worked on the full opinion in solitude, buoyed by his colleagues' unusual will to unanimity in this dramatic case and at the same time constrained by the demands of satisfying such divergent Justices.[69] The prompt per curiam allowed the Court to resolve a serious issue with expedition in the tense wartime atmosphere while still having the leisure to craft an important precedent acceptable to all members of the Court.

B. Working by Indirection

In the 1950s, the Court discovered a new use for the per curiam as an impersonal vehicle for resolving controversial cases without confronting controversial issues. By presenting an opinion in the per curiam mode, the Court sent a signal that any substantive discussion was irrelevant, that the result was compelled not by the merits of highly contested issues but rather by external factors that precluded the Court from even addressing the merits. With no Justice signing the opinion, there was no individual to be blamed for evading the tough questions. The choice had been made by a faceless entity—a kind of legal bureaucrat—and the opinion that conveyed that choice seemed somehow less to be blamed for timidity than acknowledged for doing its job.

The strategic use of the per curiam for purposes of evasion is illustrated by the Court's 1953 decision to uphold an increasingly shaky thirty-year-old precedent. In *Toolson v. New York Yankees*,[70] the Court was asked to revisit the question of baseball's exemption from federal antitrust law, an exemption that had been established by a 1922 Holmes decision, *Federal Baseball Club v. National League*.[71] With two Justices dissenting, the *Toolson* Court, after full argument, decided that any change in the status of baseball should be left to Congress and reaffirmed *Federal Baseball* "[w]ithout examination of the underlying issues."[72] Like earlier per curiams that simply made reference to binding precedents, *Toolson's* reliance on *stare decisis* and deference to Congress obviated the need for a developed opinion, at least in the view of seven Justices.

However, the one-paragraph opinion provided something more than a gesture of institutional respect for Holmes and Congress or—as the dissent charged—a refusal to acknowledge fundamental changes in the conduct of baseball that had fatally undermined the precedent.[73] Since *Federal Baseball* had ruled that baseball was not commerce, it precluded Congress from regulating the sport under its Commerce Clause power.[74] As Schwartz has documented, Chief Justice Warren objected that Justice Black's original draft per curiam did not make clear that Congress had the power to regulate baseball under federal antitrust law should it choose to do so.[75] He proposed additional language making that point, and Black agreed to incorporate it.[76] Thus, *Toolson* ends by reaffirming *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the antitrust laws," leaving the door open for Congress to resolve the issue by statute.[77] In *Toolson*, then, the per curiam that appears to do no more than reaffirm a precedent in fact modifies that precedent, making new law at the very moment than it apparently disclaims any intention of addressing the merits.

The Court refined the use of the per curiam as a strategic instrument of indirection in a series of cases seeking to expand desegregation of public facilities in the wake of *Brown v. Board of Education*. These cases were resolved by per curiam opinions of the most basic variety. Not only did these opinions omit any discussion of the issue, but they declined even to identify the subject matter of the case. In *Mayor v. Dawson*,[78] for example, the Court noted only that "[t]he motion to af-

firm is granted and the judgment is affirmed," thus effectively desegregating public beaches.[79] On the same day, in *Holmes v. Atlanta*,[80] the Court desegregated public golf courses, vacating the decisions below and remanding "with directions to enter a decree for petitioners in conformity" with *Mayor*.[81] A year later, in *Gayle v. Browder*, the Court desegregated Montgomery, Alabama's bus system by affirming the court below and citing *Brown, Mayor,* and *Holmes*.[82] All three opinions appeared in the rear section of **U.S. Reports** designated "Decisions Per Curiam," surrounded by summary decisions dismissing cases for lack of a substantial federal question. The message was unmistakable: attempts to preserve segregated public facilities were, as a matter of law, so groundless and so lacking in merit that they could be disposed of with a stroke, recorded among the cases with the slightest claim on the Court's attention. Two years later, when the Court struck down segregation in public housing, the per curiam lacked even any cite to precedent; it consisted of just four words: "The judgment is affirmed."[83]

The most elaborate of these per curiams, *Johnson v. Virginia,* came in 1962, when the Court, in two pages, reversed the contempt conviction of a black man who had refused to sit in the blacks-only section of traffic court.[84] After describing the facts of the case, the opinion disposed of the case with two sentences: "Such a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities. . . . State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws."[85]

In this sequence of cases, the Court engaged in jurisprudence by elision. Between *Brown*, which was carefully limited to public education, and *Johnson*, which baldly asserted that the extension of *Brown* to all public facilities "is no longer open to question," there was, quite simply, no discussion by the Court of the implications of *Brown* for any

In *Holmes v. Atlanta* (1955), the Court desegregated public golf courses with a basic per curiam opinion that not only omitted any discussion of the issue, but declined even to identify the subject matter of the case. The Court did the same in per curiam opinions desegregating public beaches and the Montgomery, Alabama bus system.

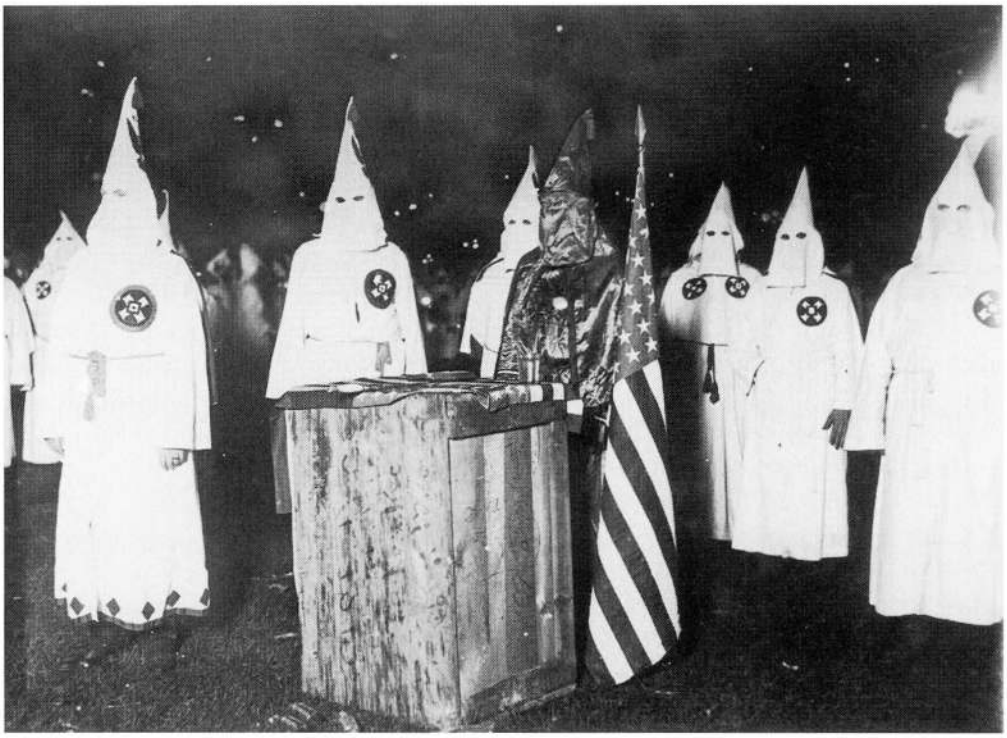
sphere outside education. Schwartz quotes the clerk instructed by Warren to draft the Montgomery bus opinion by citing three precedents as saying "I thought at the time that it was a pretty casual way for the Court to advance a major proposition of constitutional law and still do."[86] Perhaps "subtle" would be a better adjective than "casual." What the Court did, instead of providing a detailed legal rationale, was to build a bridge of per curiams, each one presented as following inevitably from its predecessor, until the final conclusion was, as the Court insisted, irrefutable. The strategic advantages of this approach are obvious. It would hardly have assisted the painful struggle to implement *Brown* throughout the South if each new case provided a new occasion to revisit old discredited arguments and reopen old wounds. By eliminating legal discussion and allowing the per curiam form to carry its message of unstoppable progress, the Court communicated its constitutional position more effectively and less provocatively than a sequence of fully developed opinions could have done.

On at least one occasion, the Court used the per curiam to conceal its intention of ducking a particularly sensitive racial issue. The Court confronted the appeal in *Naim v. Naim*[87] challenging the constitutionality of Virginia's antimiscegenation law at conference in November 1955, little more than five months after the issuance of *Brown II*, the opinion mandating enforcement of the school desegregation decision.[88] At conference, Justice Frankfurter insisted that it would be a mistake to hear the case because a divided decision on the miscegenation law would interfere with the difficult enforcement process under *Brown*. Frankfurter argued "'that to throw a decision of this Court . . . into the vortex of the present disquietude would . . . seriously, I believe very seriously, embarrass the carrying-out of the Court's decree of last May.'"[89] Over dissenting votes from Warren and Black, who believed that the Court should meet its responsibility and address the issue, the Court voted to issue a per curiam opinion based on the inadequacy of the record below.[90] With Frankfurter's assistance, Justice Clark drafted a deliberately vague opinion citing "[t]he inadequacy of the record" and "the failure of the parties to bring here all questions relevant to the disposition of the case" as the reasons for the Court's decision remanding the case to the lower court.[91] Although both Warren and Black considered appending dissents, eventually both decided to refrain, allowing the Court to use the per curiam as a perfect instrument of evasion.[92]

C. Creating New Law

By the late 1960s, the Court had moved beyond evasion, using the per curiam not only to avoid important substantive issues but also at times forthrightly to resolve them. The most remarkable of the per curiam cases in which the Court made significant new law is *Brandenburg v. Ohio*,[93] unmistakably a major First Amendment precedent. Reviewing Ohio's criminal syndicalism statute, the Court replaced its longstanding "clear and present danger" test for speech advocating illegal action with a new, more liberal standard by striking down the statute for its failure to distinguish between speech that directly incites "imminent lawless action" and speech that merely advocates it.[94] The opinion also overrules *Whitney v. California*,[95] a forty-year-old—though "thoroughly discredited"[96]—precedent. It is surprising to find such a decisive step taken in a per curiam.

The explanation for *Brandenburg* is as remarkable as its use of the per curiam form. After oral argument on February 27, 1969, the Court voted unanimously to overturn the defendant's conviction for statements made at a Ku Klux Klan rally in violation of the Ohio statute.[97] The case was assigned to Justice Fortas, who had his signed draft in circulation by April 11. Although by mid April Fortas also had the necessary votes, he agreed to a request from Justice Harlan that he delay releasing *Brandenburg* until two related cases were



Justice Brennan took over Justice Fortas' draft opinion in *Brandenburg v. Ohio* (1969) when Fortas resigned abruptly from the Court over allegations of irregular financial dealings. Brennan shortened and polished the draft, which was then released as a per curiam decision. At issue were the First Amendment speech rights of a Ku Klux Klan member.

also ready because "'it would be well to bring down the three cases at the same time.'"[98] That delay was fatal to Fortas's authorship of *Brandenburg*. On May 14 he responded to pressure from Congress and the White House over allegations of irregular financial dealings and resigned from the Court. The case was then reassigned to Brennan and reappeared as a per curiam.

The *Brandenburg* draft that Brennan inherited from Fortas was a polished opinion of slightly more than seven pages, and Brennan left much of the draft intact. He corrected a few technical errors, moved part of one paragraph from the text to a footnote, made some minor stylistic adjustments, and eliminated two pages of text, most of it an historical account of the enactment and enforcement of criminal syndicalism statutes.[99] Brennan also deleted Fortas' final paragraph, which found "no need here to decide whether under a properly drawn statute the State could punish any aspect of the conduct disclosed by this record."[100] The per curiam opinion is thus both shorter and more narrowly focused than the Fortas draft.

In addition to making these routine changes, however, Brennan also took one highly significant step. In the language of the Fortas draft, the First Amendment would permit prosecution for speech that advocates force or illegal action when that speech is "directed to inciting or producing imminent lawless action and is attended by present danger that such action may in fact be provoked."[101] Fortas rejected a request by Black that all references to the clear and present danger test be eliminated, though Black was nonetheless willing to concur in the draft.[102] When Brennan took over the opinion, he altered Fortas' controlling language, removing the echo of the earlier test. In his version, "the

constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [103] The opinion was released on June 9, 1969,[104] less than a month after Fortas' resignation from the Court.

Brennan's seemingly slight verbal adjustment of Fortas' language in fact altered First Amendment doctrine dramatically. Where Fortas' version of the traditional clear and present danger test still allowed the government to restrict speech when there was any "present danger" of imminent lawless action, Brennan's reformulation imposed tighter restraints on government: only when the speech at issue was "likely to incite or produce such action" could the speaker be silenced. Gerald Gunther has described *Brandenburg* as creating "a new standard of speech protection."[105] More sweepingly, Morton Horwitz has described it as "the culmination of Justice Brennan's free-speech jurisprudence," an opinion that "finally shook off the repressive effects of McCarthyism, vindicated the Holmes-Brandeis free speech dissents, and arguably even went beyond Justices Holmes and Brandeis in the protection it provided speech."[106]

Brandenburg is thus a landmark case, released in per curiam form only because of its unusual history. Most of the brief text was written by Fortas and left intact by Brennan, so in one sense it was a collaborative work by two members of the Court—one departed, one very much present—rather than an authentic "Brennan" opinion. In a larger sense, however, the opinion stretches the increasingly elastic boundaries of the per curiam in two additional ways. First, by failing to identify the true author of a new and influential standard, *Brandenburg* obscures the doctrinal development of First Amendment jurisprudence. Second, by signaling that the case is an unexceptional resolution of a routine legal issue, the per curiam obscures as well the significance of its content. Fortas had circulated *Brandenburg* as a signed opinion, and it seems clear that had he remained on the Court, or had Brennan been originally assigned the case, *Brandenburg* would not have emerged as a per curiam. The twist of fate that allowed Brennan to alter First Amendment law in a way that Fortas had rejected also allowed the per curiam to assume prominence as a source of important new law.

IV. Conclusion

In its first century, from *Mesa v. United States* in 1862 to *Brandenburg v. Ohio* in 1969, the per curiam developed from a simple device of administrative convenience to an adaptable judicial device capable of serving a variety of functions. That change also reflected the larger shift in the Court's jurisprudence from a strong preference for consensus to an insistence by many of its Justices on personal statement through concurrences and dissents. It is not surprising that, in the years that followed *Brandenburg*, the per curiam assumed a prominent role in the resolution of several of the Court's most important constitutional cases, including its controversial decision in *Bush v. Gore.* As its early history demonstrates, the per curiam has proved itself a flexible judicial instrument capable of expressing both the consensus that accompanies routine decisions and the wide diversity of views that marks the Court's most challenging decisions.

***Note:** This article is an abridgement of Laura Krugman Ray, "The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion," 79* Nebraska Law Review *517 (2000).*

ENDNOTES

[1]Learned Hand, **The Bill of Rights** at 72 (1958).

[2]Karl M. ZoBell, "Division of Opinion in the Supreme

Court: A History of Judicial Disintegration," 44 *Cornell L. Q.* 186, 192–93 (1959).

[3]The Court produced more than twenty-five dissenting opinions in the 1937 Term; five years later, in the 1942 Term, the number had climbed to sixty-three. *See* Albert P. Blaustein and Roy M. Mersky, **The First One Hundred Justices** at 137–40 (1978). The number of concurring opinions, generally considerably smaller than the number of dissents, did not exceed 25 until the the 1944 Term. *Id.*

[4]*See* C. Herman Pritchett, **The Roosevelt Court: A Study in Judicial and Political Values 1937–1947** at 24 (1948). According to Pritchett's figures, in the 1935 Term, only 16 percent of the Court's opinions were nonunanimous; by the 1938 Term the figure was 34 percent, and by 1943 it had climbed to 58 percent. *See id.* at 25.

[5]**Black's Law Dictionary** 1156 (7th ed. 1999).

[6]67 U.S. 721 (1862).

[7]*Id.* at 722.

[8]131 U.S. app. at lxvi (1839).

[9]76 L.Ed. 1341 (1889).

[10]136 U.S. 570 (1889).

[11]The Court noted briefly that the case was "[r]eversed with costs, on the authority of the decision of this court in the case of *Hartranft v. Oliver*, (No. 190 of October Term 1887), 125 U.S. 525." *Id.* at 571.

[12]212 U.S. 275 (1909).

[13]*See id.* at 275–77.

[14]*Id.*at 277.

[15]*Fox v. Gulf Refining Co.*, 295 U.S. 75 (1935); *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

[16]295 U.S. 76 (1935).

[17]*See id.* at 77.

[18]295 U.S. 395 (1935).

[19]*See id.* at 396.

[20]*See Opinions Per Curiam,* 187 U.S. 635 (1902).

[21]282 U.S. 792 (1931).

[22]*See id.* at 794.

[23]214 U.S. 492 (1909).

[24]*Id.* at 495 (Holmes, J., dissenting).

[25]*Id.* at 496.

[26]281 U.S. 537 (1930).

[27]*Broad River Power Company v. South Carolina*, 282 U.S. 187, 192 (1930).

[28]*Id.* at 192–93.

[29]*See, e.g., Cate v. Beasley*, 299 U.S. 30, 32 (1936) ("Mr. Justice Reynolds is of opinion that the challenged judgment should be reversed.").

[30]Roger K. Newman, **Hugo Black: A Biography** 273 (2nd ed. 1997).

[31]302 U.S. 419 (1938).

[32]*Id.* at 422–23. On remand, the district court was directed to conduct a new hearing to determine whether the rates set by the Commission were confiscatory in light of an accurate valuation of the water company's property. *See id.*

[33]*See id.* at 423–24 (Black, J., dissenting).

[34]*Id.* at 441.

[35]*Id.*

[36]Quoted in Newman, *supra* note 30, at 273–74.

[37]*See McCart,* 302 U.S. at 423.

[38]*See* **The Oxford Companion to the Supreme Court of the United States** 969 (Kermit L. Hall, ed., 1992).

[39]*United States v. Swift and Co.*, 318 U.S. 442, 446 (1943). The three Justices were Black, Douglas, and Murphy. *See id.*

[40]*See New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 691 (1943).

[41]The first jointly authored separate opinion was a dissent signed by Chief Justice Vinson and Justices Reed and Jackson. *See United States v. Capital Transit Co.*, 338 U.S. 286, 291 (1949).

[42]*See Jones v. Opelika*, 319 U.S. 103, 104 (1943). The companion case was *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and the dissents in that case are referenced in *Opelika.*

[43]*See, e.g., Bowles v. United States*, 319 U.S. 33, 36, 38 (1943) (Jackson, J., dissenting, joined by Reed, J.).

[44]362 U.S. 390 (1960).

[45]*See Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 256 (1963) (Harlan, J., concurring in part and dissenting in part).

[46]*See Chamberlin v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964) (Douglas, J., concurring in part).

[47]*See Codd v. Vegler*, 429 U.S. 624, 629, 631 (1977) (Blackmun, J., concurring; Brennan, J., dissenting; Stewart, J., dissenting; Stevens, J., dissenting).

[48]380 U.S. 359 (1965).

[49]*See id.* at 371 (Douglas, J., *dubitante*).

[50]*Id.* at 372.

[51]David M. O'Brien, "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions," in **Supreme Court Decision-Making** 91, 94 (Cornell W. Clayton and Howard Gillman, eds., 1999). O'Brien calculates that Holmes averaged 2.4 dissents per Term. *See id.*

[52]William E. Leuchtenburg, **The Supreme Court Reborn** 140–41 (1995).

[53]*See generally id.*

[54]O'Brien, *supra* note 51, at 100.

[55]On the divisions and alliances within the Roosevelt Court, *see* Pritchett, *supra* note 4, at 240–63.

[56]Bernard Schwartz believes that "Fred M. Vinson may have been the least effective Court head in the Supreme Court's history." Bernard Schwartz, **A History of the Supreme Court** 253 (1993).

[57]The account of the Court's resolution of *Brown* is based

on two major sources: Bernard Schwartz, **Super Chief** 72–127 (1983) (hereinafter Schwartz, **Super Chief**), and Richard Kluger, **Simple Justice** 657–99 (1975).

[58]*See* Schwartz, **Super Chief**, *supra* note 57, at 94. Schwartz's source for the conversation was Reed's law clerk, who witnessed it. *Id.*

[59]*Id.* at 105.

[60]For a detailed account of the behind-the-scenes maneuvers that resulted in the Court's unanimous opinion, *see* Bob Woodward and Scott Armstrong, **The Brethren** 287–347 (1979). For a brief account of the shaping of the Court's opinion, *see* Bernard Schwartz, **Decision: How the Supreme Court Decides Cases** 145–48 (1996) (hereinafter Schwartz, **Decision**).

[61]Woodward and Armstrong, *supra* note 60, at 296, 309–10.

[62]Schwartz titles his chapter on the Burger Court "The Court Leads the Chief." Schwartz, **Decision**, *supra* note 60, at 135.

[63]Schwartz, **Super Chief**, *supra* note 57, at 97.

[64]Schwartz, **Decision**, *supra* note 60, at 147.

[65]*See Furman v. Georgia*, 408 U.S. 238 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1972).

[66]See Buckley v. Valeo, 424 U.S. 1 (1976).

[67]317 U.S. 1 (1942).

[68]Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** 657 (1956).

[69]*See id.* at 659.

[70]346 U.S. 356 (1953).

[71]*See* 259 U.S. 200 (1922). Holmes found that "[t]he business [of] giving exhibitions of base ball . . . although made for money would not be called trade or commerce in the commonly accepted use of those words." *Id.* at 208–09.

[72]*Toolson*, 346 U.S. at 357.

[73]Justice Burton called it "a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act." *Id.* at 358.

[74]*See* Schwartz, **Super Chief**, *supra* note 57, at 162.

[75]*See id.* at 162–63.

[76]*See id.*

[77]*Toolson*, 346 U.S. at 357.

[78]350 U.S. 877 (1955).

[79]*Id.* at. 877.

[80]350 U.S. 879 (1955).

[81]*Id.* at 879.

[82]352 U.S. 903 (1956).

[83]*New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958).

[84]373 U.S. 61 (1963).

[85]*Id.* at 62.

[86]Schwartz, **Super Chief**, *supra* note 57, at 126.

[87]350 U.S. 891 (1955).

[88]*See* Schwartz, **Super Chief**, *supra* note 57, at 158–59. *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955), appeared a year after *Brown I*, 347 U.S. 483 (1954).

[89]Schwartz, **Super Chief**, *supra* note 57, at 159.

[90]*See id.* at 160–61.

[91]*Id.* at 160.

[92]*Id.* at 160–61.

[93]395 U.S. 444 (1969).

[94]*Id.* at 447.

[95]274 U.S. 357 (1927).

[96]*Brandenburg*, 395 U.S. at 447.

[97]*See* Bernard Schwartz, "Justice Brennan and the Brandenburg Decision—A Lawgiver in Action," 79 *Judicature* 24, 27 (1995).

[98]*Id.* at 28 (quoting a letter from Justice Harlan to Justice Fortas).

[99]*See* Fortas Draft, *Brandenburg v. Ohio*, in Thurgood Marshall Papers, Manuscript Division, Library of Congress (1969).

[100]*Id.* at 8.

[101]*Id.* at 5.

[102]Bruce Alan Murphy, **Fortas: The Rise and Ruin of a Supreme Court Justice** 543 (1988).

[103]*Brandenburg*, 395 U.S. at 447.

[104]*See id.* at 444.

[105]Gerald Gunther, **Learned Hand: The Man and the Judge** 603 (1994).

[106]Morton J. Horwitz, "In Memoriam: William J. Brennan," 111 *Harv. L. Rev.* 23, 28 (1997).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

"Democratic institutions are never done," observed Woodrow Wilson over a century ago. "[T]hey are like living tissue—always a-making."[1] Then and now, Wilson's point applies as much to the federal judiciary as to the elected branches of government, as alterations in organization, jurisdiction, and the docket attest.

Yet Wilson's statement obscures another truth: in America constancy and continuity persist alongside institutional change. Consider, for instance, an assessment of the Supreme Court that James Madison offered one year before Chief Justice John Marshall's death in 1835. "[N]otwithstanding this abstract view of the co-ordinate and independent right of the three departments to expound the Constitution, the Judicial department most familiarizes itself to the public attention as the expositor . . . ; and attracts most the public confidence by the composition of the tribunal," wrote the "Father of the Constitution" and fourth President.

> It is the Judicial department in which questions of constitutionality . . . generally find their ultimate discussion and operative decision: and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the Executive department, and their fewness over the multitudinous composition of the Legislative department. . . . [I]t may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution, as well in questions within its cognizance concerning the boundaries be-

> tween the several departments of the Government as in those between the Union and its members.[2]

Madison could have been writing about the Court in the early twenty-first century. In these respects, little seems changed. The Court's widely accepted contemporary role as principal voice of the Constitution was firmly embedded 168 years ago. The esteem in which the Court was held enabled it safely and effectively to navigate stormy political waters, just as it does today. Then as now, the Court's esteem necessarily derived from the merit and integrity of its Justices and from the perceived fairness of its decisionmaking procedures.

That esteem also derived from the Court's success in managing an inevitability. Soon after 1800, the Court each Term had to confront a growing volume of precedents, reconciling decisions in the present with decisions from days gone by or discarding them. This is a reality that neither the legislative or executive branches confront: the judiciary maintains its legitimacy in part based on how well it copes with its legacy. Madison thus understood the Supreme Court's curious relationship to politics, which combined a conscious aloofness from participation in the political world with a weighty political effect in the context of deciding cases. The Court would succeed as a coordinate branch of government to the degree that Justices were seen as relegating their own values to the background and thrusting values of the Constitution into the foreground.

Size appropriately mattered, too, in carrying out those tasks. A plural judiciary facilitated collective reflection and the sharing of insight and accumulated wisdom, just as a Bench of manageable proportions allowed the Court more easily to speak with one voice and to bolster confidence in its decisions.

Last, Madison's assessment implicitly acknowledged an essential component of any viable legal system—the willingness of citizens to resolve disputes through litigation, not violence, to look to the courtroom and not to the streets when seeking redress. As Marshall had anticipated at the Virginia ratifying convention, judicial review might even be an alternative to revolution. "What is the service or purpose of a judiciary," asked the future Chief Justice, "but to execute the laws in a peaceful, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force?"[3]

As Madison recognized, the judiciary's unique place in the political system is both opportunity and challenge. This seems clear from five recent books representing three common methodological approaches to analysis of the Supreme Court: biography, period study, and case study.

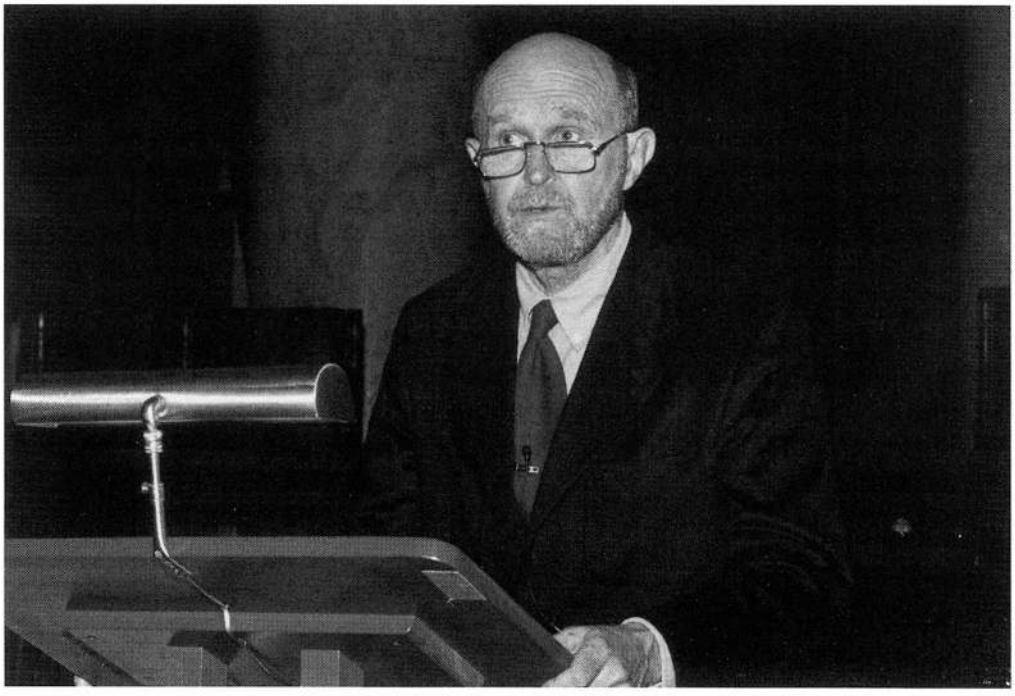
When Fred L. Israel wrote his essay on James Iredell for the first edition of **The Justices of the United States Supreme Court**[4] more than three decades ago, he noted that only one book-length study of Iredell existed[5]

Publication of *Justice James Iredell* by Campbell University's Willis Whichard provides a notable addition to the bibliography of the early Court. Carefully documented, well-written, and entertaining to read, this is the only modern biography of the sixth Justice.

and that it had been published in 1857. Nearly a century and a half later, publication of **Justice James Iredell**, by Campbell University's Willis Whichard, provides the second such study.[6] Carefully documented, well-written, and entertaining to read, this single modern biography of the sixth Justice is a notable addition to the bibliography of the early Court.

One wonders why so major a gap in the literature of the Supreme Court persisted for so long. This gap, which Whichard has closed, may be understandable for at least three reasons. Iredell died in 1799 at the age of 48. While men and women of his day often succumbed to death before 50, many of Iredell's prominent contemporaries in political affairs lived half again as long. Time, therefore, did not offer Iredell as many opportunities for accomplishment as it did others. In addition, Iredell's career on the Supreme Court, his most visible public service in the life of the new nation, lasted only nine years. With the notable exceptions of individuals such as Chief Justice Salmon P. Chase and Justice Benjamin Cardozo (both of whom had led biography-worthy lives prior to going on the High Court), Justices with fewer than ten years of service have often been relegated to the back corners of the literature. Finally, Iredell's tenure did not extend beyond the least-known, least-understood, and least-appreciated era of Supreme Court history: that of the pre-Marshall Bench. While the Supreme Court Historical Society's **Documentary History**[7] project and other recent works[8] have done much to illumine what had been a thoroughly dim period, the fact remains that, collectively as the Supreme Court, the Justices prior to Marshall decided comparatively few cases, and in some of those no published opinion survived.

Indeed, the bulk of the work accom-



R. Kent Newmyer of the University of Connecticut (pictured), already familiar to readers through a biography of Justice Story and a volume on the Marshall and Taney Courts, offers a portrait of the Great Chief Justice in *John Marshall and the Heroic Age of the Supreme Court*. His book, part of the Southern Biography Series now under the editorship of Bertram Wyatt-Brown, is the latest example of the rich outpouring of Marshall scholarship in the past decade.

plished by these Justices was done individually on circuit. For Iredell, who had responsibility for the Southern circuit during much of his tenure, that meant "lead[ing] . . . the life of a post boy,"[9] in his brother's words, traveling 1900 miles on a single swing through that expansive territory. Iredell observed that he "scarcely thought there had been so much barren land in all America."[10] Thus, Iredell's having had a brief tenure on a relatively inactive Bench before it institutionally took shape does not yield the interest that other Justices in other times might attract.

That much acknowledged, one remains puzzled that Iredell has been so neglected by students both of the Court and of the formative period in American national history. Even the number of scholarly articles about Iredell remains small. First, his early life is an interesting story. With James Wilson, he was one of only two original Justices born abroad. (Wilson, a Scot, also shared duty with Iredell on the arduous Southern circuit, and in 1798 Wilson died practically on Iredell's doorstep. The former's finances were in such shambles—he was being pursued, literally, by his creditors—that his family could not afford to return the body to Pennsylvania. Instead Wilson was interred in Iredell's father-in-law's family plot, where he reposed until 1906.) At age 17, Iredell emigrated from England to Edenton, North Carolina, where the Chowan River empties into Albermarle Sound, to be the King's Comptroller of Customs. He studied law under Samuel Johnston, the most prominent lawyer in North Carolina, fell in love with Johnston's sister Hannah, and married her in 1773. His brother-in-law also possessed the finest library in the colony, and for the rest of his years Iredell drew upon it in a systematic program of self-education. Initially dubious about the drive for independence, Iredell closed his comptroller's books in April 1776. Hiring a substitute for military service, as was allowed, the future Justice became an enthusiastic pamphleteer and clearinghouse for correspondents in support of the cause. Such revolutionary ardor created a temporary break with family in England and cost him status as the sole heir to a bachelor uncle's impressive estate in Jamaica.

Second, Iredell left a substantial trail in the form of personal and public papers that are accessible today at Duke University, the University of North Carolina at Chapel Hill, and the state archives in Raleigh. Some of these were published in the 1857 book. Many more were published in a two-volume set in 1976, although this set contains nothing written after 1783.[11] Surely the remaining sixteen years will be revealed in later volumes; his papers are a treasure. One senses from what Whichard writes that they display at least as much about Iredell as John Marshall's reveal about him. Iredell comes across more as "correspondent and chronicler" than as jurist.[12]

Third, Iredell had achieved a national reputation before his appointment to the Supreme Court in 1790. This was chiefly because of his role in achieving ratification of the Constitution in North Carolina. He was a delegate to the ratifying convention in Hillsborough in 1788 and—as his letters, pamphlets, and speeches at the convention demonstrate—one of the Constitution's strongest advocates. After the convention voted solidly against ratification (84–184), Iredell's efforts behind the scenes helped to secure an equally solid positive vote (195–77) at the second convention in 1789. Little wonder, then, that he was Washington's choice for the sixth seat once Robert Harrison of Maryland, the President's friend and former private military secretary, declined appointment.

Moreover, by 1790 Iredell had compiled a stunning résumé in North Carolina, not only as a lawyer but as a judge, attorney general, and compiler of statutes as well. Whichard pays close attention to Iredell's role as counsel in *Bayard v. Singleton*,[13] in which North Carolina's high court followed Iredell's argument (made both in court and simultaneously in a pseudonymous letter in a newspaper) in striking down a statute that conflicted with the

state constitution, a decision that was possibly "[t]he clearest pre-Constitution case involving review power."[14] And Iredell's views were not simply the product of a desire to win a case. Four years earlier, he had gone on record asserting that the Constitution was "superior even to the legislature, *and of which the judges are the guardians and protectors.*"[15]

Finally, there is Iredell's role in *Chisholm v. Georgia*,[16] the first Supreme Court case in which the outcome turned on constitutional interpretation. Although an ardent Federalist, Iredell also acknowledged the residual sovereignty of the states. His dissenting opinion rejected the position taken by Chief Justice John Jay and Justices Blair, Cushing, and Wilson that Article III of the Constitution provided sufficient authorization for the federal courts to hear cases brought against a state by a citizen of another state. Assuming that was the correct reading of Article III, Iredell believed that implementing jurisdictional legislation by Congress was essential.[17] That point aside, he was not prepared to accept the majority's construction of Article III: if it had been the intention to set aside the sovereign immunity of the states, surely that would have been made explicit in the text. Moreover, the majority's interpretation went against the express assurances made by Madison, Marshall, and Hamilton at state ratifying conventions that no such result was intended by the language of Article III. Iredell also had a more accurate reading of the political pulse of the country: the Eleventh Amendment promptly reversed the majority and vindicated the dissent. Iredell might be gratified to know that, over two centuries later, a different Supreme Court majority suggested that he had gotten it right after all.[18]

Iredell's career intersected issues of federalism and judicial review in its embryonic state. Along with an independent judiciary, these are sometimes said to be America's principal contributions to political science. Yet it is doubtful that they would exist in their present forms today, or be considered—and in some instances adopted—by constitution writers in other nations had it not been for the impact of Chief Justice John Marshall on the evolution of all three.

Marshall's achievements over a public career spanning roughly sixty of his nearly eighty years make him a challenge to any author. To write about Marshall after 1800 is to write about the Supreme Court, and with a handful of exceptions, to write about the Supreme Court in the first third of the nineteenth century is to write about Marshall. Marshall seems a perfect fit for Emerson's claim that "[a]n institution is the lengthened shadow of one man."[19] The fourth Chief Justice's shadow on the Constitution and the development of the American polity remains a long one indeed. R. Kent Newmyer of the University of Connecticut, already familiar to readers through a biography of Justice Story and a volume on the Marshall and Taney Courts,[20] offers a portrait of the Great Chief Justice in **John Marshall and the Heroic Age of the Supreme Court**.[21] His book, part of the Southern Biography Series now under the editorship of Bertram Wyatt-Brown, is the latest example of the rich outpouring of Marshall scholarship in the past decade.[22]

Newmyer labels his study an "interpretive biography,"[23] thus positioning it in the literature between shorter biographies and jurisprudential studies, on the one hand, and narrative or life-and-times works, on the other. Newmyer's combines elements of both. There is plenty of lively narrative and context, to be sure, but details about family or about Marshall's business ventures, for example, are included only as they are necessary to understanding Marshall as a public figure. It is a measure of Marshall that even an intentionally scaled-down approach yields a volume of about 500 pages.

With so much in print about Marshall, any author contemplating yet another study might well ponder, as does Newmyer, what he or she might hope to contribute. Newmyer's preface, therefore, poses a series of questions

the author intends to answer or contradictions that others have not satisfactorily addressed. Chief among them is "how . . . was it that Marshall, the Supreme Court, and the Constitution became so inseparable—in fact and in historic memory?"[24] The answer is an outgrowth of development of the book's key theme: "By the 1820s . . . , state and local resistance to the emerging market economy merged with states' rights constitutional theory. Led by Virginian theorists, cultural localists mounted an all-out assault on Marshall and his version of constitutional nationalism. This struggle, particularly as it was embodied in the personal and ideological rivalry between Marshall and Jefferson, . . . was a dispute over the meaning of the American Revolution and the nature of the new nation it brought into being."[25]

For Newmyer, Marshall's service in Washington's army during the Revolution and his role as a delegate to the Virginia ratifying convention were defining events that shaped his vision of the future of the American nation. Those moments are the subjects of the book's first two chapters, with the remaining six devoted mainly to Marshall's Court years. A nation with a truly national economy would be headed by a strong central government, in conjunction with constructive power-sharing with the states, where officials at both levels governed in a conservative tradition of deferential—not popular—leadership. As Marshall insisted at Virginia's 1788 convention in response to doubts that Congress could prudently be trusted to establish a system of lower federal courts,

> Why not leave it to Congress? Will it enlarge their powers? Is it necessary for them wantonly to infringe your rights? Have you anything to apprehend, when they can in no case abuse their power without rendering themselves hateful to the people at large? When this is the case, something may be left to the Legislature freely chosen by ourselves, from among ourselves, who are to share the burdens imposed upon the community, and who can be changed at our pleasure. Where power may be trusted, and there is no motive to abuse it, it seems to me to be as well to leave it undetermined, as to fix it in the Constitution.[26]

Newmyer finds in this statement the basis of the point Marshall later made in *McCulloch v. Maryland*[27] that the Constitution could not function adequately if it were either written or interpreted like a code of laws. The "war over interpretation, which consumed so much of Marshall's life, . . . began at the Virginia ratifying convention. . . . [W]e see him like everyone else peering through a glass darkly."[28] As Chief Justice, his goal "was to maintain the national Union generated by the idealism of the Revolution and institutionalized tentatively and against the odds in the Constitution of 1787."[29] The magic of 1787 became for Marshall a promise that, in his Court years, he tried to make a reality.

Yet Newmyer is careful to note that Marshall's constitutional jurisprudence, for which he is properly remembered and acclaimed, "did not emanate full-blown and perfect from the brow of Jove. Rather, it was the end product of an ongoing dialectic with his states' rights opponents both on and off the Court."[30] Thus, had the Federalists not withered after 1800 and had the forces of states' rights and Jacksonian democracy not gained ascendancy, Marshall might not have had the challenges—presented in cases such as *McCulloch*, *Cohens v. Virginia*,[31] and *Gibbons v. Ogden*[32]—that provided the forum for the articulation of a vision for the nation. Newmyer thus accepts Holmes' assessment of Marshall: "A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*."[33]

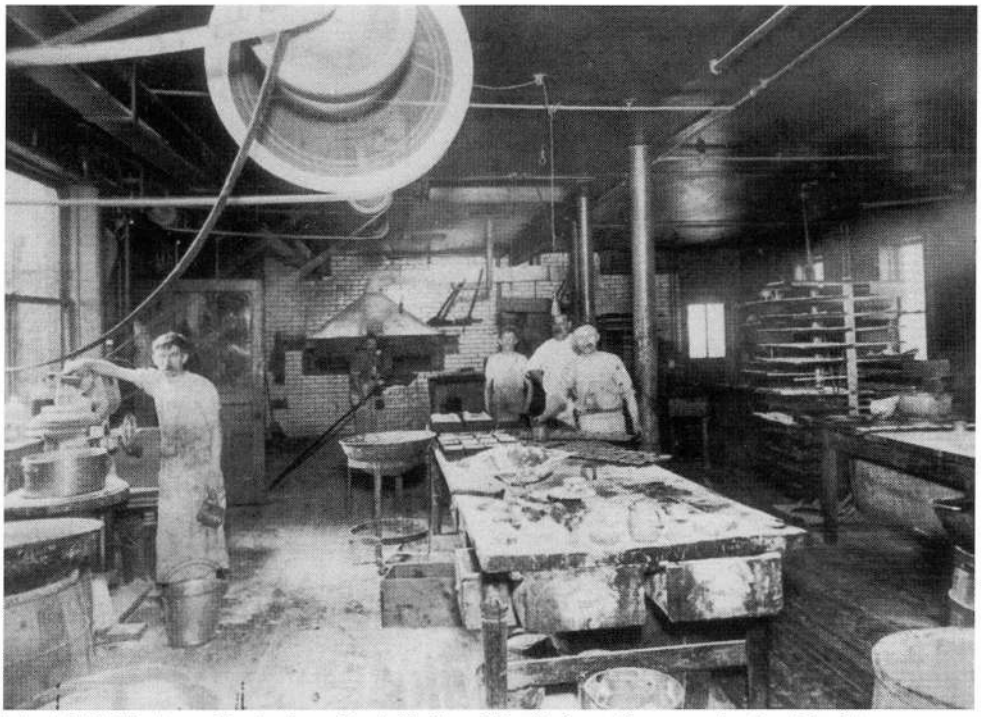
Near the end of his life, Marshall considered his efforts on behalf of that vision to have been a failure.[34] Indeed, there was good cause for pessimism concerning whether his jurisprudence would survive. "[W]hat Marshall witnessed in his last years and what the Taney Court completed—was that the Supreme Court did not have a monopoly on constitutional interpretation."[35] And even Marshall could not have foreseen the dimensions, the cost, and the transforming power of the holocaust to come. Rejecting Marshall's notion that judicial review could be a substitute for violence (a point Chief Justice Taney echoed in *Abelman v. Booth*[36]), an emerging political force in the Northeast and Midwest refused to accept the outcome of the judicial process.[37] Then the eleven Southern states refused to accept the outcome of a presidential election. Even Marshall's grandsons took up arms against the Union.

Marshall was not optimistic because his Court was changing, as was the nation. Yet his Court had not fallen victim to various proposals, especially prevalent during the 1820s, to clip its wings. There might be majority sentiment in Congress to "do something" about the Court, but sufficient majorities in both houses could never agree on what should be done. Moreover, Marshall was a talented strategist as well as an able judge. In *Cohens*, he reaffirmed the constitutionality of section 25 of the 1789 Judiciary Act, all the while accepting Virginia's authority to punish sales of tickets within the state even when Congress had authorized the lottery. In *Gibbons*, he rested the Court's invalidation of the New York steamboat monopoly on the superiority of an act of Congress over a state statute, not on the exclusivity of the commerce power itself. In *Willson v. Black Bird Creek Marsh Company*,[38] he carved out a place for local commercial regulation within the strong hints of exclusivity that he had outlined in *Gibbons*. Such stratagems made the Court a fuzzy target for its enemies, and all the while Marshall plowed deep principles of constitutional law.

His major rulings perhaps survived the Taney Court because of an irony. With Jacksonian ideas in ascendancy in Congress and the White House for most of the next quarter century, there was little or no legislation to generate litigation testing the limits of Congress's implied powers (as on the matter of internal improvements) or of Congress's powers to regulate commerce "among the states." The underlying theories of *McCulloch* and *Gibbons* were safe because they were out of favor.

Most of the constitutional doctrines Marshall worked hard to weave into the fabric of American law have persisted. Perhaps by the turn of the twentieth century, if not before, the public mind had come to accept a unity in the trinity of Marshall, the Constitution, and the Supreme Court, making Marshall "A Judge *for* All Seasons."[39] "[T]ime has been on Marshall's side," said Civil War veteran Holmes. "[T]he theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our cornerstone."[40] "The paradox," writes Newmyer, "is that Marshall's reputation for greatness appears to exceed the scope of his juridical accomplishments."[41]

Within seven decades of Marshall's death, an emboldened Court had begun to examine a growing volume of state and local social legislation through the exacting lens of the Fourteenth Amendment. The result was the era of substantive due process (sometimes called the "Lochner era," in reference to *Lochner v. New York*[42]) that persisted from the 1890s until 1937. Invalidations of state and local legislation on all constitutional grounds suggest the phenomenon that was unfolding. On average, the Waite Court struck down fewer than five state laws or local ordinances per Term, approximately the same as the early Fuller Court. In the White Court, however, the number jumped to sixteen per Term, and for the Taft Court it remained almost as high at fifteen.[43] How many of these invalidations rested on substantive due pro-



Michael J. Phillips' new *The Lochner Court, Myth and Reality* is another example of revisionist reassessment of this period, departing from the long-dominant Progressive perspective by which the Court engaged in "an unadorned endorsement of the strong and wealthy at the expense of the weak and the poor." Above is Joseph Lochner, the owner of a bakery in Utica, NY, who was convicted of violating a law aimed at improving employee working conditions.

cess grounds? This is one of the first questions posed by Indiana University's Michael J. Phillips in **The Lochner Court, Myth and Reality**.[44] The topic may have more than historical interest should substantive due process re-emerge to any significant degree. The book is another example of revisionist reassessment of this period[45] that departs from the long-dominant Progressive perspective by which the Court engaged in "an unadorned endorsement of the strong and wealthy at the expense of the weak and poor."[46]

The number of laws struck down on substantive due process grounds between 1897 and 1937, Phillips reports, turns out to be considerably less than is commonly believed. Phillips explains that the standard source, picked up and widely reported by later authors such as Robert G. McCloskey,[47] is B. F. Wright, who tallied some 184.[48] Prior to Wright, Felix Frankfurter had counted 220 decisions holding state and local legislation invalid that were based on the Fourteenth Amendment.[49] Making a fresh tally and analysis, Phillips concludes that the actual number of substantive due process rulings negating legislation is smaller. Depending on how one classifies borderline and rate cases, the actual number falls between a high of 110 and a low of 56.[50] These 56 "clearly constitute the core of Lochner-era substantive due process. These decisions, that is, clearly used due process to strike down substantive government action while applying values that either are native to due process or at least do not originate elsewhere."[51] Over a forty-year period, neither figure seems especially high, yielding an average of 1.4 to 2.75 invalidations per Term. Even if one were to accept a total above 200, the conclusion seems plain: the Court upheld the vast majority of challenged statutes.

Still, especially with novel legislation,

even an occasional judicial veto meant that the constitutional status of legislation remained in doubt until the Court had spoken. Until 1937, such laws had to jump through the hoops of due process, liberty of contract, and the police power. Moreover, the limits suggested by the language of substantive due process, coupled with the possibility of high-court censure, might well have shaped legislative debate and flatly deterred passage of some measures in the first instance.

For Phillip, "the old Court's substantive due process decisions were much more Progressive than is commonly imagined."[52] In addition, "some of the cases in which it did strike down government action were more justified than is generally believed."[53] In this category he places *New State Ice Co. v. Liebmann*,[54] which undid an Oklahoma statute blocking entry into the ice-making business in areas where existing suppliers could satisfy demand. Justice Brandeis, ordinarily counted among the foes of monopoly, dissented. His renowned opinion[55] "exceed[ed] [Justice] Sutherland's page count by a ratio of about three to one, and outfootnot[ed] him fifty-seven to zero."[56] Yet, agreeing with one recent reassessment,[57] Phillips believes that Brandeis was on thin ice. "[T]his supposed master policy scientist failed either to justify Oklahoma's entry restriction or to undermine Sutherland's arguments against it."[58]

The author then considers the basis of the Court's substantive due-process jurisprudence. Or, as the title of the third chapter asks, "What Motivated the Old Court?"[59] One critique has maintained that substantive due process was bad because it looked at the content (the "what") of legislation instead of procedure (the "how") itself. Not only was it therefore not a good fit for the Due *Process* Clause, but it also invited a usurpation of legislative authority and a perversion of democracy. "The judicial function," Harvard's James Bradley Thayer had declared when substantive due process was in its infancy, "is merely that of fixing the outside border of reasonable legislative action."[60] If judges went beyond that, they could not avoid stepping "into the shoes of the law-maker."[61]

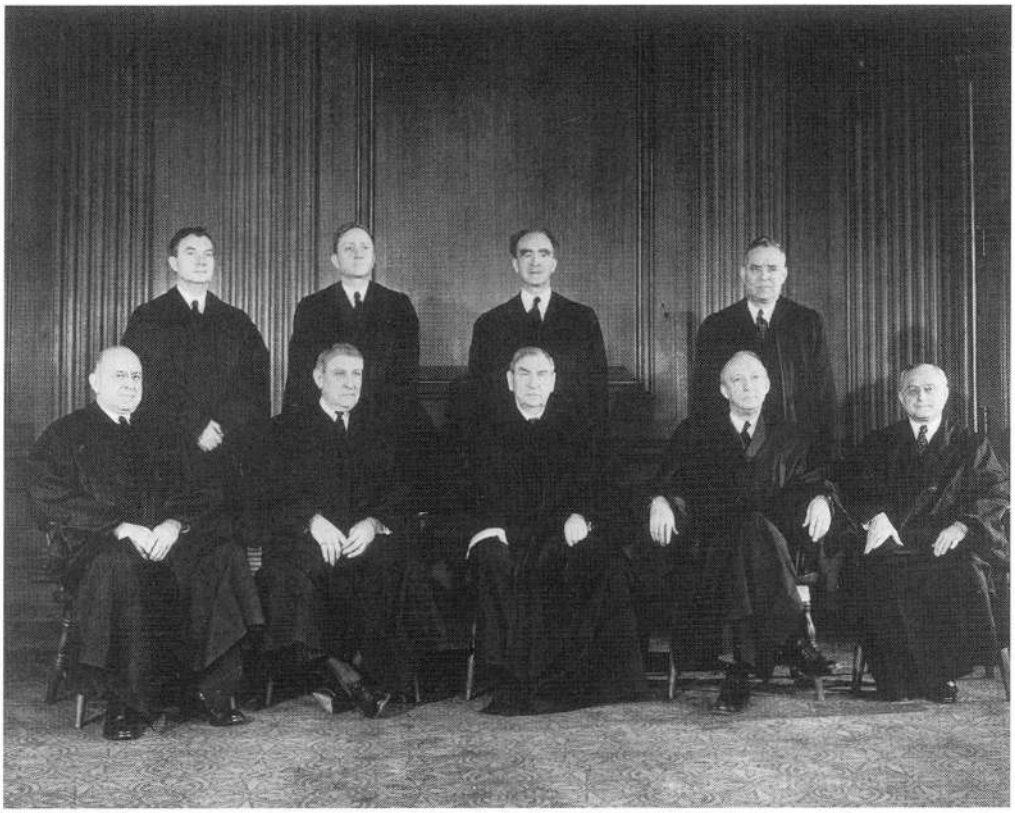
Two other critiques start with a common assumption: that laws struck down were designed to level the playing field between employer and employee and between corporations and individuals.[62] The first of this pair of critiques then attributes the Court's jurisprudence to a misguided, outdated, and misinformed intent, with roots in Jacksonian democracy, to resist such measures as "class" or "partial" legislation—public policy that conferred special privileges on some at the expense of others.[63] The second of this pair is the classic Progressive interpretation that cast the Court in the role of writing a new economic theory into the Constitution. This view took its cue from Justice Holmes' accusation in his *Lochner* dissent that the case had been decided "upon an economic theory which a large part of the country does not entertain."[64] As advocates of laissez-faire economics, the Justices might also be seen as the agents of big business by writing social Darwinism into the Constitution; decisions favoring business sided with the "fittest" who had "survived."[65] As Senator Robert La Follette charged during his unsuccessful campaign for the presidency in 1924, "Always these decisions of the Court are on the side of the wealthy and powerful and against the poor and weak, whom it is the policy of [the] law-making branch of the Government to assist by enlightened and humanitarian legislation."[66] "The Peckham opinion in the *Lochner* case," Professor Edward Corwin commented a quarter century after La Follette's speech, "is the classic statement of the judicial version of laissez-faireism."[67]

Of these two critiques, Phillips finds the latter at odds with the evidence[68] and the former inadequate: "Some of the *Lochner* Court's substantive due process cases support the class legislation hypothesis and some do not. For the most part, though, they support that hypothesis through what they do rather than what they say."[69] Instead, the Justices

tended more frequently to justify themselves by saying that "the challenged measure deprived the claimant of liberty or property. By a potpourri of different means, these opinions then tried to determine whether that deprivation was substantively justified. When the challenged law failed whatever test the Court applied, it ceased to have force." Phillips' conclusion is that the Court's aim, in whatever guise, "was to protect liberty and property against arbitrary or unreasonable restraints."[70] That explanation, he finds, better describes the justifications in nine categories of cases ranging from public utility issues to occupational freedom and employment.[71] One is left wondering what guided the judicial vision of arbitrary and unreasonable restraints.

Which theory comes in second place? For Phillips, "the agent-of-business thesis probably has a bit more explanatory power," but the class legislation interpretation "seems the better of the two." First, the Court sometimes used class-legislation language in its opinions; second, that hypothesis "seems easier to reconcile with our preferred explanation, the liberty and property thesis."[72]

Lochner-era jurisprudence abruptly ended in 1937 with Chief Justice Hughes's opinion in *West Coast Hotel Co. v. Parrish*[73] and with the other components of the "Constitutional Revolution, Ltd.,"[74] that ensued from President Roosevelt's bold assault on the judiciary through his Court-packing plan. By the summer of 1941, when Associate Justice Harlan Fiske Stone became Chief Justice,[75] Owen J. Roberts was the only other Justice dating from the "old Court." Roosevelt had



Although Chief Justice Stone died before he could complete his fifth Term, under his tenure the Court consolidated its newly acquired tolerance for social and economic legislation and, in an independent step, signaled that it would take seriously the protection of nonproprietarian individual rights. Chief Justice Stone is pictured here with the full Court in 1941.

practically remade the Court in just four years.

Stone's tenure as Chief ranks among the shortest: his death in the spring of 1946 occurred before the end of his fifth Term. Yet those five years have long been regarded as memorable for at least three reasons. The Court consolidated its newly acquired tolerance for social and economic legislation and, in an independent step, signaled that it would take seriously the protection of nonproprietarian individual rights, a role Justice Stone had suggested in 1938 in the now-famous fourth footnote of *United States v. Carolene Products Co.*[76] Moreover, the Court confronted more novel war-generated legal problems than any Bench since the 1860s. (Stone's is the only Chief Justiceship that coincides so completely with wartime. He became Chief Justice five months before Pearl Harbor and died less than a year after the Japanese surrender.)

This short era is the subject of **The Stone Court**[77] by Peter G. Renstrom of Western Michigan University. The book is among the first of the ABC-CLIO Supreme Court Handbooks to be published under Renstrom's series editorship. Each of the projected volumes will examine a single Court period as demarcated by the succession of Chief Justices,[78] with each volume adhering to a common format consisting of two parts. Part one consists of four substantive chapters that examine (1) the particular Court in the context of its times, including the circumstances surrounding the appointment of each Justice who served with that Chief Justice; (2) the individual Justices in terms of their backgrounds and jurisprudential thought; (3) the significant decisions rendered by that Court; and, (4) the legacy and impact of that Court. Part two, which in **The Stone Court** represents about one-third of the volume, includes a variety of reference materials that relate to personalities, policies, and events addressed in part one.

While of obvious value to the academic community and the legal profession, **The Stone Court** and the other entries in the series are intended to reach a wider and more general audience as well. This goal seems beneficially to distinguish the Supreme Court Handbooks series from two others. The tomes published so far in the Holmes Devise History of the Supreme Court of the United States are truly treasures for the expert but are hardly written for the novice and pose a navigation challenge to the generalist.[79] The more recently conceived Chief Justiceships of the United States Supreme Court series[80] is more accessible (and more modest in scope) than the Holmes Devise series, and seems more comprehensive than the Handbook series in terms of the number of legal issues addressed. In contrast, the Handbook series promises a sharper focus on selected issues and a greater emphasis on individuals, context, and impact. For example, Renstrom fortuitously explores *Ex parte Quirin*[81] and other war-related cases, describing as well Justice Frankfurter's behind-the-scenes consultations with Secretary of War Stimson on the design and scope of military tribunals and his vigorous defense of the tribunal in *Quirin* when the matter came before the Court.[82]

Renstrom's appraisal of the Stone Court is mixed. Its legacy is one "of unmet expectations," one "without significant consequence until the second decade of the Warren Court era."[83] The author attributes this record of underachievement (measured by what many expected and by what might have been accomplished) to numerous factors. There is the matter of time: an abbreviated five Terms did not allow the Stone Bench to "fashion its own distinctive jurisprudence, particularly with the enormous distraction of the war."[84] Moreover, the Court's roster had undergone rapid change. In a different context, such change might have been an asset. After all, the Bench has only occasionally been staffed by so many intellectually gifted and politically astute individuals. However, these appointees were confronting new questions amidst a debate about what the Court's role should be. The "right in-

tellectual chemistry" never materialized to enable the Stone Justices "to find common ground." Rapid transformation in membership yielded in turn a Bench plagued by personal animosities, with the Black-Jackson feud being only the most visible. Personal disagreement "is reflected in the number of split decisions," which during the Stone years "reached unprecedented levels."[85] These liabilities were compounded by disruptions in staffing, including Justice Roberts' involvement in the Pearl Harbor inquiry, Justice James Byrnes's fleeting tenure prior to his move into the executive branch, and Justice Jackson's year-long absence at Nuremberg. Renstrom believes that Stone's "leadership style" was yet another obstacle. He apparently did not like being in the center chair and proved himself either unable or unwilling to lead.[86]

Many of the Stone Court's troubles, of course, were a byproduct of the single-mindedness of the President who shaped its roster. What counted most to FDR was loyalty to the New Deal. However, by 1938 that battle had been won, and Roosevelt's appointees soon split over the new issues crowding the docket. The parallel with Lincoln is striking. Lincoln wanted Justices fiercely loyal to the Union and to Northern prosecution of the war, and he was largely successful. However, by 1865 the future of the Union and the outcome of the war ceased to be in doubt. Other questions that Lincoln had not anticipated confronted "his" Justices, and, not surprisingly, they took different sides, just as Franklin Roosevelt's later would do.

The Stone Court's legacy is muted for a final reason as well: "the modest record of the Vinson Court that followed it."[87] After the deaths of Justices Murphy and Rutledge in 1949, there were insufficient votes "to develop an individual-rights jurisprudence suggested by some of the Stone Court's rulings."[88] In other words, if one thinks of the Stone years as a transition or "bridge" between one Court era and another, then the indeterminate nature of the Vinson years makes

In his new book, *Civil Rights and Public Accommodations*, Richard C. Cortner of the University of Arizona tells the stories behind *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung*, a pair of rulings that sustained Title II of the Civil Rights Act of 1964. Pictured is Moreton Rolleson, Jr., the owner of the Heart of Atlanta Motel, who challenged the constitutionality of the Act, which permitted Congress to regulate interstate commerce to prohibit racial discrimination in privately owned public accommodations.

the Stone Court appear to be a bridge to nowhere. Nonetheless, the Vinson factor explains only so much: the Stone Court's deference in almost every instance to military necessity, especially on the issue of Japanese relocation, blunted the individual-rights record it might otherwise have left.

As Renstrom acknowledges, the Warren Court recovered the Stone Court's momentum, and in no realm is this clearer than with respect to racial equality. Students of the Warren era and of judicial decisionmaking will be pleased at the publication of **Civil Rights and Public Accommodations** by Richard C. Cortner of the University of Arizona.[89] Probably the most skilled author in the genre of case studies of Supreme Court decisions,[90] Cortner has directed his story-telling talents to *Heart of Atlanta Motel v. United States*[91] and *Katzenbach v. McClung*.[92] This pair of rulings dating from December 14, 1964, sustained the public accommodations provisions of Title II of the Civil Rights Act, which had become law on July 2, 1964. First proposed during the Kennedy administration and later made a key provision of President Lyndon Johnson's legislative agenda, the statute banned discrimination based on racial and certain other grounds in private establishments serving the public. The cases remain important beyond their historical interest. First, they are reminders that judicial review is a force when it authenticates, not merely when it negates. Second, as Cortner shows, *Heart of Atlanta* and *McClung* are directly relevant to the debate within the contemporary Court on the contours and limits of the Commerce Clause.[93]

Four decades ago, the need for corrective civil rights legislation was real and pressing. True, *Brown v. Board of Education*[94] had decreed an end to state-mandated segregated schooling and, by implication, to *de jure* segregation in other public settings too. Yet, in 1963 and 1964, racial segregation was still the practice in hotels, restaurants, theatres, recreational facilities, and other similar privately owned establishments in a large part of the nation. African-Americans were sometimes not served or admitted at all, sometimes they were seated but separated from whites, and sometimes they were allowed take-out service only. Blacks contemplating a trip, commented senator and civil rights champion Hubert H. Humphrey, had to "draw up travel plans much as a general advancing across hostile territory would establish his logistical support."[95] Opponents of racial discrimination in private businesses took part in hundreds of demonstrations designed to protest such policies through direct action. The National Association for the Advancement of Colored People (NAACP) defended some 13,000 persons on criminal trespass charges in the early 1960s, and by 1964 some 3,000 cases were still pending.[96]

Yet alongside a growing consensus in early 1964 that corrective national action was needed stood serious doubts about the legal footing of such action. As it reviewed convictions arising from the sit-in demonstrations, the Court resisted the solution insisted upon by a minority of its Bench that they be invalidated on the broad Fourteenth Amendment basis that state enforcement of a criminal trespass statute in such situations amounted to unconstitutional "state action" under the Equal Protection Clause.[97] And the holding in the Civil Rights Cases of 1883,[98] declaring that Congress was without authority under section 5 of the Fourteenth Amendment directly to reach purely private discrimination, was still good law. Moreover, any legislation banning private discrimination might encounter the barrier of property rights posed by the Due Process Clause of the Fifth Amendment. Congress then chose to attack the problem of private discrimination largely by way of the safer route furnished by the Commerce Clause.

By early fall of 1964, constitutional challenges to Title II had reached the Supreme Court. In the government's view, racial segregation in the travel industry burdened commerce among the states. Furthermore, the law applied to the Heart of Atlanta Motel because

the facility catered to interstate travelers. Thus, if the Commerce Clause could be used as a tool against racial discrimination at all, this type of establishment made an excellent test case. The motel's discriminatory policy could easily be shown to have negative effects on interstate travel.

The restaurant in *McClung* posed a greater challenge. This second case had begun not at the federal government's initiative but as an action against the attorney general by the owners of Ollie's Barbeque in Birmingham, Alabama, deliberately to avoid being considered collectively with national restaurant and motel chains. Ollie's was a homespun eatery, well removed from major highways and the airport, serving an entirely local clientele. It would be covered under Title II's sweep because some of the food served at Ollie's had come from out of state, even though it had been purchased from local suppliers. Congress had said that racial discrimination in the sale of food negatively affected commerce. Would this argument satisfy the Supreme Court?

Drawing from documents at the district-court and Supreme Court levels,[99] transcripts of oral arguments, briefs, memoranda and conversations relating to Solicitor General Archibald Cox's defense of the law, and several caches of judicial papers, Cortner demonstrates that the outcome was never in doubt. What was in doubt was the form that the Court's opinion in both cases, which Chief Justice Warren had assigned to Justice Tom Clark, would take.

Justice John Marshall Harlan, particularly concerned over the absence of an established connection between discriminatory service and a burden on interstate movement of food, drafted a separate opinion concurring on the application of Title II to the Heart of Atlanta Motel, but dissenting with respect to the McClungs' restaurant. As Harlan said at conference, "But there was no evidence beyond conjecture to show that reduction in demand for interstate food had actually taken place. A real demand reduction would be brought about only if racial discrimination caused people to eat less, not eat elsewhere."[100] Harlan was also bothered by language in Clark's initial draft in *Heart of Atlanta* validating the statute as applied to *intrastate* travelers. Clark's task "consequently became one of producing majority opinions in both . . . cases that would satisfy Justice Harlan on these points and keep him in the majority fold."[101] A November 27 draft incorporated a sentence, essentially retained in the final version, that Harlan had suggested: "The absence of evidence directly connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter."[102] A draft of December 4 for *Heart of Atlanta* deleted reference to intrastate travelers. Clark's courting of Harlan was central: with three Justices (Black, Douglas, and Goldberg) writing concurring opinions that developed subjects Clark deliberately left untouched or that offered broader bases for the decisions, Harlan's support was necessary if the Supreme Court was to avoid an intellectually messy and potentially institutionally damaging 5–3–1 display of opinions on so important a statute.

Exactly 125 years before these two cases were decided, John Quincy Adams had accurately observed that "The Constitution itself had been extorted from the grinding necessity of a reluctant nation."[103] Here Adams echoed Marshall's reminder in *Marbury v. Madison* that "The exercise of this original right [the establishment of a constitution] is a very great exertion; nor can it, nor ought it, to be frequently repeated."[104] The Great Chief Justice understood the truth that has been validated both by his successors and the volumes examined here: the Supreme Court's role in constitutional interpretation has allowed change—and sometimes fostered it—within the confines of a comforting continuity.

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

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ENDNOTES

[1]Woodrow Wilson, **An Old Master and Other Political Essays** (1893), 116.

[2]Letter of 1834, in **Letters and Other Writings of James Madison: Fourth President of the United States** (1865), vol. 4, 349–350. The addressee of the letter is not indicated, nor is the date of the letter any more specific than 1834.

[3]Jonathan Elliot, ed., 3 **The Debates in the Several State Conventions on the Adoption of the Federal Constitution** (1836), 554.

[4]Fred L. Israel, "James Iredell," in Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions** (1969), vol. 1, 132.

[5]Griffith J. McRee, **Life and Correspondence of James Iredell** (1857), 2 vols. McRee was the husband of one of the Iredell granddaughters.

[6]Willis P. Whichard, **Justice James Iredell** (2000) (hereafter cited as Whichard).

[7]Maeva Marcus and James R. Perry, eds., **The Documentary History of the Supreme Court of the United States**, 1789–1800 (1985–), 6 vols. to date.

[8]For examples, *see* Scott Douglas Gerber, ed., **Seriatim: The Supreme Court Before John Marshall** (1998), and William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995).

[9]Whichard, 173.

[10]*Id.*, 175.

[11]**The Papers of James Iredell.** Don Giggenbothan, ed. 2 vols. (to date) (1976–).

[12]Whichard, xvii.

[13]1 N.C. 5 (1787).

[14]Bernard Schwartz, **A History of the Supreme Court** (1993), 10.

[15]Quoted in Whichard, 12 (emphasis apparently in the original).

[16]2 U.S. (2 Dallas) 419 (1793).

[17]In effect, Iredell anticipated the position that federal courts later followed regarding the broad sweep of federal judicial authority proclaimed by Article III, yet left barely touched until the Act of March 3, 1875, when for the first time Congress bestowed on the U.S. circuit courts the full panoply of Article III authority. As early as 1816, Justice Joseph Story noted disapprovingly the absence of such necessary legislation: "Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheaton) 304, 328 (1816).

[18]*Alden v. Maine*, 527 U.S. 706, 727 (1999).

[19]**Bartlett's Familiar Quotations**, 15th ed. (1980), 497.

[20]**Supreme Court Justice Joseph Story: Statesman of the Old Republic** (1985), and **The Supreme Court under Marshall and Taney** (1968).

[21]R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001) (hereafter cited as Newmyer).

[22]For example, see David Robarge, **A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court** (2000); Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (1996), and Jean Edward Smith, **John Marshall: Definer of a Nation** (1996). Hobson is chief editor of **The Papers of John Marshall** (1974–), of which ten

volumes have appeared to date. "Talking with Chuck Hobson," writes Newmyer, "is about as close as one can come to talking to the old Chief Justice himself." Newmyer, xviii.

[23]Newmyer, xiii.

[24]*Id.*, xiv.

[25]*Id.*, xvi.

[26]Quoted in *id*, 62.

[27]17 U.S. (4 Wheaton) 316 (1819).

[28]Newmyer, 63.

[29]*Id.*, xvi.

[30]*Id.*

[31]19 U.S. (6 Wheaton) 264 (1821).

[32]22 U.S. (9 Wheaton) 1 (1824).

[33]Oliver Wendell Holmes, "John Marshall, In Answer to a Motion that the Court Adjourn, On February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice," in Mark DeWolfe Howe, comp., **The Occasional Speeches of Justice Oliver Wendell Holmes** (1962), 132 (emphasis in original). Holmes' appointment to the U.S. Supreme Court came in 1902; at the time of these remarks on Marshall, Holmes was chief justice of Massachusetts's high court.

[34]Newmyer, 464.

[35]*Id.*, 484.

[36]62 U.S. (21 Howard) 506 (1859).

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

[38]27 U.S. (2 Peters) 245 (1829).

[39]This is the title of the epilogue. Newmyer, 459.

[40]Holmes, "John Marshall," in Howe, comp., **Occasional Speeches**, 135.

[41]Newmyer, 459.

[42]198 U.S. 45 (1905).

[43]These averages are extrapolated from Table 2.1 in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 13th ed. (2002), 47.

[44]Michael J. Phillips, **The Lochner Court, Myth and Reality** (2001) (hereafter cited as Phillips).

[45]For example, see Michael J. Brodhead, **David J. Brewer: The Life of a Supreme Court Justice, 1837–1910** (1994); Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner-Era Police-Powers Jurisprudence** (1993); Paul Kens, **Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*** (1990); and Alan Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration," 53 *Journal of American History* 751 (1967).

[46]Robert G. McCloskey, **American Conservatism in the Age of Enterprise** (1951), 84.

[47]Robert G. McCloskey, **The American Supreme Court**, 2nd rev. ed. (1994), 101.

[48]**The Growth of American Constitutional Law** (1942), 148–154.

[49]Felix Frankfurter, **Mr. Justice Holmes and the Supreme Court** (1938), 97.

[50]Phillips, 36–41.

[51]*Id.*, 41.

[52]*Id.*, ix.

[53]*Id.*

[54]285 U.S. 262 (1932).

[55]Brandeis's opinion in *New State Ice* is the usual source cited for the states-as-laboratories theory of federalism. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U.S. at 311 (Brandeis dissenting). A contemporary variation on Brandeis's idea is congressional authorization of state initiatives or experimentation in situations where, without congressional approval, such initiatives would doubtless fall short under the Commerce Clause. A clear example is clean-air legislation allowing California to depart from national clean-air standards in order to impose stricter emissions standards on vehicles sold in-state, and allowing other states to depart from congressionally mandated standards as well, provided they adhere to the California standards. One study has called this phenomenon "trailblazer federalism." James F. Van Orden, "California as Policy Trailblazer: Effects on Alternative Automobile Technology and Federalism," thesis presented in candidacy for an honors A.B. degree in environmental policy and business, Franklin & Marshall College, April 24, 2001.

[56]Phillips, 100.

[57]Hadley Arkes, **The Return of George Sutherland** (1994), 55.

[58]Phillips, 101.

[59]*Id.*, 91.

[60]James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129, 148 (1893).

[61]*Id.*, 152. See also Charles C. Marshall, "A New Constitutional Amendment," 24 *American Law Review* 908 (1890).

[62]As with the statute challenged in *New State Ice*, Phillips finds that sweeping characterization of legislation sometimes flawed.

[63]Gillman, **The Constitution Besieged**, 11, 18.

[64]198 U.S. at 75 (Holmes dissenting).

[65]"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," wrote Holmes in his dissent. *Id.* Along with William Graham Sumner, Herbert Spencer had a profound impact in the late nineteenth century on American social and economic thought, with his emphasis on individualism and a minimalist state. The historian Richard Hofstadter credited Spencer with having coined the phrase "survival of the fittest," often attributed to Charles Darwin. Mason and Stephenson, **American Constitutional Law**, 343 n.

[66]"Full Text of La Follette's Speech Attacking Supreme Court," *New York Times*, September 19, 1924, sec. A, p. 2. According to the reporter who was present, La Follette quoted at length from Supreme Court opinions (always a risky venture in public speaking), but soon desisted when the audience began to leave the hall in droves.

[67]Edward S. Corwin, **Liberty Against Government** (1948), 179.

[68]Phillips, 117.

[69]*Id.*, 113–114.

[70]*Id.*, 115.

[71]See Figure 3.1 in *id.*, 116.

[72]*Id.*, 119.

[73]300 U.S. 379 (1937).

[74]The tag comes from the title of Edward S. Corwin's book of the same name (1941, reissued in 1977).

[75]Chief Justice Charles Evans Hughes retired on July 1, 1941. Stone had originally been named to the Bench in 1925 by President Calvin Coolidge.

[76]304 U.S. 144 (1938).

[77]Peter G. Renstrom, **The Stone Court** (2001) (hereafter cited as Renstrom).

[78]The author of this review essay has agreed to write the volume on the Waite Court for Professor Renstrom's series.

[79]No volume in the Holmes Devise series seems to have appeared since 1993. The first two volumes in the series, one on the pre-Marshall Court by Julius Goebel and the other on the Chase Court by Charles Fairman, appeared in 1971.

[80]The initial volumes in this series, on the pre-Marshall and the Fuller courts, appeared in 1995.

[81]317 U.S. 1 (1942). See Renstrom, 121–123, 184–185. Until September 11, 2001, *Quirin* otherwise had fallen strangely out of sight. A recent edition of a widely used law-school constitutional law casebook does not include mention of the case in its index. Gerald Gunther and Kathleen M. Sullivan, **Constitutional Law**, 13th ed. (1997).

[82]Renstrom, 59.

[83]*Id.*, 180.

[84]*Id.*, 181.

[85]*Id.*

[86]*Id.*

[87]*Id.*, 182.

[88]*Id.*, 183.

[89]Richard C. Cortner, **Civil Rights and Public Accommodations** (2001) (hereafter cited as Cortner).

[90]Case studies by Cortner include: **The Kingfish and the Constitution: Huey Long, the First Amendment, and the Emergence of Modern Press Freedom in America** (1996); **The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment** (1993); **A "Scottsboro" Case in Mississippi: The Supreme Court and *Brown v. Mississippi*** (1986); **The Apportionment Cases** (1970); and **The Arizona Train Limit Case** (1970).

[91]379 U.S. 241 (1964).

[92]379 U.S. 294 (1964).

[93]For example, see *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).

[94]347 U.S. 483 (1954).

[95]Quoted in Cortner, ix.

[96]*Id.*

[97]*Bell v. Maryland*, 378 U.S. 226 (1964).

[98]109 U.S. 3 (1883).

[99]Both cases involved decisions by three-judge district-court panels, more frequently deployed then than today. Accordingly, the rulings went to the Supreme Court on direct appeal; there were thus no intervening holdings by the U.S. Court of Appeals for the Fifth Circuit. (Only later were Alabama and Georgia, along with Florida, carved out of the Fifth to form the Eleventh Circuit.)

[100]Quoted in Cortner, 164.

[101]*Id.*, 165.

[102]*Id.*, 168; also see 379 U.S. at 304–305.

[103]John Quincy Adams, **The Jubilee of the Constitution** (1839), 55.

[104]5 U.S. (1 Cranch) 137, 176 (1803).

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Corrections

In a previous issue, biographical information for a contributor was incorrect and has been corrected below:

John B. Owens, a former law clerk to Justice Ruth Bader Ginsburg during the October 1997 Term, wrote this article while he was a trial attorney for the Department of Justice and an associate at O'Melveny & Myers in Washington D.C. He is now an Assistant United States Attorney in the Central District of California (Los Angeles). The ideas expressed in this article are the author's and do not reflect the views of the Department of Justice.

In the caption on page 3, we incorrectly identified the treaty Chief Justice John Jay negotiated with Great Britain while serving on the Court. It was the 1794 Treaty of Amity, Commerce and Navigation, known as the Jay Treaty.

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