Introduction

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One professional task that historians perform is to read manuscripts that are submitted to publishers and evaluate them to see if they are accurate, well written, and suitable for publication. This past summer I read such a manuscript, a biography of one of the lesser-known Justices of the Supreme Court, Wiley Rutledge, who served in the 1940s. In the course of my own research, I had come across a quote about Rutledge indicating that when he died, he was greatly mourned, not just for that which he had already accomplished, but for that which he would now be unable to do. In his new biography of Wiley Rutledge, John M. Ferren will do much, I believe, to justify the truth of that statement.

As it turned out, I was already aware that Judge Ferren was working on the Rutledge biography. I first met him a few years ago when he was a fellow at the Woodrow Wilson Center in Washington, and last year I imposed on him to talk to the research colloquium that the Supreme Court Historical Society hosts every month. He spoke on the Yamashita case, and we then agreed that he would submit an article for the *Journal*. We believe you will find the article fascinating, a piece that will whet your appetite for the full Rutledge story.

In many ways, Robert Frankel is one of our own, since he is one of the editors of the Society's Documentary History project. We have tapped that source often, and the articles growing out of the editors' research have shed much light on the judicial history of the nation in its early years. Historians have long speculated on the extent of judicial review before *Marbury v. Madison* (1803). In this article, we have one of the more definitive examinations of that issue.

I just happened to see a copy of a paper that Sarah Gordon gave last year, and I thought it was so interesting that I asked her to expand it for publication in the *Journal*. With attention once again focused on polygamy in Utah, this historical look at that issue 125 years ago should be of interest to all of our readers.

If you follow books on constitutional and legal history, you will know that there has been

a rash of publications in the period leading up to the fiftieth anniversary of *Brown v. Board of Education*. We published an essay review a few issues back on James Patterson's book on the legacy of *Brown*, and I am aware of at least three other scholars who are also mining that subject. One of them is Jeffrey Hockett. In this piece, he talks about how the ruling in that case had to be legitimized not only in terms of jurisprudence, but also in terms of popular acceptance.

Sometimes we take Grier Stephenson for granted, and we should not. Grier has a busy career as a teacher and a scholar at Franklin & Marshall College. In addition, for many years he has been doing readers of this journal a great service by providing an overview of recent books on the Court in his "Judicial Bookshelf." So, from a grateful editor who is sure he also speaks for a grateful readership: many thanks, Grier.

As usual, there is a feast here. Enjoy!

Before *Marbury*: *Hylton v. United States* and the Origins of Judicial Review

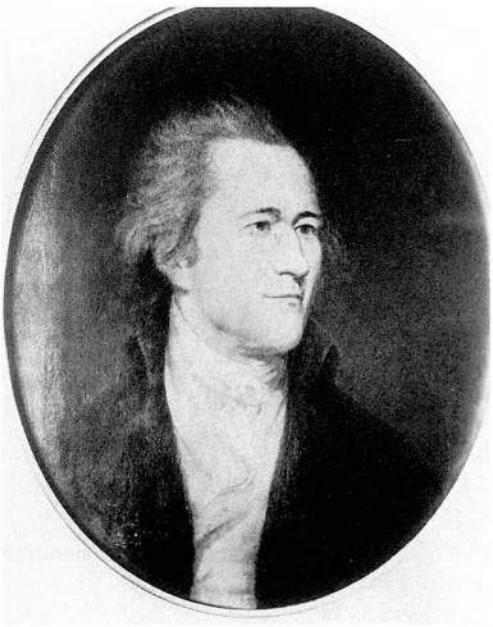
ROBERT P. FRANKEL, JR.[1]

Marbury v. Madison, decided in 1803, is famous for being the first case in which the Supreme Court asserted its power of judicial review. The typical American history textbook includes at least a few lines about how the Court, under the "Great Chief Justice," John Marshall, struck down part of the Judiciary Act of 1789 and claimed its authority to stand as the ultimate guardian of the Constitution.

However, the Court actually employed just this kind of judicial review for the first time some seven years earlier, in the 1796 case, *Hylton v. United States*. The Court did not overturn the federal law upon which this case hinged, the Carriage Tax Act of 1794, but the Justices had been prepared to do so. In fact, *Hylton* was an arranged case, with both parties understanding that the constitutionality of the statute stood at issue. That the Court ultimately upheld the legislation does not mean the Justices had not employed judicial review, because they clearly had.

The Constitution says nothing about judicial review, but many scholars believe the Framers assumed the existence of such an authority. Alexander Hamilton, who would argue *Hylton* on behalf of the government in the Supreme Court, maintained in *Federalist* No. 78 that the judiciary would have the final word on the constitutional legitimacy of congressional statutes.[2] It has also been pointed out that there was a tradition of judicial review in colonial and state courts.

An examination of the federal courts in the 1790s strengthens the notion that judicial review was well accepted in the first years of the Republic and that *Marbury* was not quite as towering a landmark as it is sometimes depicted.[3] In 1792, in *Hayburn's Case*, two Supreme Court Justices and a district court judge, sitting as the United States Circuit Court for Pennsylvania, effectively voided a federal law when they refused to adhere to Congress's



Alexander Hamilton argued *Hylton v. United States* (1796) for the government in the Supreme Court. The case was the most conspicuous example of the Supreme Court's use of judicial review before *Marbury v. Madison*.

mandate that they hear the claims of Revolutionary War invalid pensioners. And the Justices, whether on circuit or sitting together as the Supreme Court, often found themselves reviewing state laws. For example, in February 1796—the same Term in which it decided *Hylton v. United States*—the high court ruled in *Ware v. Hylton* that the 1783 Treaty of Peace with Great Britain overrode a Virginia confiscation statute passed during the Revolution and that therefore British merchants could not be impeded in collecting debts.[4]

Hylton v. United States, however, stands as the most conspicuous example of the Supreme Court's use of judicial review prior to *Marbury*. From the outset everyone knew that the case would be decided on the basis of whether a congressional act—one bearing national significance—adhered to the Constitution. In contrast to *Marbury*, in which the decision to strike down a portion of the Judiciary Act had been unanticipated, it was no secret that *Hylton* would turn on the Court's judgment as to the constitutionality of the carriage legislation. Both sides not only were prepared to accept that judgment but had actively sought it. Furthermore, the Court would be ruling not on an issue relative to the functioning of the judicial branch, but on the validity of a federal tax.

The Carriage Tax Act of 1794, passed to raise revenues to bolster the nation's defensive capacity as tensions with Great Britain mounted, laid duties upon carriages, payable once a year, with rates ranging from one dollar for the crudest two-wheel vehicle to ten dollars for a coach.[5] But objections to the tax on the grounds that it was unconstitutional had arisen as early as the congressional debate over the legislation.[6]

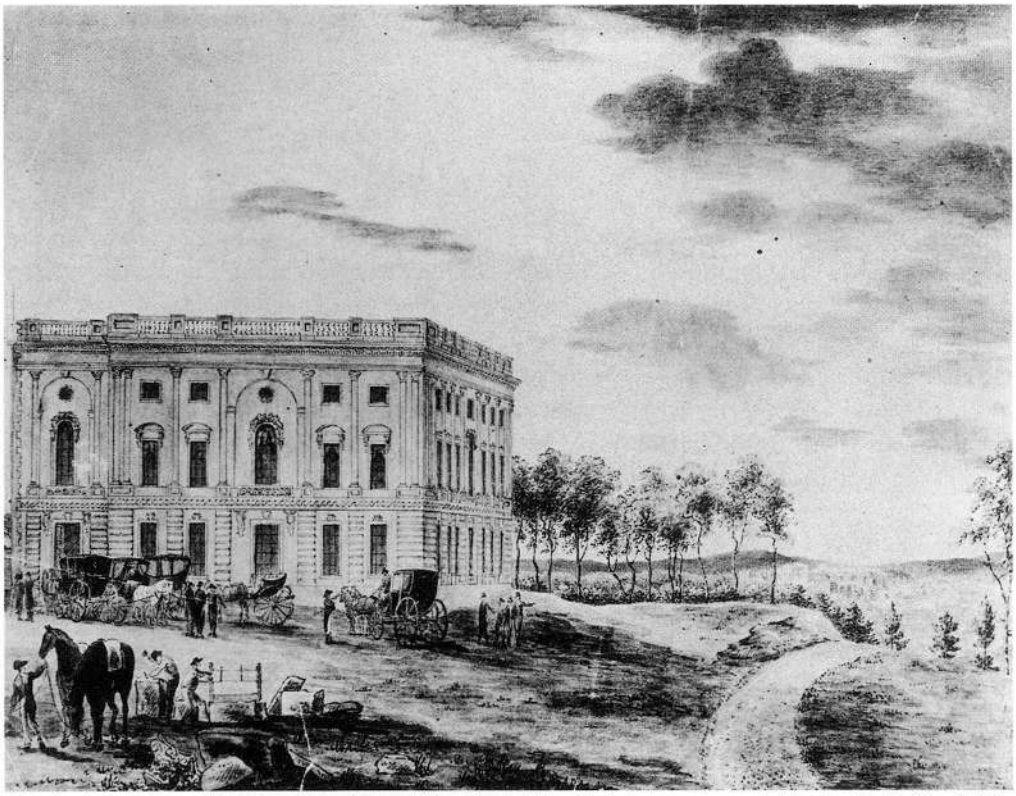
Article I of the Constitution gave Congress the power to collect taxes and directed that duties, imposts, and excises should be uniform throughout the nation. However, in two other places in the first article, it was stipulated that direct taxes had to be laid in proportion to the population of each state.[7] The question, therefore, was whether the carriage tax constituted a direct tax as conceived of—though never explicitly defined—by the Framers. If so, Congress should have imposed it proportionally. But if the tax was not direct, then it was valid as constructed.

Soon after the passage of the Carriage Tax Act, certain Virginians resolved to disobey the statute and force a confrontation in court. In July 1794 Edward Carrington, the federal supervisor of the revenue for Virginia, alerted Tench Coxe, his superior in the Treasury Department in Philadelphia, that "[a] very general idea prevails in this district, that the act is unconstitutional, and numbers of very respectable Characters have signified their determination to try the point by legal decision."[8] When the first carriage tax came due in September 1794, among the distinguished Virginians who refused to pay were the state's chief justice, Edmund Pendleton, his fellow judge Spencer Roane, and John Page, a United States congressman.[9] That the tax rebellion flared where it did should not have

come as a great surprise, for the Virginians had led the fight against the carriage bill in Congress. Aside from their constitutional objections, they perceived the tax as yet another of Hamilton's centralizing financial measures, though it is not clear that the Secretary of the Treasury himself actually participated in the crafting of the legislation. Furthermore, there seems to have been an element of self-interest at play, as the use of carriages was more prevalent in the South than in the North.[10]

A mere desire on the part of Virginians to submit the Carriage Tax Act to a judicial test would not, however, lead to the docketing of a case. For an adjudication to occur, the federal government would have to proceed against one or more of the tax evaders. Carrington understood this, as manifest by his remark to Coxe that "the institution of suits will rest with the United States."[11] But as of early 1795, when the Virginians had yet to see evidence that anyone was being sued for nonpayment, they surmised that there would be no case. A disappointed Judge Pendleton even speculated that the federal government might rather allow a handful of people to fail to pay the tax than risk losing in court.[12]

The Treasury, however, had decided to meet the challenge to the carriage tax and initiate litigation, with the expectation that the Supreme Court would ultimately rule on the question of constitutionality.[13] In fact, whether the Virginians knew it or not, by the beginning of 1795 the government was commencing preparations for a trial. Commissioner of the Revenue Coxe was coordinating the effort in Philadelphia, with Carrington as his operative out in the field. Coxe, who was not a lawyer, proceeded according to the guidance provided by both Secretary Hamilton and Attorney



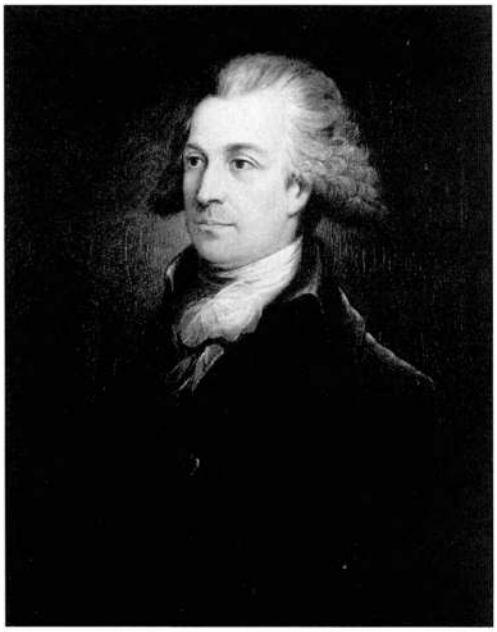
A federal tax on carriages, such as those pictured awaiting their passengers outside the Capitol in 1800, was the subject of *Hylton v. United States* (1796). The carriage tax was sustained, after debate about the revenue-raising power of the new national government.

General William Bradford. The problem was how, when, and where to bring a suit—and against whom.

Although Carrington had already taken steps to get the carriage tax matter into court, in January 1795 Coxe instructed him to discontinue his efforts because the Attorney General was about to become personally involved. Bradford planned to journey to Virginia for the trial and join forces there with the United States attorney, Alexander Campbell. To enhance this legal team, Coxe also hoped to retain John Marshall, who was then in private practice in Richmond.[14]

There seems to have been some ambiguity at this point as to whether the government should pursue a single suit or multiple suits, and whether the venue should be state or federal court. Both Bradford and Hamilton favored proceeding on two tracks. In a letter written in his final days as Treasury Secretary, Hamilton advised Coxe that the government should initiate suits both in the United States Circuit Court for the district of Virginia and in Virginia state court, though only if two defendants could be secured. To drag one man into different courts would be "oppressive." And if only a single case was to be pursued, Hamilton preferred the federal circuit court. The Secretary made it plain that his ultimate goal was to put the controversy before the Supreme Court, which "can alone produce the acquiescence" of the government in the face of an adverse judgment. To get the case into the Supreme Court, Hamilton stated that the defendant should be sued in the circuit court for a debt of $2,000, the threshold amount necessary to obtain a review by the higher tribunal.[15] Because such a large tax bill for any one individual's carriages would have constituted an absurdity, clearly Hamilton was suggesting the utilization of a legal fiction. Furthermore, he expressed the hope that whoever assumed the role of defendant would cooperate in expediting the process.[16]

That defendant—that single defendant—turned out to be Daniel Lawrence Hylton, the same Richmond merchant who had been sued in the British debt case, *Ware v. Hylton*. How this one man ended up as a party in two unrelated and dissimilar cases that came before the Supreme Court at the same time—indeed, two of the most important cases of the decade—is not altogether clear. But he had apparently refused to pay the carriage tax in September 1794, and by January of 1795 Coxe was already referring to the status of "Hylton's case."[17] Furthermore, Hylton was closely tied to the two federal officials in Virginia responsible for instituting the suit, Carrington and Campbell, the latter of whom had been serving for some time as his counsel in *Ware*.[18] Although Campbell would be cast as Hylton's adversary in this case, Hylton was by no means abandoned, because Marshall, his other attorney in *Ware*, had agreed to represent him in the carriage tax litigation.[19] It is not difficult to picture these gentlemen—interrelated members of the Richmond elite—sitting down



Tench Coxe was the official in the Treasury Department in Philadelphia who coordinated the *Hylton* case for the government. As Commissioner of the Revenue, Coxe, though not a lawyer, helped prepare the case against prominent Virginians who refused to pay the federal carriage tax.

together and hammering out a consensus on how to proceed.[20]

Back in Philadelphia, Tench Coxe had been hoping to enlist Marshall to argue for the government and was disappointed when he learned, at the beginning of February 1795, that the lawyer had committed himself on the other side.[21] Then, in April, Coxe discovered that the Attorney General would also be unavailable to help in the case, now slated for the May term of the Virginia federal circuit court, because President Washington had asked him to stay in the capital and prosecute the "whiskey rebels."[22] In addition to losing the services of Marshall and Bradford, the government was apparently running into general difficulty in its attempt to secure assistance for Campbell. Venting his frustration with the Virginia bar, Coxe complained that if no counsel could be hired, then "[t]he Gentlemen of the law, as a body, would be substituted in effect for the Bench of Judges."[23]

Coxe was eager for the case to be heard in May so that it could then be brought before the Supreme Court at the August Term. Not only did he wish for the validity of the carriage tax to be settled as soon as possible, but he believed such a schedule would be favorable to Hylton, as Marshall was due to be in Philadelphia in August to argue *Ware*. Such solicitude on the part of the plaintiff's side for a defendant and opposing counsel would certainly be unusual in a case that had not been arranged. But arranged the case was, and in fact Coxe, in presenting Carrington with a proposal by which the suit might move forward, praised Hylton for his "spirit of accommodation."[24]

At the May term of the circuit court, consisting of Justice James Wilson and the district judge for Virginia, Cyrus Griffin, the government declared that Hylton had violated the Carriage Tax Act the previous September by failing to pay a duty on his 125 chariots, assessed at a rate of eight dollars each. Therefore, he owed back taxes amounting to $1,000, plus an equal sum in penalties, adding up to $2,000.[25] Though Hylton pleaded that he owed no such debt, his counsel proceeded to enter into an agreement with opposing counsel in which the defendant essentially accepted all of the facts in the government's declaration to be true and waived a trial by jury. It was conceded that Hylton had disobeyed the Carriage Tax Act, but that he had done so because he believed the "law was unconstitutional & void." With this agreement on the record, the way was now open for the lawyers to make their arguments before the circuit court on purely constitutional grounds.[26]

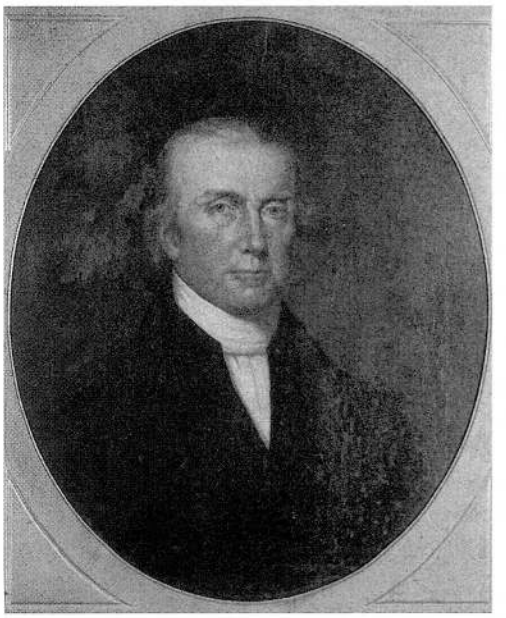
The two parties, however, were already setting their sights on the Supreme Court. Even before the proceedings began in *United States v. Hylton*, the Supreme Court clerk—presumably at the behest of the government—had made out a writ of error that Hylton would be able to employ if he did not prevail in the circuit court. Furthermore, the government was prepared to pay his expenses to take the case to the next level. Indeed, Coxe apparently envisioned that the agreement on the facts would be followed by a perfunctory circuit court judgment and that the case would be "fully argued, and finally determined" that August in Philadelphia.[27]

The circuit court proceedings, however, proved to be no brief, uneventful stop on the road to the Supreme Court. The issue was "fully argued" in Richmond that May. Marshall did not appear for Hylton, but the defendant was vigorously represented by John Taylor of Caroline, who had been intending to play a role in the case for some months.[28] He himself was one of the Virginians who had refused to pay the tax.[29] And despite Coxe's troubles in finding anyone to help Campbell on the government side, able counsel was obtained in the person of John Wickham, another prominent Richmond lawyer involved in *Ware*.

By agreement—and counter to custom—Taylor led off the proceedings on behalf of Hylton, the defendant. His argument was long, often opaque, and suffused with the rabidly Republican, states' rights philosophy upon which he would build his reputation. According

to Taylor, the constitutional provision dictating that direct taxes had to be laid in proportion to state population was "the most important stipulation of the whole compact." If the principle of proportionality was not adhered to in laying such taxes, then the federal government would be in a position to favor certain states while discriminating against others.[30]

As to whether the carriage tax constituted a direct tax, Taylor harbored no doubts. He defined a direct tax in the broadest of terms, devoting a great deal of his presentation to the contention that the category comprised much more than a capitation tax, as mentioned in the Constitution, and a land tax. According to Taylor, anything that was locally produced and consumed—that is, necessities such as food or clothing—was subject to direct taxation. An indirect tax, on the other hand, would apply to a commercial item, usually a luxury, that might be produced in one state and purchased in another at the discretion of the consumer. A citizen paid a direct tax straight to the government and an indirect tax, through the cost of the product, by way of the merchandiser. In Taylor's estimation the former was much more dangerous: "By an indirect tax we can only be incommoded, by a direct tax annihilated." Therefore, while indirect taxes could be—indeed, had to be—laid uniformly throughout the land, for a direct tax to be just it had to be laid according to the principle of proportionality. Equality among the states could not be maintained if one state or section bore a heavier tax burden.[31]



Attorney John Taylor of Caroline, Virginia, argued in the circuit court on behalf of Daniel Lawrence Hylton, a Richmond merchant who refused to pay the carriage tax in 1794. Having himself refused to pay the tax, Taylor (above) defended his client's position vigorously.

Though Taylor opened the possibility that the carriage tax could be reformulated as a proportional tax, he clearly preferred that it be abolished altogether. Of course, the tax would be abolished if the court voided the statute, and Taylor in effect advocated that it do just that when he made a spirited defense of judicial review. The Constitution, he averred, stood as a bulwark against "legislative majorities" and "interpose[d] the judiciary between the government and the individual." Under the American system, it was the role of the courts to make sure that Congress did not overstep its bounds. If violations of the Constitution were permitted, then the document would cease to be a vital instrument. The courts needed to begin "deciding constitutional questions, like other judicial cases—independently of political influence, upon free discussion, and without a risque of any disagreeable consequence to the party propounding them."[32]

When it was Wickham's turn to argue on behalf of the government, he refuted the model of taxation presented by Taylor. For Wickham a direct tax was "a tax upon the revenue or income of individuals," while an indirect tax was "[a] tax upon their expences, or consumption." According to Wickham, the carriage tax, as a tax on consumption, constituted an indirect tax, and, under Article I, had to be imposed uniformly. Besides, in light of the great disparity regarding the number of carriages in different parts of the country, Wickham argued that it would have been impossible to impose the carriage tax based upon state

population. Philadelphians would end up "paying farthings," while a carriage owner in Vermont would have to "sacrifice perhaps half his income."[33]

In Wickham's view Taylor had distorted the intent of the Framers—by laying down definitions for taxes that could not possibly have been the understanding in 1787 and then by justifying his definitions based on a faulty grasp of constitutional principles. Wickham charged that "the counsel for the defendant instead of enquiring into the meaning of the Convention who framed the Constitution, and the people who adopted it by the words they make use of, has put himself in their place, and endeavours to prove that by his construction only, can the rights and interests of the people be preserved." Above all, Taylor was guilty of trying to interpret the Constitution to fit his extreme states' rights view of the country. Wickham argued that America was not "a confederation of states" but one nation, and that it was ridiculous to think that the census should generally be used to apportion taxes the way it was used to determine representation. The Framers' notion of equality in taxation was among individuals, not states, and best achieved through the principle of uniformity, not proportionality. It was true that states could conceivably be targeted through selective use of the indirect tax, but then recourse would have to be obtained through Congress, not the courts.[34]

At the end of his argument, Wickham cryptically declined to discuss whether there existed a "power of the court by a judicial decision to declare an act of the fœderal legislature null and void." In an apparent reference to *Hayburn's Case*, he said that the Justices had resolved this question while riding circuit. Therefore, it would be "improper as well as unnecessary" for him to comment further. Taylor, of course, had shown no such restraint in asserting the power of judicial review, but whether Wickham would have liked to voice his agreement that the court had the power to strike down the Carriage Tax Act is not evident. On the one hand, by making *Hylton* a test case, the government was implicitly recognizing the power of the courts to pass on the statute. On the other hand, Wickham, as a lawyer striving for victory, may well have wanted to argue against the court's authority. His co-counsel Campbell reputedly believed that the carriage tax was unconstitutional but that the court could not overturn an act of Congress.[35]

When the judges delivered their opinions, Wilson and Griffin split, the former siding with the government and the latter with Hylton.[36] Under the Judiciary Act of 1793, when a circuit court bench divided, the case was supposed to be held over until the next term to see whether agreement could be secured. If the split persisted, then the decision of the presiding justice would prevail.[37] Because of the desire to get this case before the Supreme Court as soon as possible, however, Hylton confessed judgment. By consent of the parties, the court entered judgment against the defendant for $2,000, with the proviso—consistent with the terms worked out at the beginning of the circuit court proceedings—that the payment of sixteen dollars would discharge the debt. To insure that Hylton's confession would not impede his course to the Supreme Court, the judgment explicitly provided that it "shall not bar the Defendant from the benefit of a Writ of Error, nor be considered as a release of any Error of which the Defendant might have availed himself if this Judgment had not been confessed, but had been regularly rendered by the Court."[38] Aside from obtaining Wilson's signature on the writ of error, all Hylton had to do now to bring the case before the Supreme Court was to submit an assignment of error, a task performed on his behalf by Campbell, the opposing counsel. In his capacity as district attorney, Campbell also attached to the assignment a statement denying the necessity of a citation—"the United States being always present in their Courts"—and acknowledging notice.[39]

Why did Campbell submit Hylton's assignment of error rather than Taylor? Perhaps

there is an innocuous explanation, but it soon became clear that Taylor had abandoned the path of accommodation. In the wake of the Richmond proceedings, he took steps to publish his circuit court argument, much to the dismay of the new Treasury Secretary, Oliver Wolcott, Jr., and others in Philadelphia. These federal officials believed that for Taylor to reduce his argument to print while the case was being reviewed constituted a threat to the judicial process, though they were poised to parry his offensive in the forum of public opinion with the release of Wickham's argument.[40]

Meanwhile, the government began to prepare for the August Term of the Supreme Court. Attorney General Bradford brought Alexander Hamilton back into the case by securing the President's permission to hire him to represent the government. Bradford told Hamilton that it would be an auspicious occasion upon which "to make your debut in the Supreme Court," for "I consider the question as the greatest one that ever came before that Court; & it is of the last importance not only that the act should be supported, but supported by the unanimous opinion of the Judges and on grounds that will bear the public inspection."[41]

Soon, however, news reached Philadelphia that Taylor was refusing to appear in the Supreme Court. Even worse, he was advising Hylton to present no case at all and let the Justices proceed as they desired. Bradford's analysis of Taylor's position was that, "Having succeeded in dividing the opinions of the Circuit Court, he wishes to prevent the Effect which a decision of the Supreme Court *on full argument* would have." Furthermore, the Attorney General resolved that if Hylton did not lay out an argument, then the government would not either. The Justices should decide the case based on the arguments made in the circuit court, of which Taylor's materialized in pamphlet form in late July.[42] At the August Term of the Supreme Court, the clerk entered *Hylton v. United States* on the docket, but when no one appeared for the plaintiff in error, the Court took no action.[43]

Taylor had thrown the case off course, though only temporarily. As the February 1796 Term of the Supreme Court neared, Hylton signaled that he did not share in the efficacy of his former counsel's tactics and wished to resume the cooperative arrangement that had once governed between the parties. In late January he signed an agreement in which he declared that *Hylton* should "be heard and determined at the Approaching session" of the Supreme Court rather than continued, for his "object in Contesting the law" was "merely to ascertain a Constitutional point and not by any means to delay the payment of a public duty."[44]

The government once again got ready to go into court. As a result of Bradford's death, the new Attorney General, Charles Lee of Virginia, assumed command of the effort, and Hamilton honored his commitment to argue for the United States.[45] Who, however, would represent Hylton? Taylor, of course, could not be counted on to serve, and though Marshall would be present at the Supreme Court that Term to argue *Ware*, he was apparently unavailable.[46] James Madison, who sympathized with Hylton but assumed the Justices did not see the issue "in the same light," feared that there would be no "professional appearance" for his fellow Virginian and that his case would "be espoused by junior & unskilful volunteers." If that were the situation, he would prefer "the cause should rest on the printed arguments & on the discernment of the Bench."[47] Madison, though, need not have worried, for soon enough Jared Ingersoll, the attorney general of Pennsylvania, was seeking his advice on how to argue on Hylton's behalf. At the eleventh hour the government had taken on the burden of hiring counsel for the other side and selected not only Ingersoll but also Alexander Campbell. Despite Campbell's record of service in this case as United States attorney for Virginia, he was slated to argue for Hylton in *Ware* and apparently had questioned the legitimacy of the carriage tax from the outset.[48]

In their arguments on behalf of Hylton, now the plaintiff in error, Ingersoll and

Campbell employed a more tempered approach than Taylor had in the court below. Though they maintained that only proportional taxation was truly fair to the states, they did not resort to heated states' rights rhetoric or insist that the union was a mere confederation. Nor did they advance an explicit, sweeping definition of what constituted a direct tax. Instead, they hewed closely to the Constitution and simply contended that a direct tax was any tax that was not a duty, impost, or excise. And they emphasized the point—only briefly alluded to by Taylor in the circuit court—that proportional taxation could be made to work in practice by allowing regional variation. Different items could be taxed in different states, as long as the process resulted in each state's making a just contribution to the union based on its population. What mattered was the final amount of money raised in a state, not the object or rate of taxation.[49]

It appears that Hamilton bore the brunt of the argument for the United States, the defendant in error, and that Attorney General Lee played a more modest role. Hamilton maintained that the Constitution endowed Congress with broad powers of taxation and that the legislature's main obligation in wielding those powers rested in treating individuals—not states—equally. He conceded that trying to distinguish between a direct and indirect tax could be a difficult exercise, for "we cannot observe an exact line." However, he thought that most taxes qualified as duties, excises, or imposts and that therefore few taxes—in fact, only capitation and land taxes for certain—could be subsumed under the "direct" rubric. Because he believed the carriage tax constituted an excise or a duty, he deemed it to be an indirect tax that had been properly laid according to the rule of uniformity. The proof that it should be considered an indirect tax was that imposing the tax proportionally would have led to "very absurd consequences," which could never have been the intention behind the Constitution.[50]

Jared Ingersoll (pictured), the Attorney General of Pennsylvania, and Alexander Campbell, a United States attorney for Virginia, argued Hylton's case before the Supreme Court, taking a more tempered approach than Taylor's. This portrait of Ingersoll was completed at a later time; no known portrait of Campbell exists.

Neither side dwelled at any length on the question of whether the Supreme Court possessed the power of judicial review. At the very beginning of the arguments, Ingersoll, on behalf of Hylton, raised the issue simply to assert that such a power existed. He made reference to the "Sentiments of the Judges individually," which may have been another invocation of *Hayburn's Case*. Hamilton did not challenge opposing counsel on this score, stating that "a Law inconsistent with the Constitution" was "void," though adding the caveat that the Court's authority to declare it so had "to be exercised with great moderation."[51]

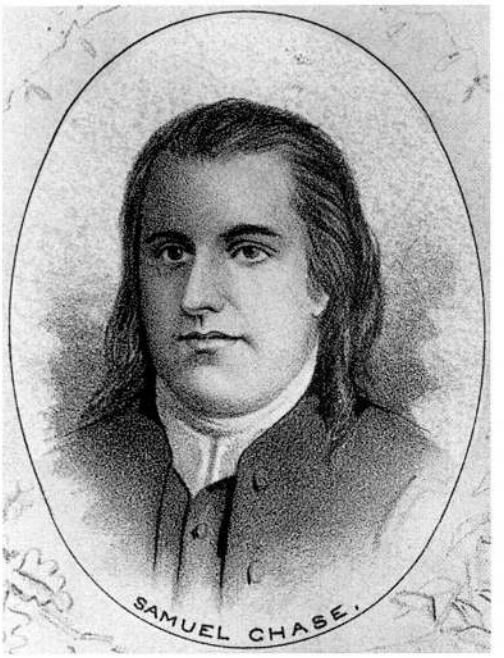
Argument in *Hylton* stretched over three days—February 23, 24, and 25, 1796.[52] When Hamilton launched into a three-hour presentation on the second day, the courtroom was crowded with members of Congress and foreign dignitaries who wished to witness the former Secretary's first appearance before the Justices. He did not disappoint. Despite being plagued by poor health, Hamilton performed impressively by most accounts, although Madison sounded a somewhat sour note in a letter to Jefferson in which he praised Ingersoll and Campbell but related that the

effect of Hamilton's argument "was to raise a fog around the subject."[53]

Only four members of the Supreme Court heard argument in *Hylton*—James Wilson, James Iredell, William Paterson, and the newest Associate Justice, Samuel Chase. Illness prevented William Cushing from attending, and the new Chief Justice, Oliver Ellsworth, was not sworn in until March 8, the day the opinions were announced. Because Wilson presided over the case in the circuit court, he refrained from delivering an opinion, though he proclaimed that, with only four Justices present for the full proceedings, he "should have thought it proper to join in the decision . . . did not the unanimity of the other three Judges, relieve me from the necessity."[54]

As Wilson stated, Iredell, Paterson, and Chase were unanimous in affirming the circuit court judgment in favor of the United States. Not only did they reach the same conclusion, but much of their reasoning was similar. All three of the Justices maintained that the carriage tax was a tax on consumption or expense, and therefore an indirect tax. None of them could imagine that the Framers of the Constitution, in addressing the issue of direct taxes, had contemplated much more than a capitation tax and a land tax. Chase was prepared to call the carriage tax a duty, but all three Justices held that Congress possessed the authority to impose taxes that were not direct but did not fit neatly into the Constitution's category of "Duties, Imposts, and Excises" either. In these cases, Congress would be wise—and within its discretion—to adhere to the principle of uniformity.[55]

Trying to apportion taxes based on state population, the Justices believed, was a difficult proposition. Paterson was the most vehement on this point, asserting that the rule of proportionality was "radically wrong." This delegate to the Philadelphia Convention of 1787 claimed that the only reason the concept found its way into the Constitution was to assuage Southerners who wished to protect their slaves and land, though in practice proportional taxation was almost unworkable.[56] The Justices went to great lengths to show how "absurd" the results would be if the government attempted to lay a carriage tax based on state population, as the tax bills for two men in two different parts of the country possessing the same kind of carriage could vary substantially. They were also dismissive—even contemptuous—of the notion that different objects could be taxed in different states, for such a system would surely turn out to be unwieldy and inequitable.[57]



The newest Associate Justice to hear the case, Samuel Chase was the only one to touch on the subject of judicial review in his opinion upholding the carriage tax.

The only member of the Court to touch upon the matter of judicial review was Chase, who stated at the end of his opinion that because he was affirming the legitimacy of the carriage tax as imposed, "it is unnecessary, *at this time*, for me to determine, whether this court, *constitutionally* possesses the power to declare an act of Congress *void*, on the ground of its being made contrary to, and in violation of, the Constitution." He added, however, that "if the court have such power, I am free to

declare, that I will never exercise it, *but in a very clear case.*"[58]

By upholding the Carriage Tax Act, the Supreme Court interpreted the Constitution in a way that bolstered the power of the federal government and rejected the Virginian, states' rights view of congressional authority. The Court's judgment affirmed that Congress could exercise wide latitude in its method of taxation, unhampered to a large extent by the Article I language on direct taxes. More generally, the decision possessed important implications for the federal-state balance.

The outcome of *Hylton v. United States*, however, lacked the momentousness that would have accompanied the overturning of the Carriage Tax Act. Not until *Marbury* did the Supreme Court strike down a piece of federal legislation as unconstitutional, and thus that case, with Chief Justice Marshall's explicit defense of judicial review in the opinion of the Court, secured its place in history. But despite Chase's statement in *Hylton* that he need not discuss the Court's authority to declare laws unconstitutional, he and his brethren did test and affirm a statute in light of the Constitution. There can be little doubt that such was an exercise in judicial review.

ENDNOTES

[1]This article is adapted from the introduction to the section on *Hylton v. United States* in the forthcoming seventh volume of **The Documentary History of the Supreme Court of the United States, 1789–1800**. The author wishes to acknowledge the assistance of his colleagues on the Documentary History Project, editor Maeva Marcus and fellow associate editors Robert F. Karachuk and Stephen L. Tull.

[2]*Federalist* No. 78, in Jacob E. Cooke, ed., **The Federalist** (Middletown, CT: Wesleyan University Press, 1961), pp. 524–526.

[3]See Maeva Marcus, "Judicial Review in the Early Republic," in Ronald Hoffman and Peter J. Albert, eds., **Launching the Extended Republic** (Charlottesville: University Press of Virginia, 1996), pp. 25–53. Two of the most esteemed recent biographers of Marshall subscribe to the idea that *Marbury* did not represent a break from prevailing assumptions and practices regarding judicial review. See Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence: University Press of Kansas, 1996), pp. 47–71, and R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (Baton Rouge: Louisiana State University Press, 2001), pp. 144–175.

[4]For *Hayburn's Case*, see Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 6 (New York: Columbia University Press, 1998), pp. 33–72. *Ware v. Hylton* will be treated in the forthcoming seventh volume of the **Documentary History**.

[5]"An Act laying duties upon Carriages for the conveyance of Persons," June 5, 1794, **U.S. Statutes at Large** 1 (1845): 373.

[6]Julius Goebel, Jr., and Joseph H. Smith, eds., **The Law Practice of Alexander Hamilton**, vol. 4 (New York: Columbia University Press, 1980), pp. 297–308.

[7]Article I, sections 2, 8, and 9.

[8]Edward Carrington to Tench Coxe, July 28, 1794, in Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 7 (New York: Columbia University Press, forthcoming).

[9]St. George Tucker to James Monroe, March 8, 1795, in *ibid.*

[10]Goebel and Smith, eds., **Law Practice of Alexander Hamilton,** vol. 4, pp. 299–300, 304–308.

[11]Edward Carrington to Tench Coxe, July 28, 1794, in Marcus, ed., **Documentary History**, vol. 7.

[12]Edmund Pendleton to James Madison, January 30, 1795, and St. George Tucker to James Monroe, March 8, 1795, in *ibid.*

[13]Edward Carrington to Tench Coxe, July 28, 1794, and Tench Coxe to Edward Carrington, August 26, 1794, in *ibid.*

[14]Tench Coxe to Edward Carrington, January 14, 1795, Tench Coxe to Alexander Hamilton, January 14, 1795, Tench Coxe to John Marshall, February 1, 1795, and Tench Coxe to Edward Carrington, February 1, 1795, in *ibid.*

[15]Actually, Section 22 of the Judiciary Act of 1789 stipulates that a writ of error can be secured only when "the matter in dispute exceeds $2,000." Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 4 (New York: Columbia University Press, 1992), p. 80; **U.S. Statutes at Large**, 1:84; Goebel and Smith, eds., **Law Practice of Alexander Hamilton**, vol. 4, p. 313.

[16]Tench Coxe to Alexander Hamilton, January 14, 1795, and Alexander Hamilton to Tench Coxe, January 28, 1795, in Marcus, ed., **Documentary History**, vol. 7.

[17]St. George Tucker to James Monroe, March 8, 1795, and Tench Coxe to Alexander Hamilton, January 14, 1795, in *ibid.*

[18]Many years later, upon preparing his will, Hylton designated three "particular & worthy friends" to serve as executors, one of them being Carrington. In 1793, before

the carriage tax controversy, Campbell married Hylton's niece. Glade Ian Nelson, "Hylton of Virginia: A Baronial Descent," *Virginia Genealogist* 19 (January–March 1975): 13–17; *Virginia Gazette, and Weekly Advertiser* (Richmond), September 20, 1793.

[19]Tench Coxe to Edward Carrington, February 2, 1795, and Tench Coxe to Edward Carrington, April 24, 1795, in Marcus, ed., **Documentary History**, vol. 7.

[20]Not only did a Hylton-Campbell kinship tie exist (see note 18 above), but Carrington and Marshall were brothers-in-law. Herbert A. Johnson, ed., **The Papers of John Marshall**, vol. 1 (Chapel Hill: University of North Carolina Press, 1974), p. 117n.

[21]Tench Coxe to Edward Carrington, February 2, 1795, in Marcus, ed., **Documentary History**, vol. 7. Marshall conveyed the news while in Philadelphia, whither he had traveled to argue *Ware v. Hylton*. That case, however, was continued to the following Term. Minutes of the Supreme Court, February 2, 1795, in Maeva Marcus and James Perry, eds., **The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 1 (New York: Columbia University Press, 1985), p. 232.

[22]A discussion of the Whiskey Rebellion cases can be found in Marcus, ed., **Documentary History**, vol. 6, pp. 514–521.

[23]Tench Coxe to Edward Carrington, April 24, 1795, in Marcus, ed., **Documentary History**, vol. 7.

[24]Tench Coxe to Edward Carrington, April 24, 1795, and Tench Coxe to Edward Carrington, April 26, 1795, in *ibid.*

[25]Declaration and Plea [May 27, 1795], in *ibid.*; Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 3 (New York: Columbia University Press, 1990), p. 48.

[26]The pact also stipulated that if Hylton lost the case, he could discharge his fictional debt of $2,000 with a sum of sixteen dollars, probably the amount he actually owed based on the failure to pay the carriage tax on a single chariot. See Declaration and Plea [May 27, 1795] and Agreement of Counsel [May 27, 1795], in Marcus, ed., **Documentary History**, vol. 7.

[27]Agreement of Counsel [May 27, 1795], Tench Coxe to Edward Carrington, April 26, 1795, and Writ of Error and Return [June 2, 1795], in *ibid.*

[28]Edmund Pendleton to James Madison, January 30, 1795, in *ibid.* Taylor presumably served as Hylton's attorney in the forging of the agreement of counsel, but none of the lawyers affixed their names to the document. Why Marshall did not argue for Hylton is not known, especially as he did attend the May term of the circuit court. See section on *Hunter v. Fairfax* in *ibid.*

[29]St. George Tucker to James Monroe, March 8, 1795, in *ibid.*

[30]John Taylor's Circuit Court Argument, May [27], 1795, in *ibid.*

[31]*Ibid.*

[32]*Ibid.*

[33]John Wickham's Circuit Court Argument, May [28], 1795, in Marcus, ed., **Documentary History**, vol. 7.

[34]*Ibid.*

[35]*Ibid.*, and St. George Tucker to James Monroe, March 8, 1795, in Marcus, ed., **Documentary History**, vol. 7.

[36]A year after giving his circuit court opinion, and shortly after being passed over to fill a vacancy on the Supreme Court, Griffin sent a letter to President Washington defending his record. Noting that he had been at odds with Chief Justice Jay in *Ware*, he then wrote, "I gave my opinion also in another great question, the *Carriage* Tax, and was unlucky enough to differ from Judge Wilson. I thought the Tax one of the best that could be laid, but it appeared to me not to be done in a Constitutional manner. most of the Bar were of the same opinion. I was sworn to determine according to the best of my Judgment; but I constantly paid the Tax myself and advised others to do it also." Cyrus Griffin to George Washington, May 23, 1796, in Marcus and Perry, eds., **Documentary History**, vol. 1, p. 849.

[37]Judiciary Act of 1793, section 2, Marcus, ed., **Documentary History**, vol. 4, p. 204; **U.S. Statutes at Large**, 1:334.

[38]Circuit Court Judgment, June 2, 1795, and Tench Coxe to William Bradford, Jr., and Oliver Wolcott, Jr., June 28, 1795, in Marcus, ed., **Documentary History**, vol. 7; 3 U.S. (3 Dall.) 172, 183–84 (1796); Julius Goebel, Jr., **The Oliver Wendell Homes Devise History of the Supreme Court of the United States**, vol. 1, **Antecedents and Beginnings to 1801** (New York: Macmillan, 1971), p. 682.

[39]Writ of Error and Return [June 2, 1795], and Assignment of Error [June 2, 1795], in Marcus, ed., **Documentary History**, vol. 7.

[40]Oliver Wolcott, Jr., to Tench Coxe, June 18, 1795, Tench Coxe to Edward Carrington, June 18, 1795, William Bradford, Jr., to Alexander Hamilton, July 2, 1795, and Tench Coxe to Edward Carrington, August 1, 1795, in *ibid.*

[41]Tench Coxe to Edward Carrington, June 30, 1795, William Bradford, Jr., to Alexander Hamilton, July 2, 1795, Tench Coxe to Edward Carrington, July 16, 1795, and Tench Coxe to Edward Carrington, July 24, 1795, in *ibid.*

[42]Wickham's argument was published in early September. See the source notes for John Taylor's Circuit Court Argument, May [27], 1795, and John Wickham's Circuit Court Argument, May [28], 1795, in *ibid.*

[43]Tench Coxe to Edward Carrington, July 24, 1795, William Bradford, Jr., to Alexander Hamilton, August 4, 1795, Tench Coxe to Edward Carrington, August 13, 1795, and Edward Carrington to the People of Virginia, August 23, 1795, in *ibid.*; Docket of the Supreme Court, in Marcus and Perry, eds., **Documentary History**, vol. 1, p. 502.

[44]Agreement of Daniel L. Hylton, January 25, 1796, in Marcus, ed., **Documentary History**, vol. 7.

[45]Tench Coxe to Edward Carrington, January 9, 1796, Tench Coxe to Charles Lee, January 9, 1796, Oliver Wolcott, Jr., to Alexander Hamilton, January 15, 1796, Tench Coxe to Edward Carrington, January 17, 1796, Tench Coxe to Charles Lee, January 28, 1796, and Tench Coxe to Edward Carrington, February 7, 1796, in *ibid.*

[46]Prior to the previous Term, August 1795, Tench Coxe had hoped that Marshall would represent Hylton if Taylor refused. See Tench Coxe to Edward Carrington, July 24, 1795, in *ibid.*

[47]James Madison to Edmund Pendleton, February 7, 1796, in *ibid.*

[48]3 U.S. (3 Dall.) 172 (1796); Jared Ingersoll to James Madison, [February 9], 1796, Account of Alexander Campbell, March 1, 1796, Account of Jared Ingersoll, March 4, 1796, and St. George Tucker to James Monroe, March 8, 1795, in Marcus, ed., **Documentary History**, vol. 7.

[49]James Iredell's Notes of Arguments in the Supreme Court, February 23, 24, and 25, 1796, and John Taylor's Circuit Court Argument, May [28], 1795, in *ibid.*

[50]James Iredell's Notes of Arguments in the Supreme Court, February 23, 24, and 25, 1796, Alexander Hamilton's "Brief," [before February 17, 1796], and Alexander Hamilton's "Opinion," [before February 17, 1796], in *ibid.*

[51]James Iredell's Notes of Arguments in the Supreme Court, February 23, 24, and 25, 1796, in *ibid.*

[52]Minutes of the Supreme Court, February 23, 24, and 25, 1796, in Marcus and Perry, eds., **Documentary History**, vol. 1, p. 263.

[53]James Iredell's Notes of Arguments in the Supreme Court, February 23, 24, and 25, 1796, *Gazette of the United States*, February 25, 1796, James Iredell to Hannah Iredell, February 26, 1796, James Madison to James Monroe, February 26, 1796, John Milledge to Sheftall Sheftall, February 26, 1796, Jeremiah Smith to William Plumer, February 27, 1796, James Madison to Thomas Jefferson, March 6, 1796, and Ezekiel Gilbert to Peter Van Schaack, March 8, 1796, in Marcus, ed., **Documentary History**, vol. 7.

[54]3 U.S. (3 Dall.) 171–184 (1796); William Tilghman's Notes on the Justices' Opinions, March 8, 1796, in Marcus, ed., **Documentary History**, vol. 7.

[55]*Ibid.*

[56]In his argument in the circuit court, Taylor had admitted that the clause in the Constitution about the apportionment of direct taxes was a concession to the South, but he thought the concession appropriate and the rule of proportionality sound. See John Taylor's Circuit Court Argument, May [27], 1795, in Marcus, ed., **Documentary History**, vol. 7.

[57]3 U.S. (3 Dall.) 171–184 (1796); William Tilghman's Notes on the Justices' Opinions, March 8, 1796, in Marcus, ed., **Documentary History**, vol. 7.

[58]3 U.S. (3 Dall.) 175 (1796).

The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America

SARAH BARRINGER GORDON

My research into the "Mormon Question" has blurred disciplinary boundaries, demonstrating that legal history occurs outside the confines of law books, out in the world of popular culture, political cartooning, and sermonizing, and even in outbreaks of violence. This article is designed to illustrate how an entire body of constitutional law was made in opposition to the marital and sexual arrangements of Mormons in the Utah Territory in the nineteenth century.

The Mormon Question tied together questions of religion, law, and the perceived sexual enslavement of women in a tantalizing mix. Many Americans in the nineteenth century were intrigued, dismayed, and ultimately persuaded that Mormon men were dangerous to the women they married. They also believed that polygamy was a threat to the entire political and constitutional system.[1]

Opponents of polygamy claimed that Mormon plural marriage was, in essence, a political and legal question. They imagined Mormon men, especially, as violent and defiant. A political cartoon from the 1880s, for example, depicted a Mormon atop a platform labeled "polygamy," shaking his fist at a cowardly Congress, with his wives chained at the neck and labeled like so many cattle. Needless to say, this kind of attack was painful in the extreme to Mormons, who claimed that they were misunderstood by the rest of the country.[2]

The arguments made on both sides of the debate over polygamy were complex and changed over time, and I can only go into a few of the many fascinating venues of the conflict. For the purposes of this article, the key point is that the combatants ranged across genres and into multiple fields of conflict, forcing our gaze as lawyers out beyond the bounds of doctrine, teaching us once again that constitutional theory and legal doctrine are rich sources of cultural insight: they are the stuff of great stories.

This story begins with religious faith. Joseph Smith founded the Church of Jesus Christ of Latter-day Saints, commonly called

This 1880s political cartoon from *The Judge* depicts a Mormon atop a platform labeled "polygamy" (on the supporting pole), shaking his fist at a cowardly Congress. His wives are chained at the neck and labeled like cattle.

the Mormon Church, in 1830. He was the sect's Prophet, its first president, and the translator of the "golden plates," which, he reported, were revealed to him by an angel. He was known in upstate New York as a counterfeiter, fortune-teller, and treasure hunter.[3] And yet Smith's inspiration forever changed his world and drew a following whose faith was severely tested by scorn and persecution. Smith not only published the **Book of Mormon**—a new revelation that placed America at the center of religious history—but also embraced a concept of ongoing revelation in the "latter days." The new covenant between God and his servant Joseph Smith assured followers that they were part of a glorious cosmic plan, which was gradually unfolded for their exaltation and, ultimately, for the salvation of the world.[4]

Mormonism was born in a society saturated with religious messages. Smith understood that he and his followers were enmeshed in what he called a "war of words" among Christians, and he claimed that his new revelation was the only uncorrupted and truly Christian Word of God.[5]

The Mormon Church quickly acquired passionate adherents and equally passionate opponents. Everywhere they went, Mormons excited the enmity of their neighbors. The story is a complex one, and involves charges of violence on both sides, but there can be no doubt that Mormons suffered greatly. In 1838, seventeen men and boys were killed by local residents in what is known as the Massacre at Haun's Mill, Missouri. The governor of Missouri called for the expulsion of all Mormons from the state; officials in other states were less explicit, but let Mormons know that they could not rely on state protection. The Prophet himself was tarred and feathered by an angry mob in Ohio.[6]

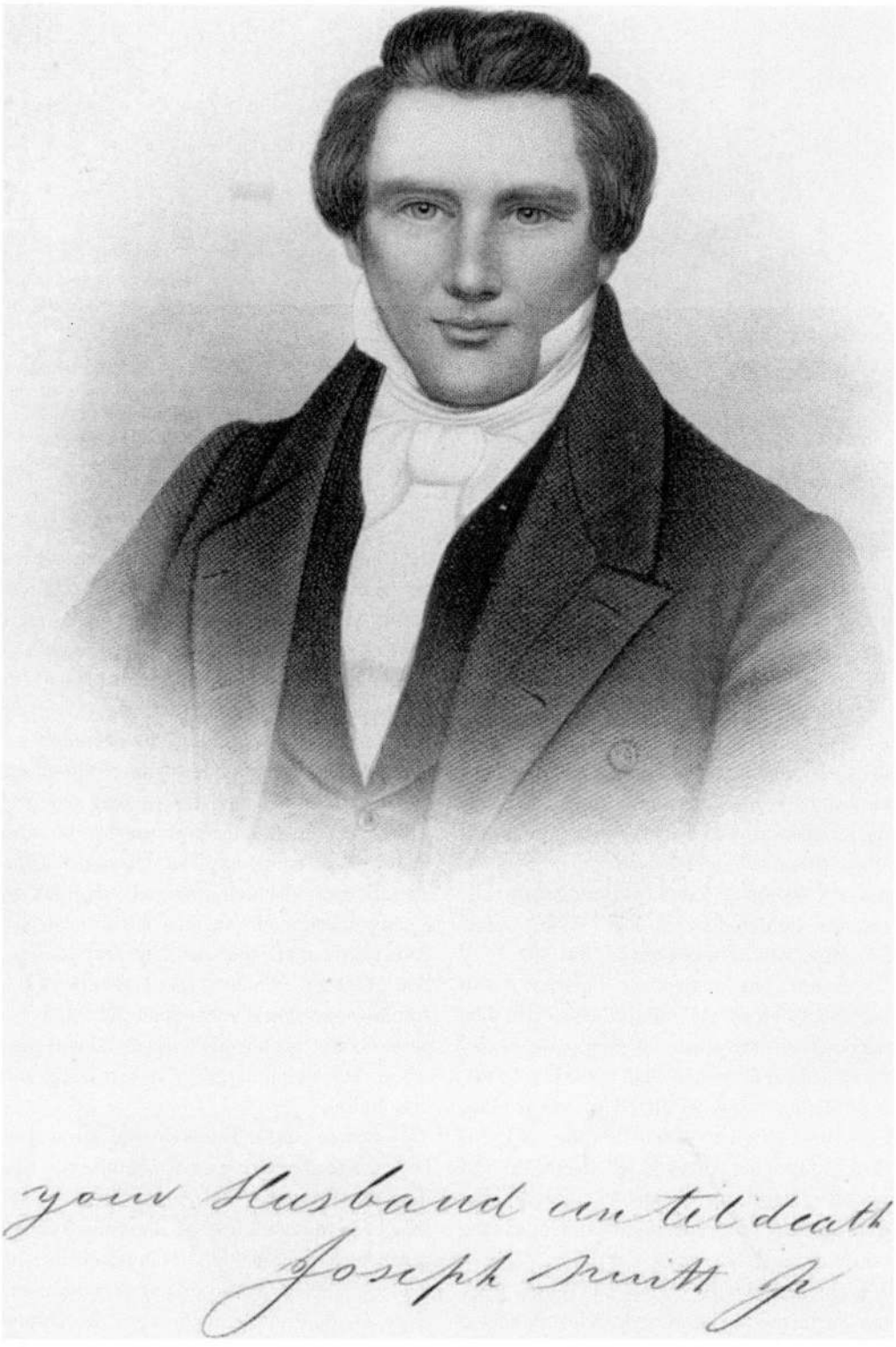
Smith and other Mormon leaders called on the federal government to protect them against such violence in the name of religious freedom. But, as everyone knew in the nineteenth century, such questions were reserved for state law. The Bill of Rights, including the First Amendment's protection of the free exercise of religion, applied to the federal government only. This was as clear as anything in the constitutional order: the federal Constitution guaranteed only that the *federal* government must respect the religious freedom of its citizens; the states were not affected by constitutional provisions aimed explicitly at the national sovereign.[7]

This lesson in the limits of constitutional freedoms filled Smith with disgust for all aspects of states' rights. He called them a "dead carcass—a stink, and they shall ascend up as a stink offering in the nose of the Almighty." For the Constitution to be interpreted properly, Smith claimed, he would have to assume the presidency of the United States. Smith's presidential campaign coincided with the creation of a Mormon military force and his own new title of "Lieutenant General." Etchings of Smith on his charger in full uniform illustrate the Mormons' conviction that they must meet force with force. It also reveals why Mormons in general—and Smith in particular—had become so controversial by the early 1840s.

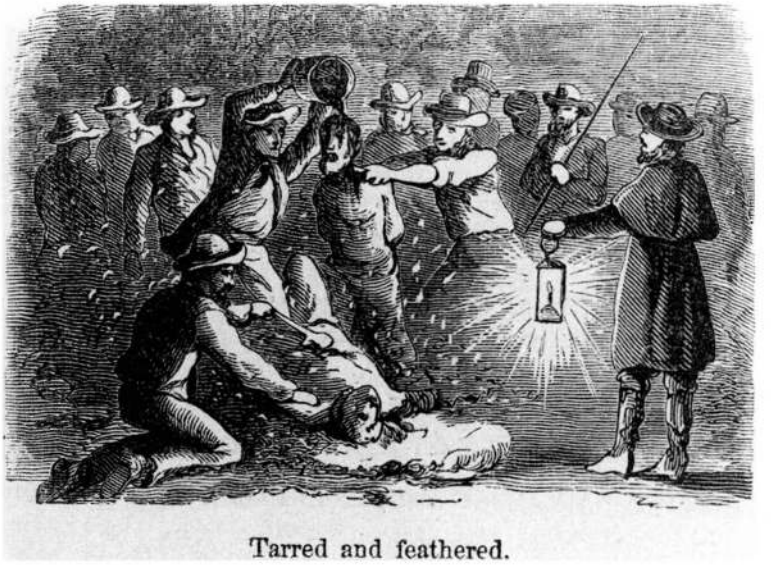
This period in Mormon history is perhaps the most dramatic of all. It includes Smith's explicit assumption of political and military power as well as considerable theological and institutional development, including the introduction of polygamy into Mormonism.[8]

Polygamy was not one of the original tenets of the faith. Instead, the doctrine of "celestial marriage," as Mormons called it, was revealed to Smith in 1843. Although evidence exists of sexual experimentation by Smith at earlier dates, for our purposes it is vital to realize that the official commencement of the practice of polygamy on the part of Smith and his most trusted followers coincides with other aspects of state-building.[9]

Smith developed a theory of government in the early 1840s that took him deep into the realm of theocracy and even further outside the American mainstream than he had been. His was a vision of a reunited church and state, a "Kingdom of God." Latter-day Saints were to prepare for the Second Coming in the New World. Polygamy was



According to his critics, Mormon Prophet Joseph Smith combined great physical charm with hypnotic powers and boundless sexual appetite.



Violence against Mormons included attacks on the Prophet himself, shown here as the victim, at the hands of an Illinois mob, of the painful and humiliating practice of tarring and feathering.

a vital part of such planning. According to the revelation on celestial marriage, God's command to Mormon men was instituted for the purification and edification of the world. The children of Mormon patriarchs would usher in the Millennium.[10]

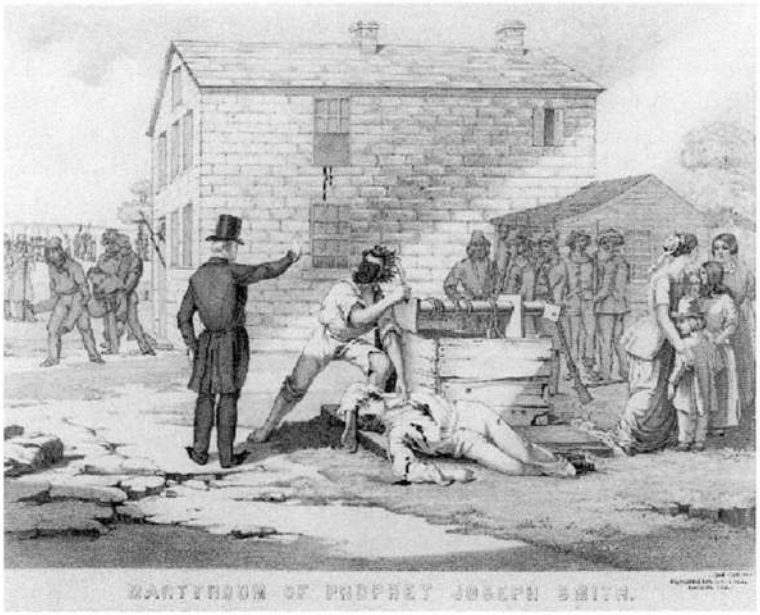
Polygamy was an immediate source of discord, even though it was kept secret for almost ten years. After Smith ordered a printing press destroyed when its owner published a story critical of polygamy and containing other rumors, he was arrested by Illinois officials. He was murdered by an angry mob of anti-Mormons who attacked the jail in 1844.

Smith's lynching created a martyr; it also seared into Mormons' minds the fact that they needed their own space for their new government. They migrated to Utah in the late 1840s, in a trek that is memorialized in Utah as "Pioneer Day." Brigham Young, the second President and Prophet of the church, led the faithful westward. He brought with him an acute sense of the limits of the federal government and the power of local majorities.[11]

Once in Utah, Young and other leaders established a government that replicated the structures of faith, settling in to build what Mormons called the "political kingdom." Young was not only the president of the Church, but also the governor; other leaders held commensurate positions of political power. The legislature granted valuable watercourses, timber stands, and grazing rights to the church and individual leaders. They also protected the structure of family government that Smith had instituted. They passed a law incorporating the church, giving it the power to own unlimited amounts of real and personal property and the right to govern marriage for all members. The decisions of the church, the legislation provided, "shall not be legally questioned." As one territorial legislator put it, marriage was "the very foundation of all government." Its perversion in the "monogamic states" meant that the whole superstructure "is radically wrong, and will contain within itself the seeds of its own decay and dissolution."[12]

As their confidence grew, and as travelers began to send reports east of what life was like in Utah, Mormons finally confirmed what had long been rumored. In 1852, the church called a general conference and announced that its leaders believed in and practiced plural marriage. Orson Pratt read aloud the "Revelation on Celestial Marriage" and described the social and political benefits of polygamy. Like many subsequent defenders of plural marriage,

In the early 1840s, "Lieutenant-General" Smith formed the "Nauvoo Legion," an organization viewed by those outside the Mormon faith with considerable suspicion.



The murder of Joseph Smith has become a central event in Mormon religious history. The lynching of Smith, who was ostensibly under the protection of state officials, confirmed for many Mormons that persecution was all they could expect from the states.

Pratt argued that polygamy was the sure cure for prostitution, and that its prevalence as a marital form around the world demonstrated that it was both natural and civilized. Most important, polygamy provided the opportunity for a faithful man to demonstrate his fidelity to the commands of God, replicating the marriages of the biblical patriarchs. Sexuality was

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HAGAR AND ISHMAEL.

ABRAHAM was one of the mightiest men that ever lived. His power did not consist in the great armies he controled, or in the greatness of the nation over which he ruled; but it was in the power which he obtained with God through his faith. He is called "the father of the faithful" and "the friend of God," and God made as great promises to him as probably could be made to any mortal being. There is not much written about his early life that has come down to us, and we shall not write anything respecting it at present; but allude to that portion of his life in which the incident occurred that is illustrated in the accompanying engraving.

Abraham had a wife, the Bible calls her his sister, the daughter of his father Terah; but in his own record, which the prophet Joseph translated, he informs us that she was the daughter of his brother Haran, and, consequently, the sister of Lot. Haran died during a famine which raged in the land of Ur, of the Chaldees. Haran had two daughters—Sarai and Milcah. Abraham married Sarai—her name was afterwards changed by the Lord to Sarah—and his brother Nahor married Milcah. By the command of the Lord Abraham took his wife and all who would accompany him and moved out of Chaldea into Canaan. Abraham and Sarah lived together as man and wife for a great many years; but they had no children. The Lord, however, had promised unto Abraham the law of celestial marriage. He knew that it was his privilege to have more wives than Sarah. Sarah, herself, understood this law, and when God commanded her husband she took her handmaid, whose name was Hagar, and gave her to Abraham to be his wife. She did this because it was the law, and if Abraham had not obeyed this law, the promises of God could not have been fulfilled to him wherein He told him that his seed should be as the dust of the earth or the

In 1868, the magazine *The Juvenile Instructor* explained to young readers that Sarah understood that Abraham had a right to additional wives under the law of celestial marriage and gave Hagar to him as a plural wife.

a divine attribute, according to Mormon doctrine, and its exercise by righteous men meant that polygamy would be practiced in purity and rectitude.[13]

Polygamy also provided for the essential right of all women, according to Mormon doctrine. In contrast to what Mormon leaders called the "whoredom, adultery, and hypocrisy" of the rest of the country, in Utah all women understood that they could be united with a responsible and proven man, who would openly acknowledge his relationship with her and his paternity of her children.[14]

Notwithstanding these defenses of polygamy, the rest of the country greeted the Mormon announcement with shock, and soon with condemnation. Although antipolygamists claimed that Mormon polygamy was entirely foreign and even barbaric, Mormons' claims to absolute control over marriage in Utah was neither unprecedented nor un-Christian. For centuries, polygamy had been bruited about on the fringes of the Protestant Reformation.[15]

In nineteenth-century America, the relationship between religious and sexual fervor was clearly marked not only by Mormonism, but also by other religious groups that sprouted after independence. The Prophet Matthias mixed sexual exercise with prophetic teaching, Oneida Perfectionists practiced group marriage and selective breeding, and Shakers combined ecstatic worship with vows of total celibacy.[16]

But Mormons were different. They were the largest, the most powerful, the most explicitly political, and the best organized. They also had their own territory, and they claimed the rights of government there. They personified the power and the instability of religious innovation. What had been a local tradition of anti-Mormonism before the exodus to Utah became a national commitment to antipolygamy,

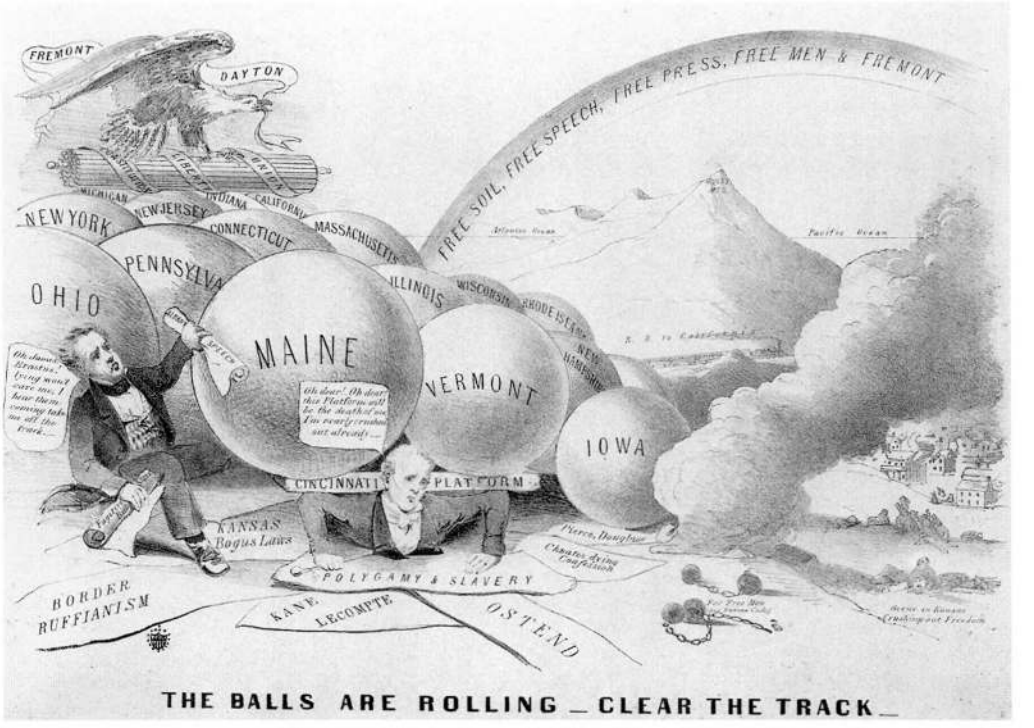
The frontispiece of Orvilla Belisle's antipolygamy novel, *Mormonism Unveiled*, showed Brigham Young making advances to an affronted and unprotected young woman.

with profound implications for the rights of local majorities to control their own "domestic relations" and for the constitutional law of religion.

Mormons thus made American history, not only in their own remarkable determination and commitment to faith, but also indirectly through the determination of their opponents, who seized on polygamy as the centerpiece of what was dangerous about Mormonism. Antipolygamists made many different arguments. Among their most powerful and appealing claims was that polygamy constituted the abuse of women. Opponents argued that legal protection for women was best realized in monogamous societies, and that polygamy nurtured rape, incest, and other crimes against women.[17]

In terms of cultural appeal, there is no doubt that the opponents won the day. Within only a few years, it was clear that no respectable American could openly support polygamy. It took courage even to argue that Mormons should be allowed to decide for themselves whether or not to practice polygamy. So effective was the correlation between the claim that polygamy was bad for women and the claim that it was bad for the entire nation that antipolygamists eventually won what had looked, at the outset, like a losing battle. In the process, they created a whole new area of constitutional law.

The story is deeply connected to race and questions of racial justice. Among the earliest and most effective methods of connecting the interests of white women in Utah with those of African Americans was the argument that polygamy was a new form of slavery, this time focused explicitly and exclusively on women. By the late 1850s, it was commonplace to allude to the sexual exploitation of slaves and to stress the sensuality and self-indulgence of slaveholding men. The sexual abuse of women, the argument went, produced tyrants like



This Currier and Ives lithograph commemorating the 1856 Republican Party platform and its antipolygamy and antislavery provision depicts President James Buchanan being bowled over by Republican forces.

slaveholders, incapable of governing themselves or participating in democratic government. The graphic violence that novelists argued was a corollary of polygamy catered to audiences that had been trained in the humanitarian tradition of antislavery fiction.

Politicians picked up on these connections. In 1856, the Republican party, in its first national platform, called for the abolition of those "twin relics of barbarism—polygamy and slavery" in the territories. Southerners understood the implications immediately, and they blocked any action against polygamy as the first step toward emancipation. They realized that it was far more popular to oppose polygamy than to oppose slavery. They knew that Republicans hoped to capitalize on the identification of the "twin relics." Southern Democrats said they despised polygamy as the sure destruction of marriage. But they also argued that it was invalid for the federal government to interfere in the "domestic relations" of any portion of the United States.[18]

The "law of God," replied one antipolygamist, required Congress to "avenge the insult [of polygamy] to our own wives and our own daughters, and the wives and daughters of our constituents." Every other state and territory had criminalized polygamy; only Utah flouted civilization and Christianity.[19]

But before the Civil War, Southerners and Mormons had the better of the argument, at least in constitutional terms. Intervention in local affairs was the essence of what had spurred the Revolution, argued Democrats. The Constitution's protection of federalism meant that domestic relations were outside the realm of national power, and were consigned to local majorities and state constitutions.

The Civil War answered the debate over the right of individual states and territories to maintain slavery within their borders, but slavery's "twin," polygamy, remained unchecked in Utah, and by the late 1860s it had spread to neighboring territories as well. Thus, the question became how to translate the "insult" into a

George Reynolds was indicted and tried for polygamy in the 1870s. His case became a landmark in constitutional law and undermined Mormons' claims to the right to practice plural marriage.

constitutionally sustainable argument for federal power over polygamy. Only after secession and the outbreak of war was positive political action possible—and then Republicans proved the Southerners right.

In 1862, Congress passed the Morrill Anti-Bigamy Act, named after Republican Senator Justin Morrill, who was known for his antislavery and antipolygamy views. The Act prohibited the marriage of one man to more than one woman in all United States territories. As Southerners had feared—and many Northerners had hoped—federal legislation on polygamy was a prelude to action against slavery. Only three months later, Lincoln resolved that slaves in the Confederacy should be emancipated at the first opportune moment.[20]

Thus, the act was something of a triumph for Republicans, a first step in a plan to reform the country along humanitarian lines. Yet it is also fair to say that the act was a failure. It was unenforceable. No Mormon jury would indict a polygamist, and loyal Mormons controlled jury pools in Utah.

It took more than ten years and various procedural modifications, as well as the continual hounding of Mormon politicians, to finally bring a polygamy case to trial. In the end, Mormons agreed to a test case, offering up George Reynolds for indictment. Reynolds was carefully chosen by his superiors. Not only did they trust him to remain loyal, but he was young, handsome, and the husband of only two wives. Reynolds belied the stereotype of the grizzled patriarch who married ever-younger women as he grew old and fat.[21]

By the time of Reynolds's trial, the Mormon leadership had decided on a policy of obfuscation. All the named witnesses experienced sudden gaps in their memory of George Reynolds and his reputation for having married more than one woman. Reynolds was only convicted after prosecutors brought in a surprise witness, his very pregnant second wife, who

The cover of *The Judge*, January 9, 1885, showing the punitive atmosphere in Congress in the mid-1880s.

had not been coached and openly admitted that she had married him.[22]

Reynolds's appeal came to the Supreme Court in 1878. Everyone familiar with constitutional law knows that *Reynolds*[23] is a landmark case. An appreciation for the texture of the surrounding debates over polygamy adds to our understanding, weaving the story of Reynolds into the institutional and doctrinal history of the Court.

By the time argument was heard in the *Reynolds* case, the Supreme Court had rejected claims that the post–Civil War amendments to the Constitution created a tissue of federal rights for individuals against states. Reconstruction in the South had faded, and the stage was set for the "reclamation" of white supremacy. Further back in time, but nonetheless still fresh in institutional memory, was the *Dred Scott* case and the court's protection of slavery.[24]

Reynolds allowed the Court to distance itself from *Dred Scott*, which the church's lawyers relied upon as the deciding precedent in the polygamy case. Polygamy—which was slavery's "twin relic," after all—was handled far differently than slavery had been. In *Reynolds*, the Supreme Court held that polygamy would "fetter" the people in "stationary despotism," invading surrounding states and territories, and ultimately compromising democracy. These arguments, and the language of bondage and tyranny in which they were framed, illustrate the distance that the Justices placed between themselves and slavery.[25]

And yet there is a more complex story here that makes the overlap between polygamy and slavery—and sex and race—more nuanced than it might otherwise appear. As the Court saw it, polygamy was "almost exclusively a feature of the life of Asiatic and of African people." After the Civil War, the racial overtones of antipolygamy rhetoric migrated away from slaveholders and onto those who had been enslaved.[26] As one newspaper editor saw it, freedpersons had an "ungovernable propensity to sexual indulgence," which meant that they would be easy prey for Mormon missionaries. And Republican politicians also made it plain that they expected former slaves to adhere to the rule of monogamy. Equally important,

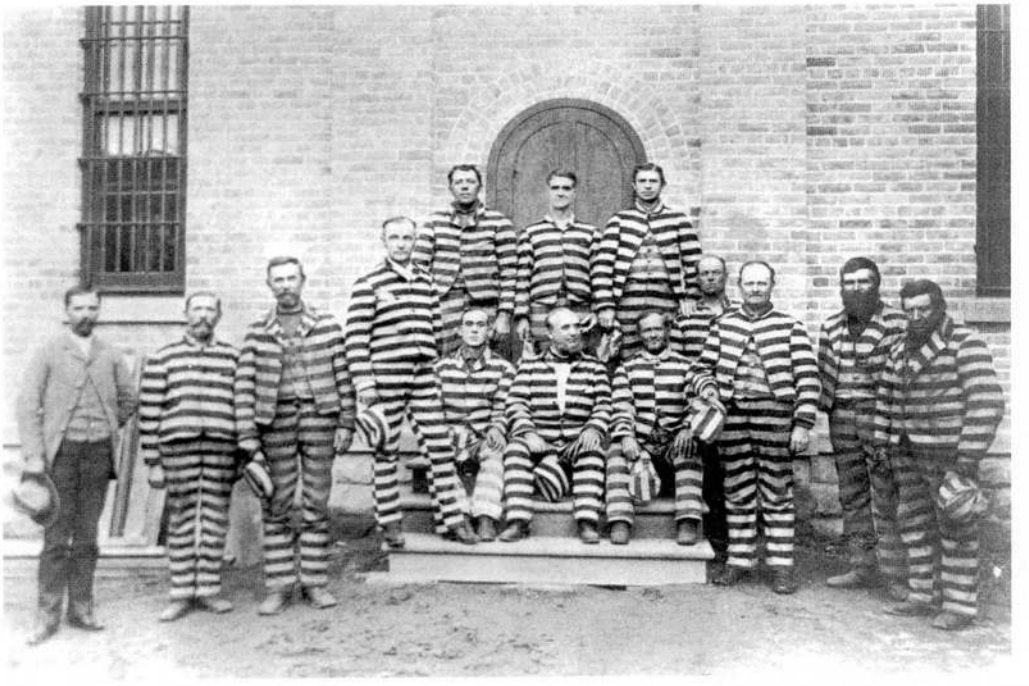
antimiscegenation statutes proliferated in the late nineteenth century, marking new racialized boundaries for marriage. The comparison of Mormon practices to those of Asia and Africa invoked the two continents whose peoples were the most frequent targets of American prohibitions against interracial marriage. These labels inevitably carried racial and racist messages, as well as religious ones.[27]

Reynolds's conviction was sustained, and he went to jail, becoming an instant hero to Mormons in Utah. However, the opinion in his case unleashed a stream of antipolygamy activism and legislation. The *Reynolds* decision galvanized the country, even though it did not change Mormons' determination to resist what one leader called "the clamor of a nation steeped in sin and ripened for the damnation of hell."[28]

Resistance had been a successful strategy for Mormons for thirty years—after all, Reynolds was the first man convicted of violating federal law. But after the *Reynolds* case, continued resistance only goaded the rest of the country. New constitutional law had changed the rules of the conflict; now polygamists could not plausibly claim that they had the Constitution on their side. Antipolygamists argued that Utah had had its chance in the political arena and at the Supreme Court, and they had lost in both. It was time to begin enforcing the law.

The result was an array of legislative invigorations of antipolygamy law and the eventual prosecution of 2,500 criminal cases involving a range of sexual offenses from adultery to fornication and from unlawful cohabitation to incest. More than a thousand Mormon men went to prison, as Congress imposed its will on a recalcitrant territory with increasing force and severity. The national government literally constructed a new family law for the territory and then imposed it on a stunned—yet still defiant—people.[29]

Here, too, the interplay between race and sex had interesting and not always obvious consequences. In Utah, the purported victims of polygamy—that is, women, especially those involved in plural marriages—were revealed



This photograph, taken in 1888, shows Mormon bishops convicted of polygamy and "unlawful cohabitation," all serving sentences in the Utah penitentiary.

by the prosecutions as complicit in their own degradation. Many women fled from federal officers, or they lied on the stand, or they "forgot" that they had ever been married and could not remember who was the father of their children, and so on. The women whose plight had sustained the sympathy of reformers even after the condition of former slaves had ceased to move them now seemed like part of the problem, rather than the focus of the solution.[30]

In the end, these women were criminalized as well. Prosecutors claimed that in Utah, "the women are as bad as the men." And unlike their husbands, who were given heroes' parades on their release from jail, women indicted for fornication or perjury have not been remembered in the history books. Their lack of contrition eroded the sympathy of those who would rescue them. Like freedpersons, they had to be "taught" how to behave.[31]

The determination to eradicate the Mormons' polygamous marital structure rested on the conviction that federal control of local affairs was the only appropriate response to a violation of rights as fundamental as polygamy. Every other state and territory was "right" on the question of polygamy, however divided they had been on slavery. Thus, the message that opposition to polygamy sent to other states and territories was that all Americans had much in common: the cumulative power of their own local customs defined their national character. The legal world created by the contest over polygamy took the experience of the states seriously. But it also imposed federal law for the first time, undermining the tradition of localism in the name of the rights of women.

The focus on Utah also obscured the actions that other states might take in other areas. Before the Civil War, polygamy and slavery, gender and race, had been "twins." In the final push to eradicate polygamy in the 1870s and 1880s, the white women of Utah became

THE CARRION CROW IN THE EAGLE'S NEST.

This cartoon, published shortly after the *Reynolds* decision was handed down by the Supreme Court, illustrates the theory that Utah was isolated among American jurisdictions—a "carrion crow" that had insinuated itself into the eagle's brood.

substitutes for the black women and men of the former Confederacy.

The formula was a successful one. With its leaders jailed or on the lam and the entire Territory of Utah consumed with the punishment or defense of polygamists, the Mormon Church capitulated in 1890, promising to counsel its followers to obey the law, rather than to defy it.

In the century and more since then, church leaders have desperately sought to occupy a "respectable" place, emphasizing their cleanliness, their thrift, their conservatism. The history of sex and race that created a new constitutional world in the second half of the nineteenth century has faded from national consciousness.

So profoundly has the new conformist ethic been absorbed that the great controversy of the past year in Utah has been the prosecution of renegade polygamist Tom Green. Many Utahans were outraged, not because they thought that Green's practice of marrying very young women and collecting welfare checks was really defensible, but because the timing of the prosecution meant that the Olympic games in Salt Lake might be marred by attention to a practice that many Mormons believe tarnishes their reputation with outsiders.[32]

What they missed—and what most press coverage has missed—is that polygamy was intimately tied up with American law and constitutional change. The campaign against polygamy defined the limits of localism and highlighted the protection of white women in Utah, even as it provided cover for Jim Crow in the South.

ENDNOTES

[1]For examples of antipolygamy rhetoric, *see* "Speech of Hon. Justin S. Morrill of Vermont on Utah Territory and its Law—Polygamy and Its License, Delivered in the House of Representatives," February 23, 1857 (Washington, D.C., 1857); George F. Edmunds, "Political Aspects of Mormonism," *Harper's Magazine* 64 (January, 1882): 285-288; [Lieber, Francis], "The Mormons: Shall Utah be Admitted to the Union?" *Putnam's Monthly* 5 (March, 1855): 225–236; Kate Field, "The Mormon Monster" lecture, delivered in the Congregational Church, corner of 10th and G Streets, Washington, D.C., Wednesday evening, December 15, 1886, reported by John Irvine, MS 311, Historical Department, Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.

[2]For defenses of Mormonism in general and polygamy in particular, *see* "Discourses on Celestial Marriage," delivered in the New Tabernacle, Salt Lake City, October 7, 8, and 9, 1869, by Orson Pratt, George A. Smith, and George Q. Cannon (Salt Lake City, UT, 1869). *See* also Davis Bitton, "Polygamy Defended: One Side of a Nineteenth-Century Polemic," in **The Ritualization of Mormon History** (Urbana, IL, 1994), 34–53.

[3]On Joseph Smith and early Mormonism, *see* Richard Bushman, **Joseph Smith and the Beginnings of Mormonism** (Urbana, IL, 1984); Jan Shipps, **Mormonism: The Story of a New Religious Tradition** (Urbana, IL, 1985); Whitney R. Cross, **The Burned-Over District: The Social and Intellectual History of Enthusiastic Religion in Western New York, 1800–1850** (Ithaca, NY, 1950).

[4]On the **Book of Mormon**, *see* Terry L. Givens, **By the Hand of Mormon: The American Scripture that Launched a New World Religion** (New York, 2002). On the importance of ongoing revelation, *see* John L. Brooke, **The Refiner's Fire: The Making of Mormon Cosmology** (Cambridge, UK, 1994).

[5]For the quoted language, *see* Church of Jesus Christ of Latter-day Saints, **History of the Church of Jesus Christ of Latter-day Saints**, 2d ed., 7 vols. (Salt Lake City, UT, 1963), 1:4, 6.

[6]On anti-Mormon violence in the pre-Utah period, *see* Marvin S. Hill, **Quest for Refuge: The Mormon Flight from American Pluralism** (Salt Lake City, UT, 1989); R. Laurence Moore, **Religious Outsiders and the Making of Americans** (New York, 1986), 25–47; Marie H. Nelson, "Anti-Mormon Mob Violence and the Rhetoric of Law and Order in Early Mormon History," *Legal Studies Forum* 21 (1997), 353.

[7]Kenneth R. Bowling, "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights," *Journal of the Early Republic* 8, no. 3 (1988); Rhys Isaac, **The Transformation of Virginia: 1740–1790** (Chapel Hill, NC, 1982); *Permoli v. First Municipality of New Orleans*, 44 U.S. (3 How.) 589, 593 (1845); *Barron v. Mayor and City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[8]Smith's language is reprinted in **History of the Church**, 6:95. On Smith's decision to run for President and his crowning as "King and Ruler over Israel," *see* D. Michael Quinn, **The Mormon Hierarchy: Origins of Power** (Salt Lake City, UT, 1994), 117–126. On Mormon militarism, *see* Paul Bailey, **The Armies of God** (Garden City, NY, 1968).

[9]For a review of the evidence of polygamy prior to 1843, *see* D. Michael Quinn, "LDS Church Authority

and New Plural Marriages, 1890–1904," *Dialogue* 18 (Spring 1985), 9–105, and Richard Van Wagoner, **Mormon Polygamy: A History**, 2d ed. (Salt Lake City, 1989), 3–12, 17–25, 29–36.

[10]R. Carmon Hardy, **Solemn Covenant: The Mormon Polygamous Passage** (Urbana, IL, 1992); Brooke, **The Refiner's Fire**.

[11]For a detailed account of Smith's murder, *see* Fawn L. Brodie, **No Man Knows My History: The Life of Joseph Smith, the Mormon Prophet** (New York, 1945). On Young's leadership, *see* Leonard Arrington, **Brigham Young, American Moses** (Urbana, IL, 1986).

[12]On the overlap between political and religious power, *see* Klaus Hansen, **Quest for Empire: The Political Kingdom of God and the Council of Fifty in Mormon History** (East Lansing, MI, 1967). On church control of the natural resources and industries of Utah, *see* Howard R. Lamar, **The Far Southwest, 1846–1912: A Territorial History** (New Haven, CT, 1966), 327–377, and Leonard Arrington, **Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830–1900** (Cambridge, MA, 1958). The territorial statute incorporating the church is reprinted in Dale Morgan, "The State of Deseret," *Utah Historical Quarterly* 8 (1940), 223–225. For the quoted language, *see* Parley Pratt, **Marriage and Morals in Utah** (Liverpool, 1856), 2, 4.

[13]Pratt's discourse is reprinted in "Celestial Marriage," *The Seer* 1 (October 1853). *See also* Hardy, **Solemn Covenant**, 102; Louis Kern, **An Ordered Love: Sex Roles and Sexuality in Victorian Utopias: The Shakers, the Mormons, and the Oneida Community** (Chapel Hill, NC, 1981), 144–152; Lawrence Foster, **Religion and Sexuality: Three American Communal Experiments of the Nineteenth Century** (New York, 1981), 125–146.

[14]Emmeline B. Wells, *Women's Exponent* 7 (May 1879), 234. *See also* Carol Cornwall Madsen, "Emmeline B. Wells: A Voice for Mormon Women," *John Whitmer Historical Association Journal* 2 (1985); and Lola Van Wagenen, "In Their Own Behalf: The Politicization of Mormon Women and the 1870 Franchise," *Dialogue* 24 (winter 1991), 31.

[15]John Cairncross, **After Polygamy Was Made a Sin: The Social History of Christian Polygamy** (London, 1974); Leo Miller, **John Milton among the Polygamophiles** (New York, 1974).

[16]Paul Johnson and Sean Wilentz, **The Kingdom of Matthias** (New York, 1994); Foster, **Religion and Sexuality**; Kern, **An Ordered Love**.

[17]For a discussion of theories of how and why polygamy was abusive of women, *see* Sarah Barringer Gordon, "'Our National Hearthstone': Antipolygamy Fiction and the Sentimental Campaign against Moral Diversity in Antebellum America," *Yale Journal of Law & the Humanities* 8 (summer 1996), 295–350.

[18]Kirk H. Porter, comp., **National Party Platforms** (New York, 1924), 48. For Southern response, *see*, e.g., Appendix to the *Congressional Globe*, 36 Cong., 1 sess., 196–97 (April 4, 1860) (Rep. Lawrence M. Keitt).

[19]*Congressional Globe*, 36 Cong., 1 sess., 1860, app., 194. (Rep. Thomas H. Nelson). *See also* Morrill, "Polygamy and Its License."

[20]The Act was passed with almost no debate. *Congressional Globe*, 37 Cong., sess., 1862, app., 2507. Mormon loyalty during the Civil War was the subject of much speculation. *See* David Bigler, **Forgotten Kingdom: The Mormon Theocracy in the American West, 1847–1896** (Spokane, WA, 1998), 224–225; Alan E. Haynes, "The Federal Government and Its Policies Regarding the Frontier Era of Utah Territory, 1850–1877" (Ph.D. diss., Catholic University, 1968).

[21]On the process that led to Reynolds's selection, *see* George Reynolds, Journal, vols. 1, 3–6, vol. 5, Historical Department, Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.; Bruce A. Van Orden, **Prisoner for Conscience' Sake: The Life of George Reynolds** (Salt Lake City, UT, 1992), 62.

[22]For a description of the trial and prosecution tactics, *see* Robert N. Baskin, **Reminiscences of Early Utah** (n.p., 1914), 61–72.

[23]*Reynolds v. United States*, 98 U.S. (16 Wall.) 145 (1879).

[24]*See*, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) and *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 136 (1873), decided on the same day. The majority opinions in these cases decimated the theory that the "privileges and immunities" clause of the recently enacted Fourteenth Amendment would provide new constitutional rights for all citizens. *See also* Paula Brandwein, **Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth** (Durham, NC, 1999), 61–95.

[25]*Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot exist long in monogamy.").

[26]*Id.*, 164.

[27]For the quoted language, *see* "Negro Suffrage and Polygamy," *New York World*, October 12, 1865, quoted in Nancy F. Cott, **Public Vows: A History of Marriage and the Nation** (Cambridge, MA, 2000), 88. *See also* Laura F. Edwards, "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation," *Law and History Review* 14 (Spring 1996), 81. On miscegenation statutes and their enforcement, *see* Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History* 83 (June 1996), 44. Utah also passed a prohibition against marriages of whites to Asians in the 1860s.

[28]Wilford Woodruff, June 1879, quoted without further citation in Kimball Young, **Isn't One Wife Enough?** (New York, 1954), 367. *See also Latter-day Saints Millennial Star*, February 3, 1879, 73; *Deseret News*, January 7, 1879, 7.

[29]The official case files of Utah's territorial district courts from 1870 to 1896 (when the territory achieved statehood) comprise some fourteen cubic feet of material, ranging from preprinted forms from H. H. Bancroft's printing company in San Francisco with the offense "unlawful cohabitation" stamped on the cover to stained and often illegible scraps of paper with scribbled jury verdicts in faded ink. Criminal prosecutions outnumber civil cases by more than twenty to one. The records are housed in the National Archives, Rocky Mountain West Division, in Denver, Colorado. The records have been microfilmed (thirty-six reels) and indexed (they are arranged very roughly in alphabetical order and, also very roughly, by district and by year). The index lists the names of the defendants but does not contain further information that could be of use to researchers. Nor are the records complete. To take just one example, the indictment of Brigham Young and other leading Mormons on charges of "lascivious cohabitation" in 1871 is not included in the criminal files.

[30]For the reaction of prosecutors to this extralegal strategy, *see* the article by U.S. district attorney for Utah P. T. Van Zile, "The Twin Relic," in Jennie Anderson Froiseth, ed., **The Women of Mormonism; Or, The Story of Polygamy as Told by the Victims Themselves** (Detroit, MI, 1882), 312–336.

[31]188 plural wives were indicted for fornication (the standard provision used for the punishment of prostitutes under state law) between 1887 and 1890. In less than a decade, they had gone from being called victims to being labeled criminals. Equally poignant, while men prosecuted for polygamy and related crimes were treated in the Mormon press and histories as heroes, the wives indicted for fornication received no such attention. None of the contemporary histories mention such indictments, nor have modern scholars unearthed this prosecutorial strategy. The "victims" of polygamy were criminalized and then forgotten.

[32]For an example of reporting on the prosecution of Green and its reception across Utah, *see* Tom Gorman, "Utah Drags Polygamy out of Shadows and into Court," *Los Angeles Times*, May 16, 2001, p. 14, col. 1. *See also* Timothy Egan, "The Persistence of Polygamy," *New York Times*, February 28, 1999, p. 51, col. 1.

The Battle over *Brown*'s Legitimacy

JEFFREY D. HOCKETT*

Constitutional scholars have given few Supreme Court rulings the attention that they have lavished upon the celebrated decision in *Brown v. Board of Education*.[1] Yet the literature of public law is surprisingly unedifying with regard to the process by which the desegregation decision achieved iconic status in American legal culture. Scholarly inattentiveness to the history of *Brown's* reputation is startling, given that southern politicians were not the only persons in 1954 to characterize the decision as a manifest instance of judicial legislation. Even persons sympathetic to desegregation conceded that the Justices had circumvented traditional legal constraints in rendering *Brown*.[2] In the years immediately following the ruling, some scholars appealed to the notion of a "living Constitution" to defend *Brown* against charges that it conflicted with the original understanding of the Fourteenth Amendment and with the "separate but equal" doctrine that the Court had established in *Plessy v. Ferguson*.[3] But critics, some of whom even accepted the concept of the "living Constitution," also challenged the Court's reading of social fact—that is, its claims regarding the inherent inequality of segregated schools—which supposedly justified judicial recognition of a right that conflicted with precedent and with the intentions of the Framers of the Equal Protection Clause.

If *Brown* reveals the role that discretion can play in the process of constitutional decision-making, however, the decision also demonstrates that the Court is limited in its ability to control the meaning of its rulings. Ironically, this limitation on the Court's power worked to the Justices' advantage in *Brown*. For the exalted status that the decision eventually achieved was, in part, a function of scholarly revisions of the basis of the ruling. More specifically, the fortunes of the *Brown* decision improved considerably when certain scholars recast the ruling as an attack upon an institution that, they argued, could only be characterized as a manifestation of white supremacy. The violence that greeted desegregation efforts in the South made benign characterizations of apartheid seem disingenuous and thus solidified the ethical appeal of *Brown*. The completeness of *Brown*'s triumph as a political icon is reflected not only in a corresponding decline in the status of the *Plessy* decision, but also in the damage done to the reputations of those scholars who accepted the morality of *Brown*

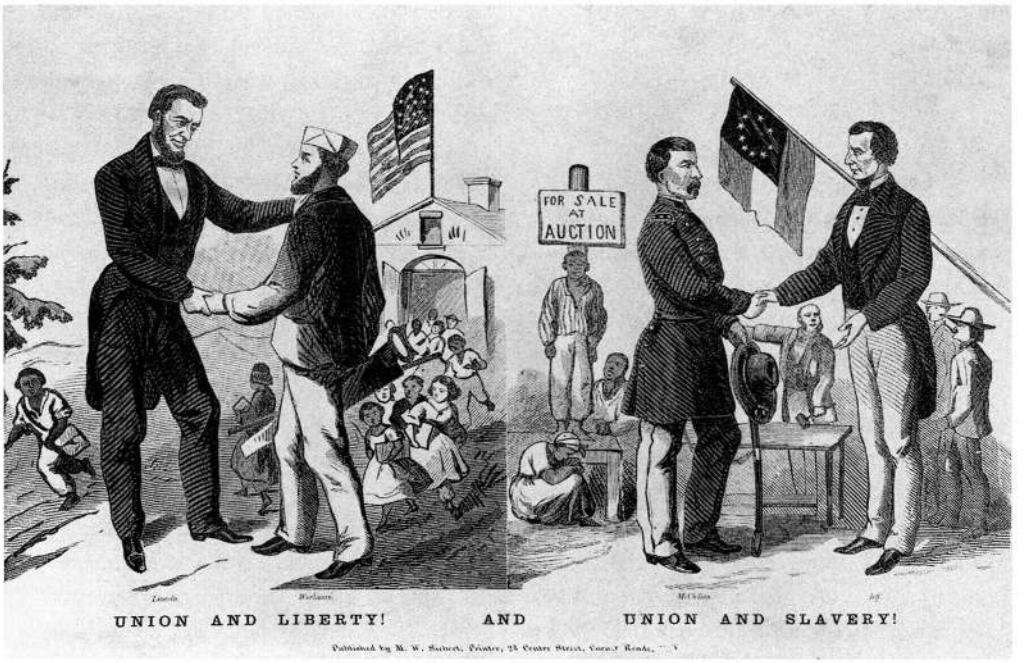
but continued to question the legality of the decision.

Scholarly Criticism of *Brown*

The Historical Critique

To place the debate over *Brown's* legitimacy in proper historical perspective, one should note that flexible interpretations of constitutional provisions were anything but novel in 1954. Indeed, the concept of the "living Constitution" had been an accepted part of American legal thought and Supreme Court doctrine since at least the end of the New Deal.[4] However, the criticism that some politicians, journalists, and scholars directed at Chief Justice Earl Warren's opinion for a unanimous Court in *Brown* revealed that the jurisprudential consensus regarding the idea that constitutional provisions are relative to time and circumstance applied only to the powers of government and did not extend to the realm of individual rights. Warren made no pretense in his opinion that the Court's ruling rested upon the intentions of the Framers and ratifiers of the Fourteenth Amendment. His treatment of the historical sources that were the focus of re-argument in 1953[5]—a statement that these sources were, "[*a*]*t best*, . . . inconclusive"[6]—prompted southern congressmen to emphasize what the Chief Justice merely implied: that constitutional history undermined the Court's holding that racial segregation in public schools violates the concept of equal protection of the laws. Indeed, the inconsistency between the Court's ruling and the history of the Fourteenth Amendment was the focus of the "Southern Manifesto" of March 1956. That statement of protest against the Court's ruling, which more than ninety

The plaintiffs in the school desegregation cases were photographed in 1964 at a press conference. From left to right: Harry Briggs, Jr., Linda Brown Smith, Spottswood Bolling, and Ethel Louise Belton Brown.



This 1864 broadside contrasting Republican candidate Abraham Lincoln, as a supporter of equality and free labor, with Democratic opponent George B. McClellan, as an alleged proponent of slavery, shows black and white schoolchildren issuing together from a schoolhouse flying the American flag. Southern congressmen who opposed *Brown* argued, however, that debates preceding passage of the Fourteenth Amendment showed no intent to integrate schools.

southern congressmen signed, recalled the arguments of the lawyers for the defendant school boards and emphasized that "[t]he debates preceding the submission of the 14th amendment clearly show that there was no intent that it should affect the systems of education maintained by the States." The manifesto also noted, among other things, that "[t]he very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia."[7]

Besides noting the Court's failure to respect the traditional sources of constitutional interpretation, certain commentators pointed up the novelty of the apparent basis of the holding in *Brown*. Of special concern to these individuals was Warren's reference in his eleventh footnote to the social-science evidence of the petitioners in the case as support for the conclusion that racially segregated public schools are inherently unequal and, thus, unconstitutional. Echoing the arguments of the National Association for the Advancement of Colored People's lawyers, who represented the petitioners, Warren maintained that segregation "generates a feeling of inferiority [in black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." In the sentence to which he attached the controversial footnote, Warren said: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority."[8] James Reston of the *New York Times* responded to the opinion with the observation that, in "ruling out racial segregation in the nation's public schools, [the Court] rejected history, philosophy, and custom as the major basis for its decision and accepted instead Justice Benjamin N. Cardozo's test of contemporary social justice." Reston declared that "[t]he Court's opinion read more like an expert paper on sociology than a Supreme Court

opinion."[9] In the same issue of the *Times*, the august constitutional scholar Alpheus T. Mason lamented: "Rather than rely on available judicial precedents, the Court invoked two of the flimsiest of all our disciplines—sociology and psychology—as the basis of its decision." Another venerable scholar, Carl Brent Swisher, observed that the "decision was based neither on the history of the amendment nor on precise textual analysis but on psychological knowledge."[10]

In an effort to defend the *Brown* decision against historical criticism, Alexander Bickel championed a broader, more flexible understanding of abstract constitutional rights, although he did not use the term "living Constitution." Echoing the arguments that the NAACP's attorneys had used before the Court,[11] and drawing upon the research that he had conducted for Felix Frankfurter while serving as the Justice's law clerk in 1953,[12] Bickel drew a distinction between "the congressional understanding of the immediate effect of the [Fourteenth Amendment] on conditions then present" and "the long-range effect, under future circumstances, of provisions necessarily intended for permanence." With regard to the former notion, he conceded that "[t]he obvious conclusion to which the evidence...easily leads is that section I of the fourteenth amendment...was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation." But, he insisted, "the fact that the proposed constitutional amendment was couched in more general terms could not have escaped those who voted for it." In other words, such language implied "a rejection—presumably as inappropriate in a constitutional provision—of such a specific and exclusive enumeration of rights as appeared in section I of the Civil Rights Act [of 1866]." Bickel hypothesized that the amendment's language may have been the result of a compromise between moderate and radical Republicans in the 39th Congress. The former individuals—in order to "defend themselves against charges that on the day after ratification Negroes were going to become white men's 'social equals,' marry their daughters, vote in their elections, sit on their juries, and attend schools with their children"—sought to avoid terms that explicitly endorsed radical changes in race relations. The radical elements in the party, however, would agree to nothing less than language that was "sufficiently elastic to permit reasonable future advances."[13]

Given the weightiness of the evidence against the view that the Framers and ratifiers of the Fourteenth Amendment specifically intended to do away with segregation, Bickel suggested that Chief Justice Warren "must" have been considering the broader notion of the original understanding "when he termed the [historical] materials 'inconclusive.'"[14] Warren, however, clearly directed his statement regarding the indeterminacy of historical investigation to the specific intentions informing the Fourteenth Amendment. For the Chief Justice followed this comment with the observation that "[t]he most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States,'" while "[t]heir opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." "What others in Congress and the state legislatures had in mind," he said, "cannot be determined with any degree of certainty."[15] That Warren would risk appearing disingenuous by declaring the specific intentions of the Framers and ratifiers of the Fourteenth Amendment inscrutable seems less impolitic when one considers that Bickel's argument regarding the meaning of that amendment was entirely lacking in evidentiary support and was thus just as vulnerable to criticism.[16]

Four years after *Brown*, Judge Learned Hand challenged the view that the "living Constitution" concept should extend to the rights contained in the Fourteenth Amendment (although he did not focus upon the matter of

the historical legitimacy of this model of constitutional interpretation). The former federal appeals court judge insisted that, in a democracy committed to the rule of law, it is "absolutely essential to confine the power [of judicial review] to the need that evoked it: that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers." Hand, however, was at a loss to articulate a standard that would limit the power of review when judges did not link the meaning of the Constitution's provisions to the original intentions of the Framers of that document. Immediately after referring to the *Brown* decision, he confessed that he could not "frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority." Stating that it was "quite clear that it has not abdicated its former function," he said he had "never been able to understand on what basis it does or can rest except as a *coup de main*."[17]

The Empirical Critique

In a famous response to Judge Hand, Herbert Wechsler suggested that the Supreme Court does not necessarily "function as a naked power organ" when exercises of judicial review are not grounded in the intentions of the Framers. Echoing Hand's commitment to the rule of law, he said he did not "depreciate the duty of fidelity to the text of the Constitution, when its words may be decisive," or "deny that history has weight in the elucidation of the text," or "deem precedent without importance." Nevertheless, he did not "regret that interpretation [of the Due Process and Equal Protection clauses] did not ground itself in ancient history but rather has perceived in these provisions a compendious affirmation of the basic values of a free society . . . ." In defense of the notion of a "living Constitution," he said that he preferred to see these and "the other clauses of the Bill of Rights read as an affirmation of the special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of a century long past, with problems very different from our own." To identify "a middle ground between a judicial House of Lords" (which Hand feared would result when the Court left "room for adaptation and adjustment" in constitutional interpretation) "and the abandonment of any limitation on the other branches" (which Hand counseled when the traditional materials of interpretation did not afford adequate guidance to judges), Wechsler offered the following:

> I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?[18]

Wechsler did not deny the realist insight that judicial decision-making—even that rooted in neutral principles of adjudication—involves value choices or discretion. Indeed, he conceded "that courts in constitutional determinations face issues that are inescapably 'political' . . . in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone." But he rejected the conclusion that evidence of value choices on the part of judges necessarily renders courts and legislatures equivalent institutions. "No legislature or executive," he observed, "is obligated by the nature of its function to support its choice of values by the type of reasoned explanation

that I have suggested is intrinsic to judicial action." While a decision that "rests on reasons with respect to all the issues in the case[—] reasons that in their generality and their neutrality transcend any immediate result that is involved"—is not devoid of discretion, it is nevertheless distinguishable from "an act of willfulness or will." One would be mistaken to conclude that this contrast between methods of decision-making amounts to a distinction without a difference, Wechsler believed. For the restraints that the requirement of principled decision-making places upon judges are substantive, not merely stylistic. "When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state," Wechsler explained, "those choices must... survive."[19]

Wechsler was not so naïve as to believe that judges invariably remain passive in the absence of principled arguments for their rulings, strong though the social expectations for normatively appropriate judicial behavior may be. Indeed, he concluded that the *Brown* decision, with which he was careful to express his sympathy, represented just such an instance of result-oriented decision-making on the part of the Court. "[F]or one of my persuasion," he confessed, "the school decision... stirs the deepest conflict I experience in testing the thesis I propose." Besides agreeing with the result in the case, he emphasized (consistent with his defense of the "living Constitution") that he did not find troubling the Court's refusal to abide by the traditional materials of constitutional interpretation: "[T]he words [of the Fourteenth Amendment] are general and leave room for expanding content as time passes and conditions change." His "problem [with the decision] inhere[d] strictly in the reasoning of the opinion"—the fact that "the separate-but-equal formula... was held to have 'no place' in public education on the ground that segregated schools are 'inherently unequal,' with deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development." The Court's treatment of social fact, or the supposed harms of segregation, he believed, hardly seemed sufficient to justify the result in the present case, let alone to provide adequate guidance in cases that might follow. The social scientists and expert witnesses in the lower courts were not of one mind that segregation had the negative effects that the Court mentioned. And it was not clear whether the witnesses who acknowledged such harm compared the "position [of the black child] under separation with that under integration where the whites were hostile to his presence and found ways to make their feelings known," or whether the point of comparison was simply "an integrated school where he was happily accepted and regarded by the whites." Similarly, Wechsler wondered whether the Court denied the existence and relevance of "the benefits that [segregation] entailed," such as a "sense of security" for black children or "the absence of hostility," and whether the Justices thought that the perception in certain black communities that such benefits existed was insufficient to sustain segregation.[20]

In view of these obvious problems, Wechsler found "it hard to think the judgment [in *Brown*] really turned upon the facts." He also recognized the significance of subsequent per curiam decisions, in which the Court—citing *Brown* as precedent, but without explanation—invalidated state-maintained segregated parks, beaches and bath houses, golf courses, and public transportation. These later decisions, he thought, indicated that the Justices regarded *Brown* as based upon more than the negative effects of segregation upon black schoolchildren.[21] Anticipating the arguments of future defenders of *Brown*,[22] he hypothesized that the decision "rested [instead] on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." Yet he did not find this alternative assessment of social fact any less

problematic. Such a position, he believed, "involve[s] an inquiry into the motive of the legislature, which is generally foreclosed to the courts" because of the vagaries of the enterprise. Moving from the motives of the alleged oppressors to the perceptions of the oppressed, he wondered whether it is "defensible to make the measure of validity of legislation the way it is interpreted by those who are affected by it?" "In the context of a charge that segregation *with equal facilities* is a denial of equality," he asked, "is there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?" After all, few would conclude that "enforced separation of the sexes discriminate[s] against females merely because it may be the females who resent it and it is imposed by judgments predominantly male."[23]

Wechsler thought that a more promising rationale for the result in *Brown* would have characterized segregation, "not [as a problem] of discrimination at all," but as a "denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." Yet, while he thought "that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied," he acknowledged that "integration forces an association upon those for whom it is unpleasant or repugnant." Sadly, he confessed that he could not discover "a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail" over the desires of those who would avoid it. In the absence of a principled argument, Wechsler was prepared to affirm the illegitimacy of *Brown*. For he reiterated that "the courts ought to be cautious to impose a choice of values on the other branches or a state, based upon the Constitution, only when they are persuaded, on an adequate and principled analysis, that the choice is clear." Adherence to this norm of behavior, he believed, "is all that self-restraint can mean and in that sense it always is essential, whatever issue may be posed."[24]

Persons less sympathetic to the result in *Brown* were content to take Wechsler at his word that there existed no alternative basis for the decision. They set out to demonstrate the vulnerability of the Court's empirical claims regarding segregation. Ernest van den Haag challenged the validity of the social-science evidence to which the Court referred. Confessing that he was "doubtful . . . about the wisdom of the decision in the desegregation cases" as well as the sufficiency of the Court's evidence, van den Haag went well beyond Wechsler's abstract musings regarding the effects of segregation. As John Davis had done on behalf of certain of the defendants during oral argument, van den Haag took direct aim at Kenneth Clark, who had been the chief witness for the petitioners, and whose research the Court placed first among the social-science studies listed in the eleventh footnote of the *Brown* decision. He found Clark's conclusions disturbingly lacking in empirical support. Indeed, like Davis, van den Haag argued that Clark's doll study—in which the researcher offered black children a choice between a black and a white doll—did more to harm than help the cause of the petitioners in *Brown*. A comparison between the responses of black children in segregated and nonsegregated schools "shows that 'they do not differ' except that *Negro children in segregated schools 'are less pronounced in their preference for the white doll' and more often think of the colored dolls as 'nice' or identify with them*." Van den Haag concluded: "[I]f Professor Clark's tests do demonstrate damage to Negro children, then they demonstrate that the damage is *less* with segregation and *greater* with congregation."[25]

A. James Gregor agreed with van den Haag's contention and offered his support in the form of a review of relevant social-science literature. Sharply critical of the empirical case for the petitioners in *Brown*, Gregor characterized the evidence presented to the Court as a collection of "suppositions" that "traffic

on the promissory notes of vague hypotheticals and surmise." Focusing on a weakness that had concerned the NAACP's lawyers, he suggested that "[l]ittle if any direct evidence of the impairments attributable to school segregation *per se* is tendered. . . . The closest approximation to the real issue before the Court is in the discussion of 'segregation' [in the petitioners' social-science appendix to their brief], which in itself covers a host of ill-defined situations: housing, recreational facilities, public conveniences, transportation, and eating places as well as nursery, grammar, secondary schools, colleges, and universities."[26] "The evident disposition to avoid any discussion of the available evidence with respect to school segregation *per se*," he surmised, "is conceivably the result of an awareness that whatever evidence *is* available *tends* to support racial separation in the schools at least throughout childhood and adolescence." Gregor drew attention to studies indicating that "racial separation may materially enhance the formation of a coherent self-system on the part of the Negro by reducing the psychological pressure to which the child is subjected." In an ironic paraphrase of Warren's language in *Brown*, he said: "[*I*]*ntegration* gives every evidence of creating insurmountable tensions for the individual Negro child and impairing his personality in a manner never likely to be undone."[27]

Scholarly Defenses of Brown

Early Apologias

Efforts to defend the empirical basis of the *Brown* decision actually began several years before Wechsler, van den Haag, and Gregor—among others—questioned the validity of the social-science evidence to which the Court referred. Indeed, in the year following the decision, Edmond Cahn anticipated and sought to answer such criticism. Rather than stand by the social scientists and their work, however, Cahn sought to de-emphasize their significance for the ruling. He regarded as a "genuine danger" the mistaken belief that the outcome of the desegregation decisions, "either entirely or in major part, was caused by the testimony and opinions of the scientists." For he "would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundations as some of the scientific demonstrations in these records." Cahn contended that some of Clark's interpretations of his data seemed to be "predetermined." And, heralding Gregor's critique, he observed that Clark's doll test did not reveal the effects of *school* segregation. "If it disclosed anything about the effects of segregation on the children," he said, "their experiences at school were not differentiated from other causes." But Cahn maintained that, "Fortunately, the outcome of the *Brown* and *Bolling* cases did not depend on the psychological experts' [sic] facing and answering the objections, queries, and doubts I have presented." "The cruelty [of segregation to black children] is obvious and evident," he explained. In fact, "it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it 'scientifically.' " Cahn characterized Warren's decision to make reference to the studies as a mere "gesture" of "courtesy" from a "magnanimous judge" to the "devoted efforts [of the plaintiffs] to defeat segregation."[28] As Morroe Berger suggested in an article that paralleled Cahn's conclusions, the Court could "simply have stated, quite baldly, that it took 'judicial notice' of the fact that segregation means inequality[; . . .] it could have ignored [the social-science materials] completely without changing its decision in the slightest."[29]

Responses to Cahn from several scholars who defended the petitioners' and the Court's use of social-science evidence reveal that van den Haag and Gregor had ample reason to believe that they were not wasting their efforts in attempting to discredit *Brown* by attacking the studies contained in the decision's eleventh footnote. Had the Court not made reference to social-science evidence, William Ball

wondered, how could it have "counter[ed] the objection of the state attorneys general, who said... that they agreed that Negroes and whites should enjoy equality, but that the separate facilities furnished provided such 'equality'?"[30] In other words, judges may take judicial notice only of facts that are not properly the subject of testimony, or which are universally recognized as common knowledge. Neither circumstance applied in *Brown*, at least as far as a substantial portion of the American population in 1954 was concerned. Indeed, as Herbert Garfinkel noted (using the words of Thurgood Marshall, the NAACP's lead attorney in *Brown*, to make his point): "'Acceptance of the [sic] segregation under the "separate but equal" doctrine ha[d] become so ingrained that overwhelming proof was sorely needed to demonstrate that equal educational opportunities for Negroes could not be provided in a segregated system.'"[31] Clark added that "[T]his was not the first time that the lawyers of the NAACP had sought to convince the United States Supreme Court that segregation in and of itself was unconstitutional." He thought it more than mere coincidence that "the lawyers of the NAACP succeeded in overruling the *Plessy* doctrine only after they enlisted an impressive array of social science testimony and talent and attacked the problem with this approach."[32]

Although these proved compelling responses to Cahn, an effective defense of the Court required of Clark and his colleagues equally effective rejoinders to van den Haag and Gregor. Garfinkel, however, provided a critique of Clark's research that rivaled that of van den Haag.[33] And Clark defended his integrity and that of the social scientists, rather than the usefulness of their findings. He took umbrage at Cahn's implication "that the primary motive of the social psychologists who participated in these cases was not 'strict fidelity to objective truth.'" And with regard to his failure to control for the effect of public-school segregation on the personalities of black children, he insisted he had been well aware of the limitations of his research and had pointed out to the NAACP's lawyers "that the available studies had so far not isolated this single variable from the total social complexity of racial prejudice, discrimination, and segregation."[34]

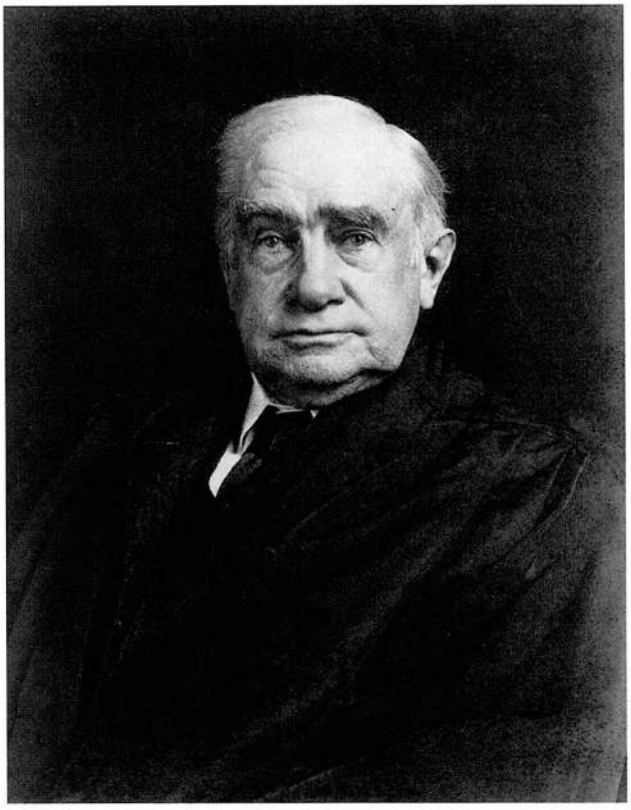
While Garfinkel was unwilling to maintain the validity of the social-science evidence relating to the harms of segregation, he alluded to a seemingly more promising strategy to defend the *Brown* decision when he suggested that *Plessy v. Ferguson* was no less dependent upon controversial empirical assumptions. "[T]he opinion in *Plessy* might well have cited the social science 'modern authority' of its day to support some aspects of its position," he contended. For "[a]t that time psychologists did believe in the inherent intellectual inferiority of the Negro, and most sociologists and political scientists did believe that 'stateways do not make folkways.' That the 1896 Court did not choose to cite expert authorities does not alter the nature of these questions or the relevancy of the evidence."[35] Garfinkel, however, relegated these observations to the conclusion of his essay and thus left their meaning and force undeveloped.

Barton Bernstein illuminated Garfinkel's point with a more elaborate rendering and critique of the empirical basis of the *Plessy* decision. In maintaining the reasonableness—and thus the constitutionality—of Louisiana's segregation statute, Bernstein claimed, Justice Henry Billings Brown "wrote conservative theory and the prevailing social science 'truths' into law." More specifically, "[t]he court explained that the standard of reasonableness is determined 'with reference to the established usages, customs, and traditions of the people.'" While Brown thought that the segregation statute was reasonable because it observed custom with a view to preserving public peace and good order, he regarded the petitioner's argument as plainly contrary to reason because it reflected the mistaken belief "that 'social prejudices may be overcome by legislation.'" In concluding "that 'legislation

Louis J. Redding (left) and Thurgood Marshall (right) conferred during a recess in the Supreme Court's hearing on racial integration in the public schools. Redding represented black schoolchildren in Delaware, and Marshall was serving as the general counsel for the NAACP.

is powerless to eradicate racial instincts,"' Bernstein noted, Brown drew upon the tenets of "the popular sociology which emerged after the Civil War." For "most sociologists" at the time were "good Spencerians," who believed "that society, the organism of evolution, could not be refashioned by legislation." As "William Graham Sumner explained[,] . . . 'legislation cannot make mores' and stateways cannot change folkways." More than this, "Franklin Henry Giddings . . . had emphasized 'consciousness of kind,' a new guise for the 'racial instincts' concept, to explain segregation. The implication in *Plessy* was that this social custom, the desire for racially segregated facilities, was grounded in 'race instincts.' These instincts were unchangeable before man-made law."[36]

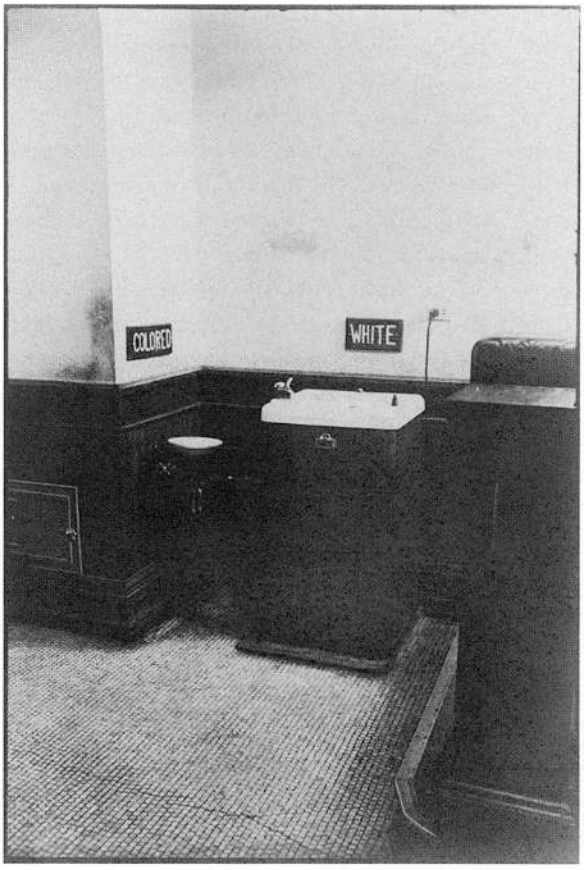
Bernstein took issue with Justice Brown's "questionable factual allegations" and "dubious legal and scientific theories." Without elaborating, he characterized as "poor history" Brown's suggestion that social attitudes cannot be shaped by law. But, even if it were the case that legislation is powerless to eradicate prejudice, Bernstein noted, a declaration of unconstitutionality in *Plessy* would not have been equivalent to legislation forcing racial commingling. Rather, a ruling in favor of the petitioners would have done no more than preclude laws enforcing racial separation in transportation. "The practices of railroads and the social habits of passengers would not have been immediately affected. The prevailing policy would have been maintained: where informal segregation existed, it would have remained; where commingling occurred, it would have continued." As for Brown's belief that segregation statutes were reflective of racial instincts—part of a



Justice Henry Billings Brown, the author of *Plessy v. Ferguson*, believed that segregated facilities reflected unchangeable racial instincts. Popular sociology dictated that social prejudices and custom could not be overcome by legislation.

long-standing effort to avoid the baleful effects of racial prejudice through the curtailment of interracial contact—Bernstein insisted that such laws were inconsistent with custom or tradition. Drawing upon the research of C. Vann Woodward, among other historians, he said: "When the *Plessy* court judged it custom, Jim Crow transportation was but a recent Southern creation. By 1896 only eight Southern states had such laws, and seven of the statutes were less than eight years old." He then suggested that southern states did not need these laws to stem racial conflict, for historical investigations of the postbellum era reveal that "Negroes and whites frequently shared the same coaches" without incident. As "[a] South Carolinian remarked in 1877[,] . . . Negroes in his state 'were permitted to, and frequently do ride in first-class railway and street cars.' At first this had caused trouble, but it was then 'so common as hardly to provoke remark.' "[37]

Unlike Bernstein, Garfinkel recognized the obvious problem with efforts to shift scholarly and legal attention from the controversial nature of the holding in *Brown* to the vulnerability of the empirical basis of *Plessy*. Unfortunately, Garfinkel's attempt to meet the conventional view that the Court had always extended a presumption of constitutionality to segregation legislation was as cursory as his discussion of Justice Brown's reliance upon the sociological assumptions of his day. Garfinkel simply declared that a presumption of constitutionality (which, in placing the burden of proof upon challengers to legislation, liberated southern states from having to do anything more than demonstrate a basis in reason for segregation laws) "is of questionable materiality to the school segregation cases. The burden of proof is placed on the legislatures in these cases, requiring that they demonstrate that their statutory restrictions on the relations



When *Plessy* was handed down in 1875, Jim Crow had just begun to be established in the South. By 1896, only eight Southern states had enacted segregationist laws, a trend that accelerated in the new century. These segregated drinking fountains were photographed in Georgia in the 1960s.

of Negroes and whites do not violate the equal protection and due process requirements of the Constitution."[38]

Garfinkel might have defended this view by noting, as did Louis Pollak, that, in the federal desegregation case *Bolling v. Sharpe*,[39] the Court invoked the Japanese curfew and exclusion cases of 1943 and 1944, respectively, to identify racial classifications as constitutionally suspect.[40] In so doing, to use Pollak's words, the Court "could not . . . sustain the reasonableness of these racial distinctions and the absence of harm said to flow from them, unless [the Justices] were prepared to say that no factual case can be made the other way."[41] But, in view of the fact that the Court had failed to provide an explanation for its placement of the burden of proof in the curfew and exclusion cases, as well as in the desegregation cases, Pollak could not have expected that his observation would help to quell criticism of the Justices. Persons sympathetic to the results in the desegregation cases, as well as persons alarmed by the decisions, would have been justified in demanding such an explanation from the Court, because *Brown* and *Bolling*, unlike the Japanese curfew and exclusion cases, involved the *invalidation* of governmental action.

Brown Recast

Charles Black provided the earliest and most compelling scholarly defense of the view that the Court had ample reason to expect the defenders of racial segregation to assume the burden of justifying the constitutionality of the practice. Although Black expressed his indebtedness to Pollak, he noted rightly that

his rationale for *Brown* differed from that of his colleague. Where Pollak said that he "[did] not think it incumbent upon [him], at least for present purposes, to resolve controversies as to the justification for and impact of Jim Crow legislation,"[42] Black took it upon himself to demonstrate that "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law." In arguing that segregation "[is] a system which is set up and continued for the very purpose of keeping [a whole race] in an inferior station," he scorned Wechsler's refusal to assess the motives of southern legislators. While Black acknowledged "the entirely sincere protestations of many southerners that segregation is 'better' for the Negroes . . . [and] is not intended to hurt them," he believed that "a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority at least for the indefinite future."[43]

Turning first to history, Black contended that "[s]egregation in the South comes down in apostolic succession from slavery and the *Dred Scott* case. The South fought to keep slavery, and lost. Then it tried the Black Codes, and lost. Then it looked around for something else and found segregation." To support his impressionistic view that "[t]he movement for segregation was an integral part of the movement to maintain and further 'white supremacy,'" he, like Bernstein, made reference to the work of C. Vann Woodward. "Professor Woodward has shown," he maintained, that "[segregation's] triumph . . . represented a triumph of extreme racialist over moderate sentiment about the Negro." But even without resorting to the scholarship of such a respected academic figure, Black believed, "[h]istory . . . tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality." An accurate picture of southern race relations, in short, is "not [one] of mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own."[44]

Black defended the view that the non-involvement of blacks in the construction of southern society secured the group's inferior status therein by noting that "[s]egregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory." He drew his reader's attention to "the long-continued and still largely effective exclusion of Negroes from voting." One could not believe seriously that "segregation [was] not intended to harm the segregated race, or to stamp it with the mark of inferiority," he said, when, "at about the same time [that segregation occurred], the very same group of people . . . [was] barred . . . from the common political life of the community—from all political power." Black also noted that, "generally speaking, segregation is the pattern of law in communities where the extralegal patterns of discrimination against Negroes are the tightest, where Negroes are subjected to the strictest codes of 'unwritten law' as to job opportunities, social intercourse, patterns of housing, going to the back door, being called by the first name, saying 'Sir,' and all the rest of the whole sorry business." While not state action, these oppressive cultural norms "assist us in understanding the meaning and assessing the impact of [contemporaneous] state action." Finally, the fact that "'[s]eparate but equal' facilities are almost never really equal" provides clear "evidence of what segregation means to the people who impose it and to the people who are subjected to it." Black asked rhetorically, "Can a system which, in all that can be measured, has practiced the grossest inequality, actually have been 'equal' in intent, in total social meaning and impact?" His answer was a direct response to Wechsler's stated incertitude about the nature of apartheid: "[S]egregation, in all visible things, speaks only haltingly any dialect but that of inequality."[45]

Indeed, Black believed that to suggest otherwise—or even to express uncertainty about the nature of segregation—was not to take a reasonable, alternative position on a contested issue but to engage in "self-induced blindness" and to perpetrate a "flagrant contradiction of known fact." While he "[did] not maintain that the evidence is all one way" ("it never is on issues of burning, fighting concern"), he thought the case "so one-sided" that he could not appreciate Wechsler's concerns over judicial fact-finding. Even if one accepted "the good faith of those who assert that segregation represents no more than an attempt to furnish a wholesome opportunity for parallel development of the races" and acknowledged "the few scattered instances [segregationists] can bring forward to support their view of the matter," there could be no doubt, Black thought, about "which balance-pan flies upward" in any objective weighing of the competing claims at issue. Going beyond a mere summary of his earlier observations, he said:

> The society that has just lost the Negro as a slave, that has just lost out in an attempt to put him under quasi-servile "Codes," the society that views his blood as a contamination and his name as an insult, the society that extralegally imposes on him every humiliating mark of low caste and that until yesterday kept him in line by lynching—this society, careless of his consent, moves by law, first to exclude him from voting, and secondly to cut him off from mixing in the general public life of the community. . . .
>
> [In view of these "matters of common notoriety",] it would be the most un-neutral of principles, improvised *ad hoc*, to require that a court faced with the present problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings.[46]

Convinced of the force of this argument, Black speculated that Wechsler possessed "no actual doubt...as to what segregation is for and what kind of societal pattern it supports and implements." Rather, his colleague seemed concerned that "there is no ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals."[47] Black also thought (as did Wechsler[48]) that the Justices likewise regarded segregation as oppressive, and that this belief (as opposed to "the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense") formed the true basis of *Brown*. Black suspected that the Court's failure to "[spell] out that segregation . . . is perceptibly a means of ghettoizing the imputedly inferior race . . . was [caused by a] reluctance to go into the distasteful details of the southern caste system." This "venial fault" of the opinion aside, he reiterated that the Justices "had the soundest reasons for judging that segregation violates the fourteenth amendment." The Court could acknowledge the oppressive nature of segregation, just "as it advises itself of the facts that we are a 'religious people,' [or] that the country is more industrialized than in Jefferson's day."[49]

Perhaps aware that many (including Wechsler) would challenge the fairness of these analogies, and that his argument (like Cahn's) would thus not square with the doctrine of judicial notice, he called upon the legal community to "[develop] ways to make it permissible for the Court to use what it knows." The absence of a formal mechanism for resolving disputes over abstract social facts, however, did not dampen his faith in the accuracy of the Court's assessment of social reality in the segregation decisions. "[S]urely," he declared, "the fact that the Court has assumed as true

a matter of common [if not universal] knowledge in regard to broad societal patterns, is (to say the very least) pretty far down the list of things to protest against." Black expressed confidence "that in the end the decisions will be accepted by the profession" on the basis that "the segregation system is actually conceived and does actually function as a means of keeping the Negro in a status of inferiority."[50]

In the same way that the Little Rock integration crisis of 1957–1958 must have confirmed for Black (if it did not inspire his assessment of) the oppressive nature of segregation, events in the years immediately following the publication of Black's essay would make it almost impossible for others to accept alternative interpretations of the practice. Specifically, the mistreatment and violence that black children endured when attempting to enter formerly white schools, and the hostility that young civil-rights workers experienced during nonviolent protests at segregated lunch counters, restaurants, libraries, theaters, beaches, motels, and swimming pools, did much to illuminate the brutality of apartheid. The events in Birmingham, Alabama during the spring of 1963, perhaps more than any other occurrence, solidified this understanding of segregation in the nation's collective conscience and, in so doing, helped to establish an exalted status for *Brown*. News viewers witnessed club-wielding patrolmen, vicious police dogs, and high-pressure water hoses that the city's police commissioner, Eugene "Bull" Connor, unleashed upon Martin Luther King, Jr. and the peaceful protesters he led. Tragically, thousands of black children were among those who experienced the fury of Connor's forces. Henceforth, Americans would have great difficulty accepting southern protestations that segregation reflected consideration for the welfare of blacks.[51]

The fallacy that segregation reflected consideration for the welfare of blacks was exposed for the American public in 1963, when television viewers witnessed vicious attacks by police officers and their dogs on peacefully protesting African Americans. This photo of men and women kneeling on a sidewalk outside City Hall in Birmingham, Alabama, captures the pacifism of the protesters, but not the ferocity of the segregationists.

Within the legal community, Wechsler's concern over the difficulties involved in ascertaining the legislative motives behind segregation lost considerable force. Indeed, Bickel's restatement of Wechsler's argument, compelling though it may have seemed in 1962, served the ironic function the following year of illuminating the hollowness of that concern. To demonstrate the "inscrutable" nature of such motives, he asked: "Who is to say that the majority of a legislature which enacts a statute segregating the schools is actuated by a conscious desire to suppress and humiliate the Negro? Who is to say that for many members more decent feelings are not decisive—the feeling, for example, that under existing circumstances Negro children are better off and can be more effectively educated in schools reserved exclusively for them, and that this is the most hopeful road to the goal of equality of the races under law?"[52] As events demonstrated, black children may well have been in less danger in separate schools. But the ferocity that state governments directed toward peaceful protest groups comprised partially of children, and the fact that state troopers acted to intimidate black students rather than to protect them, enabled scholars and jurists to assume that negative effects stemming from the illicit motives behind segregation outweighed any benefits that legislative and executive officials might have anticipated for black children.

In diminishing the basis for concern over the ascertainment of the legislative motives behind segregation, the events of the early 1960s lent credence to Black's belief that the oppressive nature of segregation was a social fact capable of judicial notice. In Bickel's words: "To determine that segregation establishes a relationship of the inferior to the superior race is to take objective notice of a fact of our national life and of experience elsewhere in the world, now and in other times.... It is no different from a similarly experiential judgment that official inquiries into private associations inhibit the freedom to join, or that hearsay evidence ... has a tendency to become distorted." Having said this in the same work in which he expressed concern over the difficulty of discovering the intentions of southern legislators, however, Bickel added that one could make such an observation about segregation "quite without reference to legislative motives and without reliance on [the] subjective and perhaps idiosyncratic feelings [of blacks]."[53] But, like Black, Bickel could not expect near-universal agreement over the oppressive nature of segregation until circumstances deprived southerners of self-serving rationales for the practice. In short, as Joseph Tussman and Jacobus tenBroek observed in an article published five years before *Brown*, it "is indeed difficult to see that anything else is involved in ... discriminatory legislative cases than questions of motivation[;] ... [l]aws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals." In a passage that anticipated Black's recasting of the basis of *Brown*, they added: "Should the temper of the Court change, it could, no doubt, find that segregation laws aim at white supremacy or are spawned of the great anti-Negro virus and thus make belated amends for the shameful history of the 'separate but equal' evasion."[54]

Transposed Reputations

The upshot of developments following the publication of Black's defense of *Brown* was the vindication of his predictions regarding the legal profession's eventual acceptance of the decision and the basis upon which this outcome would take place. Indeed, opponents as well as proponents of the view that the "living Constitution" concept extends to individual rights as well as governmental powers have accepted not only the legitimacy of *Brown* but the greatness of the decision as well. As Michael Perry suggests, "*Brown* ... is generally thought to represent the Court at its best."[55] And, while few contemporary scholars would dispute Perry's view, or Gerald Gunther's claim that

Brown "was an entirely legitimate decision,"[56] most do not believe that Warren's opinion reflected the Court's true rationale for the ruling. In the words of Philip Kurland, "It would take an extraordinarily sophisticated, or perhaps an extraordinarily naïve, approach to judicial behavior to believe that the cited [social-science] literature was the cause of the Court's judgment rather than the result of it."[57] Or, as Robert Bork suggests, "nobody who read *Brown* believed for a moment that the decision turned on social science studies about such matters as the preference of black children for white or black dolls."[58] The certitude with which Bork made this historically inaccurate statement reflects just how far the legal profession has moved from the arguments of van den Haag, Gregor, Ball, and Garfinkel.

With regard to the conventional understanding of the actual basis of *Brown*, J. Harvie Wilkinson reveals how contemporary legal scholars exhibit none of Wechsler's reluctance to question the nature of segregation or to characterize *Brown* as an attack upon the motives that most now agree informed the practice. According to Wilkinson, *Brown* was "one of the last, great actions whose moral logic seemed so uncomplex and irrefutable," because the "opposition [to the decision] seemed so thoroughly extreme, rooted as it was in notions of racial hegemony and the constitutional premises of John C. Calhoun."[59] Surely Black felt a certain satisfaction when Mark Yudof, seconding Wilkinson's point, invoked Black's essay as support for the proposition that "*Brown* was premised on the notion that state statutes and constitutions that require the separation of white and black children in the public schools are designed to and have the effect of stigmatizing black Americans as inferior beings."[60]

Brown's ascendance in status occasioned a corresponding decline in the reputation of the *Plessy* decision. As David Strauss contends, the decision in which the Court placed its imprimatur upon the "separate but equal" doctrine "is now universally condemned."[61] Few scholars would regard as excessive Perry's statement that *Plessy* was a "ridiculous and shameful opinion."[62] *Plessy*, Richard Posner explains, "had come to seem, in the fullness of time, bad ethics and bad politics."[63] Indeed, Wilkinson characterizes the opinion in that case as "a warehouse of segregationist 'truths' that echo through our history."[64] Similarly, and in sharp contrast to Wechsler's refusal to criticize the logic of *Plessy*, Bruce Ackerman states: "Whatever Justice Brown . . . might have thought, it is now absurd to dismiss the 'badge of inferiority' imposed by state officials as they shunt black children to segregated schools as if it were 'solely' the product of a 'choice' by the 'colored race' . . . to put [a degrading] construction upon it."[65]

Scholars now contrast the abstract nature of Justice Brown's majority opinion in *Plessy* with the striking candor of John Marshall Harlan's dissent in that case. Perry, for example, notes that, unlike the *Plessy* majority, Harlan was willing to face the "undeniable fact" that segregation was "rooted in white-supremacist ideology." "In one of the most prophetic dissents ever penned by a Supreme

Young black men in Texas protest racially segregated schools in the 1940s.

Court Justice, [Harlan] protested: 'We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.'"[66] H. N. Hirsch expresses a similar admiration for Harlan's dissent, which, he says, "makes clear... [that] 'separate but equal' can be interpreted as constitutional only by the most stubborn refusal to face social facts."[67]

While the transposed reputations of *Plessy* and *Brown* served to vindicate Black, this shift made a controversial figure of Wechsler, the most visible of *Brown*'s more credible critics. As events in the 1960s began to give substance to Black's discussion of the oppressive nature of segregation, Wechsler became a lightning rod for the invective of *Brown*'s defenders. Indeed, a number of scholars went so far as to charge him with jurisprudential naïveté. Arthur Miller and Ronald Howell declared that Wechsler's counsel of "[a]dherence to neutral principles... [was a call for the discovery of] principles which do not refer to value choices."[68] And Martin Shapiro characterized Wechsler's constitutional jurisprudence as little more than an echo of "the traditional myth of the impersonal, nonpolitical, law-finding judge whose decisions are the results of the inexorable logic of the law and not of his own preferences and discretion."[69]

In response, Wechsler reiterated that he "[did] not deny that constitutional provisions are directed to protecting certain special values or that the principled development of a particular provision is concerned with the value or the values thus involved."[70] And he claimed that he "never thought the principle of neutral principles offers a court a guide to exercising its authority, in the sense of a formula that indicates how cases ought to be decided."[71]

Wechsler would require the aid of others to respond to the somewhat more mannerly criticism that he was "more misleading than enlightening" regarding what the doctrine of neutral principles implies, and was thus irresponsible in challenging a decision that "struck a tremendous blow for the Declaration of Independence, the Gettysburg Address, and the fourteenth amendment, not to mention our position in a world in which a majority of the people are not white."[72] To clarify Wechsler's position, M. P. Golding suggested that "[n]eutrality and generality are to be found not in the *content* of the law but in its *application* or *administration*."[73] Adhering to the same view, Louis Henkin elaborated: "[A] court should not announce a principle if it is... not intended to be applicable in a general area in which no legitimate distinctions are apparent."[74] In short, the basic elements of Wechsler's doctrine of neutrality include uniformity of application (a decision ought to rest only on a principle that judges are willing to apply in other, similar contexts) and adequate generality (judges must articulate a principle broadly enough to make its scope of application fairly clear).

Wechsler apparently accepted this formulation of his argument. He commented that courts should not "judge the instant case in terms that are quite plainly unacceptable in light of other cases that it is now clear are covered by the principle affirmed in reaching judgment and indistinguishable upon valid grounds." Returning, once again, to *Brown*, he elaborated upon the Court's failure to adhere to the formal requirement of neutrality in its opinion. Assuming the need to find a basis for the holding other than the vulnerable empirical argument that the Court offered, Wechsler argued that one "could not responsibly declare the principle that race is outlawed as a basis of official action." For, to provide adequate generality, the Justices "were required to anticipate the problem of benevolent [racial] quotas, which would be outlawed by the principle... [mentioned], and indicate if they considered them distinguishable."[75] The Court's failure to discuss the impact of the ruling "upon measures that take race into account to equalize job opportunity or to reduce *de facto*

segregation" thus rendered the opinion in *Brown* unprincipled.[76]

While these observations may have saved Wechsler from the charge of incoherence, other comments he made subsequent to his initial criticism of *Brown* have prompted vehement criticism from contemporary scholars who have concluded that his constitutional jurisprudence is incompatible with judicial recognition of racial oppression. As one who *rejects* the view that Wechsler's neutral principles requirement precludes judicial acknowledgment of racial domination, Kent Greenawalt offers the following as a "principle [that] would satisfy Wechsler's demand [for neutrality:]... Racial classifications that disadvantage or stigmatize members of minority racial groups are unconstitutional unless they are necessitated by a very grave public need or, perhaps, unless they promote integration and the long-term advantage of those groups."[77] As Barbara Flagg points out, however, Wechsler indicated that Black's justification of *Brown*, which is implicit in Greenawalt's principle, "would not allay his concerns."[78] Specifically, Wechsler confessed that he was "[unable] to accept [Black's and Pollak's] rationales as an answer to the difficulties [he had] raised." The principle in *Brown* (or any constitutional decision, for that matter), he said, should have "a scope that is acceptable *whatever interest, group, or person may assert the claim*."[79] Flagg concludes that Wechsler believed neutrality requires judges to avoid making "analytic outcomes turn on the identity of affected individuals" or the actual social status of groups.[80] Or, as Cass Sunstein observes, Wechsler thought that "[t]he existing distribution of power and resources as between blacks and whites should be taken by courts as simply 'there': neutrality lies in inaction; it is threatened when the Court 'takes sides' by preferring those disadvantaged."[81]

Echoing Black,[82] Gary Peller is willing to entertain the possibility that "Wechsler was not asserting that broad-scale racial domination did not exist." Rather, in spite of his defense of the "living Constitution" concept and the attendant belief that the meaning of constitutional provisions (including constitutional rights) is relative to time and circumstance, Wechsler was concerned about "the contingent and subjective nature of any evaluation of power in society." He thought that "[t]he determination whether broad-scale social domination of blacks existed—so that the segregation in *Brown* would be seen as part of a larger social inequality—was a [subjective] value question," as opposed to an objective determination of fact. In spite of his protestations against his early critics, then, Wechsler apparently imposed a substantive, and not merely a formal, constraint upon judicial decision-making when he forbade judges to make this value choice. In Peller's view, however, "the actual distribution of wealth, jobs, political power, intellectual prestige, educational opportunity, housing, and social status between whites and blacks in fifties America" (to say nothing of the racial violence during the early 1960s) was more than sufficient to "prove the inequality that Wechsler could not find from the fact of segregated schools in *Brown*." Since Wechsler never wavered from his earlier position, Peller concludes—in a statement at odds with the measured tone of his initial assessment—that Wechsler "assumed that social domination of blacks either did not exist or that such a racial regime did not impugn the legitimacy of the legislature."[83]

Peller's criticism of Wechsler's "apologetic vision of American society,"[84] however, pales in contrast to that of David Richards. Borrowing from Black's analysis of *Brown*, Richards characterizes the decision "as an attempt to assure special protection to groups systematically denied the moral consideration due them." *Brown*, he believes, "reflects serious consideration of social facts of group prejudice and its unfair force in majoritarian politics." Wechsler's "summary dismissal of any kind of inquiry into legislative motives,"

by contrast, "evidences his refusal to take seriously familiar facts of social life, in this case, the force of the separate-but-equal doctrine as a formal mask of racial hatred." Wechsler's resulting conclusion that *Brown* is unprincipled and therefore illegitimate, Richards contends, reveals not only "the excessively formal character of his notion of 'neutral principles'" but a "striking failure of moral imagination" on his part as well.[85]

Conclusion

The near-universal agreement regarding *Brown*'s greatness, and the invective visited upon those few individuals who would question the legitimacy of the decision, should not lead one to conclude that *Brown* is no longer the subject of scholarly controversy. Ironically, one contemporary debate focuses upon an issue that even the members of the Supreme Court in 1954 had conceded to defenders of segregation—*Brown*'s apparent inconsistency with the intentions of the Framers of the Fourteenth Amendment. The urgency that certain scholars exhibit in defending the view that *Brown* can be reconciled with traditional legal materials[86] stems, in part, from the fact that the decision has been a particularly effective weapon in the arsenal of defenders of the "living Constitution" concept.[87] As Michael McConnell notes: "[W]hat was once seen as a weakness in the Supreme Court's decision in *Brown*"—namely, the decision's nonconformity to the Framers' intentions—"is now a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it." Indeed, "[s]uch is the moral authority of *Brown* that if any particular theory [of judicial review] does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[88]

A more pertinent line of inquiry from the perspective of the majority of scholars who accept *Brown*'s irreconcilability with traditional materials of constitutional interpretation is the decision's import for current constitutional controversies involving race. While Wechsler was wrong about the legitimacy of *Brown*, he observed correctly that the decision did not provide clear guidance for controversies over "benevolent" racial classifications. Even the scholarly recasting of *Brown* in the 1960s did not afford such guidance, since a judicial attack upon institutions of white supremacy can be justified through resort to principles that legitimize such classifications as well as through reference to principles that are hostile to them. Not surprisingly, scholars who are convinced of the dangerousness of and the lack of need for remedial racial classifications seek to enlist the moral authority of *Brown* by reconciling the decision with the color-blindness concept.[89] Similarly, scholars persuaded of the need for and the benign nature of affirmative action are equally intent on linking *Brown* to the racial subordination concept, or the idea that government may not act to reinforce the subordinate status of a racial group but may employ racial classifications to aid the victims of discrimination.[90] This debate over *Brown*'s legacy reinforces an important lesson of the battle over the legitimacy of the decision: that Supreme Court Justices are limited in their ability to give permanence to the meaning of their decisions. As the history of *Brown* demonstrates, the meaning of the Court's decisions is, at times, the result of a contest among political forces—forces that would use those decisions as symbols for political purposes.[91]

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ENDNOTES

[1]*Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). *Brown* was one of four consolidated state cases involving racial segregation in public schools at the

elementary and secondary school levels. The other three cases came from South Carolina (*Briggs v. Elliott*), Virginia (*Davis v. County School Board of Prince Edward County, Virginia*), and Delaware (*Gebhart v. Belton*). *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown*, involved the public schools of the District of Columbia, which were under the control of the national government.

[2]See, e.g., "A.F.L. Chief Hails Court," *New York Times*, 18 May 1954, late city edition; "Experts Approve Timetable on Bias," *New York Times*, 18 May 1954, late city edition; "Historians Laud Court's Decision," *New York Times*, 18 May 1954, late city edition; "Editorial Excerpts From the Nation's Press on Segregation Ruling," *New York Times*, 18 May 1954, late city edition.

[3]*Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Supreme Court sustained the constitutionality of a Louisiana statute that required railroads to provide equal but separate accommodations for whites and blacks and forbade persons from occupying rail cars other than those to which their race had been assigned. The Court held that the law, like similar laws that established separate schools for white and black children, did not violate the equal protection clause of the Fourteenth Amendment. Rather than imply the inferiority of blacks, the Court argued, the law was simply a reasonable exercise of the state's police power to preserve public peace and good order.

[4]Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* 11 (1997): 191–247.

[5]Given the differences among the Justices after the 1952 deliberations on *Brown*, the Court ordered re-argument of the segregation cases. In its re-argument order, the Court asked the parties to respond to a series of questions (which Justice Frankfurter formulated) that focused upon the history of the Fourteenth Amendment and the matter of enforcing a desegregation decree. Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality**, 2 vols. (New York: Alfred A. Knopf, 1975), 2: 777–779; Felix Frankfurter, Memorandum for the Conference, Re: The Segregation Cases, 27 May 1953, Papers of Felix Frankfurter—Harvard Collection, Library of Congress, Manuscript Division, Part II, Reel 4. The questions relating to constitutional history and precedent in the Court's re-argument order read:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment (a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
>
> 3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools? (*Brown v. Board of Education of Topeka, Kansas*, 345 U.S. 972, 972–973 [1953]).

[6]*Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 489 (1954) (emphasis added).

[7]Congressional Record, House, vol. 102, Part 4, p. 4515, March 12, 1956. See also Charles Fairman, "Foreword: The Attack on the Segregation Cases," *Harvard Law Review* 70 (1956): 83–94; Michael W. McConnell, "Originalism and the Desegregation Decisions," *Virginia Law Review* 81 (1995): 949, 1133–1134. For the arguments of the lawyers for the defendant school boards regarding the intentions informing the Equal Protection Clause of the Fourteenth Amendment, see Leon Friedman, ed., **Argument: The Complete Oral Argument Before the Supreme Court in *Brown v. Board of Education of Topeka*, 1952–55** (New York: Chelsea House, 1969), 207–213.

[8]*Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 494 (1954). To demonstrate the inherent inequality of segregation, the NAACP's lawyers referred to social-science studies that purportedly revealed the psychological harm that segregation inflicted upon black children. And, to demonstrate that educational segregation had no basis in reason, the NAACP referred to social-science studies that attributed differences in the educational performances of racial groups to environmental causes and that documented peaceable integration efforts in a number of social contexts. Appellants' Statement as to Jurisdiction, *Brown v. Board of Education of Topeka, Kansas*, 1951, 12–13, Papers of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division (hereafter cited as NAACP Papers), Box II–B–138; Brief for Appellants, *Brown v. Board of Education of Topeka, Kansas*, 1952, 6–10, NAACP Papers, Box II–B–138; Appendix to Appellants' Briefs, *Brown v. Board of Education of Topeka, Kansas*, *Briggs v. Elliott*, and *Davis v. County School Board of Prince Edward County,*

Virginia, 1952, 3–10, 12–16, NAACP Papers, Box II–B–138.

[9]James Reston, "A Sociological Decision," *New York Times*, 18 May 1954, late city edition.

[10]As quoted in Paul L. Rosen, **The Supreme Court and Social Science** (Urbana: University of Illinois Press, 1972), 174–175.

[11]See Brief for Appellants in *Brown v. Board of Education of Topeka, Kansas*, *Briggs v. Elliott*, and *Davis v. County School Board of Prince Edward County, Virginia*, and for Respondents in *Gebhart v. Belton*, 1953, 18, 118–120, NAACP Papers, Box II–B–142.

[12]One can find a copy of Bickel's memorandum for Justice Frankfurter (entitled "Legislative History of the Fourteenth Amendment") in Papers of Robert H. Jackson, Library of Congress, Manuscript Division, Box 184.

[13]Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (1955): 59, 58, 60, 62, 61. See also Alfred H. Kelly, "The Fourteenth Amendment Reconsidered," *Michigan Law Review* 54 (1956): 1049–1086; Louis H. Pollak, "The Supreme Court under Fire," *Journal of Public Law* 6 (1957): 439–443.

[14]Bickel, "The Original Understanding and the Segregation Decision," 63.

[15]*Brown v. Board of Education*, 347 U.S. 483, 489 (1954). See also Michael Klarman, "An Interpretive History of Modern Equal Protection," *Michigan Law Review* 90 (1991): 252n.180.

[16]For criticism of the view that the Framers and ratifiers of the Fourteenth Amendment contemplated that the meaning of the amendment's abstract provisions would change as social circumstances changed, see Raoul Berger, **Government by Judiciary: The Transformation of the Fourteenth Amendment** (Cambridge: Harvard University Press, 1977), 99–116.

[17]Learned Hand, **The Bill of Rights** (Cambridge: Harvard University Press, 1958), 29–30, 55.

[18]Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 12, 16–17, 19, 16, 15.

[19]*Ibid.*, 15–16, 19, 11, 19.

[20]*Ibid.*, 31–33. See also Kenneth Karst, "Legislative Facts in Constitutional Litigation," in **The Supreme Court Review**, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1960), 103–105.

[21]Wechsler, "Toward Neutral Principles of Constitutional Law," 32–33. The relevant per curiam rulings are: *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971 (1954); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 877 (1955); and *Gayle v. Browder*, 352 U.S. 903 (1956).

[22]See article text accompanying notes 42–50 below.

[23]Wechsler, "Toward Neutral Principles of Constitutional Law," 33 (emphasis in original).

[24]*Ibid.*, 34, 25.

[25]Ernest van den Haag, "Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark," *Villanova Law Review* 6 (1960): 70, 77 (emphasis in original). See also Rosen, **The Supreme Court and Social Science**, 173–196; and I. A. Newby, **Challenge to the Court: Social Scientists and the Defense of Segregation, 1954–1966** (Baton Rouge: Louisiana State University Press, 1967), 185–212. For John Davis's attack during oral argument upon Kenneth Clark's research into the effects of segregation, see Friedman, ed., **Argument**, 58–59.

[26]A. James Gregor, "The Law, Social Science, and School Segregation: An Assessment," *Western Reserve Law Review* 14 (1963): 626. For evidence of the NAACP's lawyers' concerns regarding the weaknesses of their empirical argument regarding the effects of segregation in public schools, see Appendix to Appellants' Briefs, *Brown v. Board of Education of Topeka, Kansas*, *Briggs v. Elliott*, and *Davis v. County School Board of Prince Edward County, Virginia*, 1952, 8–9, NAACP Papers, Box II–B–138.

[27]Gregor, "The Law, Social Science, and School Segregation," 626 (emphasis in original), 628, 629 (emphasis added).

[28]Edmond Cahn, "Jurisprudence," *New York University Law Review* 30 (1955): 157–58, 163–165, 159–160. Ernest van den Haag "concur[red]" with Cahn's finding that the Court did not base the *Brown* decision on the social-science evidence to which it made reference. Nevertheless, he believed that "the Court's reasoning...[has] something in common with Professor Clark's conclusions even though not relying on his evidence" (Van den Haag, "Social Science Testimony in the Desegregation Cases," 69–70). Van den Haag thus felt compelled to critique Clark's research (see article text accompanying note 25 above).

[29]Morroe Berger, "Desegregation, Law, and Social Science: What Was the Basis of the Supreme Court's Decision?" *Commentary* 23 (1957): 475. See also Pollak, "The Supreme Court under Fire," 436–438.

[30]William B. Ball, "Lawyers and Social Scientists—Guiding the Guides," *Villanova Law Review* 5 (1959): 221.

[31]Herbert Garfinkel, "Social Science Evidence and the School Segregation Cases," *Journal of Politics* 21 (1959): 43.

[32]Kenneth B. Clark, "The Desegregation Cases: Criticism of the Social Scientist's Role," *Villanova Law Review* 5 (1959): 234–235. For a discussion of the NAACP's non-social-science-based attack upon segregation, see Mark V. Tushnet, **The NAACP's Legal Strategy against Segregated Education, 1925–1950** (Chapel Hill: University of North Carolina Press, 1987).

[33]Garfinkel, "Social Science Evidence and the School Segregation Cases," 46–58.

[34]Clark, "The Desegregation Cases," 230–231. Clark defended himself against van den Haag's criticisms in a similar manner—that is, by emphasizing that he had been aware of and was candid about the limitations of his research (*ibid.*, 236–240).

[35]Garfinkel, "Social Science Evidence and the School Segregation Cases," 58.

[36]Barton J. Bernstein, "*Plessy v. Ferguson*: Conservative Sociological Jurisprudence," *Journal of Negro History* 48 (1963): 198–199, 201–202. See also Herbert Hovenkamp, "Social Science and Segregation Before *Brown*," *Duke Law Journal* (1985): 624–672.

[37]Bernstein, "*Plessy v. Ferguson*," 199, 201, 200. See C. Vann Woodward, **The Strange Career of Jim Crow** (New York: Oxford University Press, 1957).

[38]Garfinkel, "Social Science Evidence and the School Segregation Cases," 41–42.

[39]*Bolling v. Sharpe*, 347 U.S. 497 (1954).

[40]*Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U. S. 214 (1944). In *Hirabayashi*, the Court, despite noting that racial distinctions are "odious to a free people," upheld wartime curfews restricting the movement of Japanese-Americans on the West Coast. In *Korematsu*, the Court, despite noting that racial restrictions are "immediately suspect," upheld the federal government's wartime relocation of West Coast Japanese-Americans to inland detention centers.

[41]Louis H. Pollak, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," *University of Pennsylvania Law Review* 108 (1959): 27. See also Ira Michael Heyman, "The Chief Justice, Racial Segregation, and the Friendly Critics," *California Law Review* 49 (1961): 121–124.

[42]Pollak, "Racial Discrimination and Judicial Integrity," 27.

[43]Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," *Yale Law Journal* 69 (1960): 421, 424.

[44]*Ibid.*, 424–425.

[45]*Ibid.*, 425–426 (emphasis omitted).

[46]*Ibid.*, 426–427.

[47]*Ibid.*, 427.

[48]See article text accompanying notes 21–23 above.

[49]Black, "The Lawfulness of the Segregation Decisions," 430 n25, 428, 426.

[50]*Ibid.*, 428, 430. Cf. Heyman, "The Chief Justice, Racial Segregation, and the Friendly Critics."

[51]For general discussions of this period of the history of the civil rights movement, see Donald G. Nieman, **Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present** (New York: Oxford University Press, 1991), 148–188; and John Hope Franklin and Alfred A. Moss, Jr., **From Slavery to Freedom: A History of African Americans**, 7th ed. (New York: Alfred A. Knopf, 1994), 492–531.

[52]Alexander M. Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics**, 2d ed. (1962; reprint, New Haven: Yale University Press, 1986), 61–62. See also Alexander M. Bickel, "Foreword: The Passive Virtues," *Harvard Law Review* 75 (1961): 70.

[53]Bickel, **Least Dangerous Branch**, 57.

[54]Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37 (1949): 358–359.

[55]Michael J. Perry, **The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policy-making by the Judiciary** (New Haven: Yale University Press, 1982), 1.

[56]Gerald Gunther, "Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects," *Washington University Law Quarterly* (1979): 819.

[57]Philip B. Kurland, "'*Brown v. Board of Education* Was the Beginning': The School Desegregation Cases in the United States Supreme Court—1954–1979," *Washington University Law Quarterly* (1979): 318.

[58]Robert H. Bork, **The Tempting of America: The Political Seduction of the Law** (New York: Touchstone Press, 1990), 76.

[59]J. Harvie Wilkinson III, **Serving Justice: A Supreme Court Clerk's View** (New York: Charterhouse, 1974), 133.

[60]Mark G. Yudof, "School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court," *Law and Contemporary Problems* 42 (Autumn 1978): 1. See also McConnell, "Originalism and the Desegregation Decisions," 1138–1139. Cf. Richard A. Posner, **The Problems of Jurisprudence** (Cambridge: Harvard University Press, 1990), 302–309.

[61]David A. Strauss, "Discriminatory Intent and the Taming of *Brown*," *University of Chicago Law Review* 56 (1989): 954.

[62]Michael J. Perry, **The Constitution in the Courts: Law or Politics?** (New York: Oxford University Press, 1994), 145.

[63]Posner, **The Problems of Jurisprudence**, 307.

[64]J. Harvie Wilkinson III, **From Brown to Bakke: The Supreme Court and School Integration: 1954–1978** (New York: Oxford University Press, 1979), 18–19.

[65]Bruce Ackerman, **We the People: Foundations** (Cambridge: Harvard University Press, Belknap Press, 1991), 150.

[66]Perry, **The Constitution in the Courts**, 145–146.

[67]H. N. Hirsch, **A Theory of Liberty: The Constitution and Minorities** (New York: Routledge, 1992), 92 n64.

[68]Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," *University of Chicago Law Review* 27 (1960): 664.

[69]Martin Shapiro, **Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence**

(New York: Free Press, 1964), 26. See also Martin Shapiro, "The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles," *George Washington Law Review* 31 (1963): 593.

[70]Herbert Wechsler, **Principles, Politics, and Fundamental Law: Selected Essays** (Cambridge: Harvard University Press, 1961), xiii.

[71]Herbert Wechsler, "The Nature of Judicial Reasoning," in **Law and Philosophy: A Symposium**, ed. Sidney Hook (New York: New York University Press, 1964), 299. See also Kent Greenawalt, "The Enduring Significance of Neutral Principles," *Columbia Law Review* 78 (1978): 990–994.

[72]Benjamin F. Wright, "The Supreme Court Cannot Be Neutral," *Texas Law Review* 40 (1962): 600, 605. See also M. P. Golding, "Principled Decision-Making and the Supreme Court," *Columbia Law Review* 63 (1963): 46, 48–49; Addison Mueller and Murray L. Schwartz, "The Principle of Neutral Principles," *UCLA Law Review* 7 (1960): 577–580.

[73]Golding, "Principled Decision-Making and the Supreme Court," 42 (emphasis added).

[74]Louis Henkin, "'Neutral Principles' and Future Cases," in Hook, ed., **Law and Philosophy**, 304. See also Louis Henkin, "Some Reflections on Current Constitutional Controversy," *University of Pennsylvania Law Review* 109 (1961): 652–655; Jan G. Deutsch, "Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science," *Stanford Law Review* 20 (1968): 188; Greenawalt, "The Enduring Significance of Neutral Principles," 985–990; Barbara J. Flagg, "Enduring Principle: On Race, Process, and Constitutional Law," *California Law Review* 82 (1994): 961.

[75]Wechsler, "The Nature of Judicial Reasoning," 297–298.

[76]Wechsler, **Principles, Politics, and Fundamental Law**, xiv.

[77]Greenawalt, "The Enduring Significance of Neutral Principles," 1003.

[78]Flagg, "Enduring Principle," 962.

[79]Wechsler, **Principles, Politics, and Fundamental Law**, xv, xiii–xiv (emphasis added).

[80]Flagg, "Enduring Principle," 962.

[81]Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review* 87 (1987): 895.

[82]See article text accompanying note 47 above.

[83]Gary Peller, "Neutral Principles in the 1950s," *Journal of Law Reform* 21 (1988): 608–609, 612. See also Sunstein, "Lochner's Legacy," 895 n111.

[84]Peller, "Neutral Principles in the 1950s," 620.

[85]David A. J. Richards, "Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication," *Georgia Law Review* 11 (1977): 1104, 1103. See also Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96 (1983): 804–824.

[86]See McConnell, "Originalism and the Desegregation Decisions," 947–1140; and Bork, **The Tempting of America**, 74–84, 144.

[87]See, e.g., Ronald Dworkin, **Law's Empire** (Cambridge: Harvard University Press, Belknap Press, 1986), 359–363.

[88]McConnell, "Originalism and the Desegregation Decisions," 952–953. See also Bork, **The Tempting of America**, 77.

[89]See, e.g., Kurland, "*Brown v. Board of Education* Was the Beginning," 316–336, 403; William Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," *University of Chicago Law Review* 46 (1979): 783–784, 803–810; William Bradford Reynolds, "Individualism vs. Group Rights: The Legacy of *Brown*," *Yale Law Journal* 93 (1984): 995–1005.

[90]See, e.g., Laurence H. Tribe, "In What Vision of the Constitution Must the Law be Color-Blind?" *John Marshall Law Review* 20 (1986): 204–205; Dworkin, **Law's Empire**, 393–396; Strauss, "Discriminatory Intent and the Taming of *Brown*," 942–943, 946–951.

[91]The battle over *Brown*'s legacy is the subject of another article that I am writing.

General Yamashita and Justice Rutledge

JOHN M. FERREN*

At 2:30 in the morning on February 23, 1946, in a small country village south of Manila in the Philippines, Japanese Lieutenant General Tomoyuki Yamashita was told, "It's time." Not three weeks after the U.S. Supreme Court had denied his request for review—with Justices Wiley Rutledge and Frank Murphy dissenting—General Yamashita, the "Tiger of Malaya," was hanged.[1]

Yamashita had earned his title by taking Singapore from the British in January 1942 with only 30,000 men to the Brits' 100,000. Clearly, Yamashita was a brilliant strategist. But he was no "tiger." Although he was "a heavily muscled bear of a man," he was a calm soul, a lover of nature. He had outspokenly opposed war with the United States and Great Britain, and thus the Tojo faction rising in Japan despised him. The Japanese high command had needed Yamashita in Malaya, but straightaway thereafter Hideki Tojo assigned him to an outpost in Manchukuo for the next two and a half years.[2] When Saipan fell in July 1944 and Tojo and his cabinet resigned, the successors in power recalled Yamashita to defend the Philippines—a hopeless proposition, he discovered. Named the Philippines' military governor, Yamashita took control of Japan's 14th Area Army on October 9, 1944, when American invasion was imminent.[3]

Less than two weeks later, General MacArthur landed on Leyte Island midway along the Philippine archipelago while the Pacific fleet was crippling the Japanese navy in Leyte Gulf. Yamashita devised a plan to defend the Japanese occupation on the large northern island of Luzon in the mountains around Manila. At that time he had but 100,000 troops, the Americans more than 400,000.[4] On January 9, 1945, MacArthur reached Luzon and advanced toward Manila. Yamashita had not declared Manila an "open city" outside the battle zone; because he depended on supplies stashed there. He left a skeleton force in Manila to inhibit the American advance while his main forces withdrew. Although Yamashita had gained effective control over

General Douglas MacArthur and aides waded ashore on the island of Leyte on October 20, 1944 after American forces overthrew Japanese occupation of the Philippines. As military governor of those islands, General Tomoyuki Yamashita planned Japan's vigorous but unsuccessful defense of the occupation. There is still no proof that he knew of the gruesome atrocities committed by his doomed troops in Luzon.

the air force and ordered it out of the capital city, he had not been able to assume authority over the navy, which left 20,000 forces in Manila after informing Yamashita—now in mountain headquarters—that 4,000 would remain. Contrary to Yamashita's orders, moreover, his subordinates, in discussions with the Japanese naval commander, Rear Admiral Sanji Iwabuchi, did not effectively negotiate a timely naval retreat from Manila. Although on paper Iwabuchi reported to Yamashita, he complied instead with Vice-Admiral Desuchi Okuchi's order to remain in Manila, destroy all naval facilities, and "fight MacArthur 'to the death.'" As a result, MacArthur—arriving on February 3—trapped the imperial navy.[5]

In his headquarters 125 miles to the north of Manila, Yamashita had not been able to learn how rapidly the Americans were advancing, but by mid-February he realized the situation and, for the second time, ordered the Japanese navy out of Manila. It was too late. By March 3, Japan's naval and residual army forces there, including Admiral Iwabuchi, were dead. In holding out as long as they could before the Americans wiped them out, however, Iwabuchi's navy—filled with liquor and ordered to take enemy lives—had spread out as a drunken mob to rape, torture, shoot, and burn. "Young girls and old women were raped and then beheaded; men's bodies were hung in the air and mutilated; babies' eyeballs were ripped out and smeared across walls; patients were tied down to their beds and then the hospital burned to the ground"—until MacArthur's forces, fighting Japanese sailors hand-to-hand, ended the atrocities.[6]

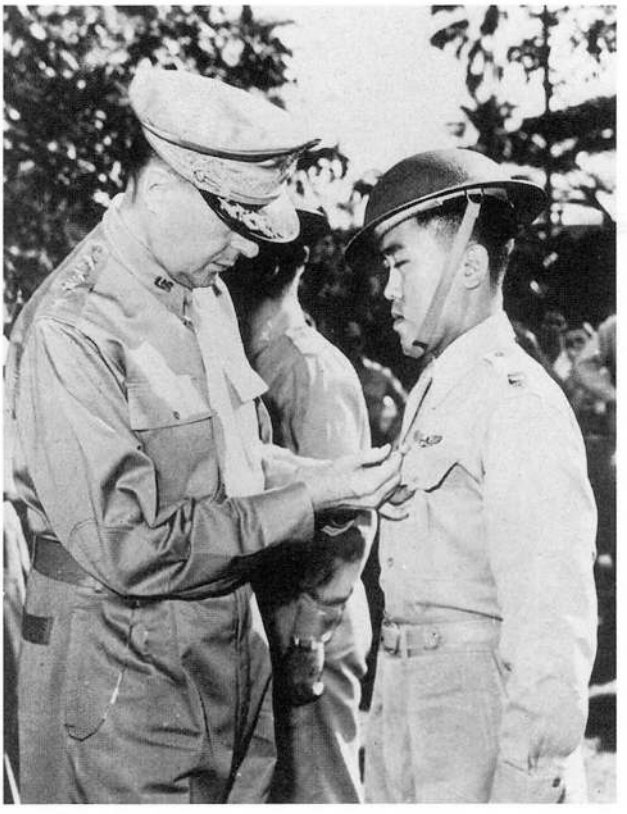
To this day it is unknown whether Yamashita had any idea of the Manila carnage at the time. He had divided his forces into three groups—one under his direct command in the mountains well north of Manila, another under Lieutenant General Shizuo Yokoyama to the east, and the third under Major General Rikichi Tsukada to the west. Yamashita's communications within his own group, as well as with the other two, ranged from limited to impossible.[7] In the meantime, General Yokayama's troops were harassed by Filipino guerillas making way for MacArthur's advancing forces. In a fateful decision, Yokoyama left guerilla control—without issuing guidelines—to his field commanders. As a result, one of his colonels, Masatoshi Fujishige, leading his "Fuji Force," deemed as enemy guerillas all civilians in Fuji's way, including women. "[K]ill all of them," Fujishige ordered. By the time the Americans liberated the area east of Manila, the Fuji Force had massacred 25,000 of the estimated 30,000 to 40,000 civilians slain by the retreating Japanese in Manila and southern Luzon. Isolated from both Yokoyama's and Tsukada's forces, Yamashita retreated with his own troops northward, resisting American attacks until September 3, 1945, when he surrendered all Japan's forces remaining on Luzon.[8]

* * * * *

On August 8, 1945, when the Allies signed a war-crimes agreement in London, it covered only atrocities in Europe; at the time, not even the U.S. War Department was prepared to offer a policy for the Pacific. By the end of August, however, the department had forwarded to General MacArthur a list of suspected war criminals and put the burden on him not only to round them up and to identify and capture others but also to initiate a plan for bringing them all to trial. Eventually, the Secretary of War and the Attorney General, as well as the Joint Chiefs of Staff, concluded that military commanders had authority to try suspected war criminals before military commissions established under regulations the commanders themselves promulgated. This left matters up to MacArthur.[9]

Immediately after Japan's surrender on September 2, President Truman pressed MacArthur to get on with war-crimes prosecutions. These were not to include those of major war politicians, such as Hideki Tojo, who were to face charges of crimes against the peace as well as against the law of war before an international tribunal in Tokyo similar to the trial of the German high command in Nuremberg.[10] As to crimes suitable for trial before a military commission, the U.S. War Crimes Office in the Department of the Judge Advocate General offered suggestions to MacArthur, whose deputy chief of staff, Major General R. J. Marshall, convened a conference in Manila on September 14 to work out the details. Marshall informed the gathering that the first trial would deal with charges, largely developed already, against General Yamashita, then in custody. Essentially, Marshall reported—acknowledging that there was no legal precedent for the charge—Yamashita would be tried criminally for "'negligence in allowing his subordinates to commit atrocities.'" MacArthur also decided to try Lieutenant General Masaharu Homma, whose campaign on Luzon resulting in the Bataan "Death March," had forced MacArthur's flight from the Philippines in 1942. These were the first war-crimes trials to result from World War II, and both dealt—virtually for the first time—with a commander's responsibility for atrocities committed by his troops in violation of the law of war established by international conventions.[11]

After drafting charges against Yamashita, MacArthur's headquarters authorized Lieutenant General Wilhelm Styer, who commanded U.S. Army forces in the western Pacific, to form a military commission based on procedures supplied by MacArthur. Next, after requesting a brief from Washington on the theory of command responsibility that could be used against Yamashita, headquarters referred to General Styer a team of five experienced prosecutors from the Judge Advocate's



General MacArthur pinned a Distinguished Service Cross on Captain Jesus A. Villamor of the Philippine Air Force on December 22, 1941, shortly before Manila fell to the Japanese troops commanded by General Masaharu Homma. Like Yamashita, Homma—whose campaign on Luzon resulted in the Bataan Death March—was tried for war crimes.

Department, later supplemented by a sixth, Filipino member. Defense lawyers were not named until just before arraignment, and none had much criminal or trial experience. The chief of the defense team was the director of the army's prison in the Philippines, three other members came from the staff that processed Philippine civilian claims against the U.S. Army, the fifth was a tax lawyer, and the sixth was a legal advisor to the military police.[12]

Three major generals and two brigadier generals comprised the commission. None was a lawyer. Nor was any a combat veteran; all had held desk jobs. The commission called the arraignment proceeding to order in the ballroom of the Philippine High Commissioner's residence in Manila on October 8, 1945, and read the following charge:

> [B]etween 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, [General Tomoyuki Yamashita] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war.

There were 64 individual charges specifying atrocities. Not one mentioned a direct link to Yamashita. He pleaded not guilty. Trial was scheduled for October 29.[13]

Three days before trial, the prosecution—which had reserved the right to file additional charges—served defense counsel with 59 more. The defense moved for a continuance. It was denied. Senior defense counsel

Colonel Harry Clarke then moved to dismiss all charges for lack of specificity:

> The Bill of Particulars . . . sets forth no instance of neglect of duty by the Accused. Nor does it set forth any acts of commission or omission by the Accused as amounting to a "permitting" of the crimes in question.
>
> The Accused is not charged with having done something or having failed to do something, but solely with having been something. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.
>
> American jurisprudence recognizes no such principle so far as its own military personnel is concerned. The Articles of War denounce and punish improper conduct by military personnel, but they do not hold a commanding officer [responsible] for the crimes committed by his subordinates. No one would even suggest that the Commanding General of an American occupation force becomes a criminal every time an American soldier violates the law . . . .

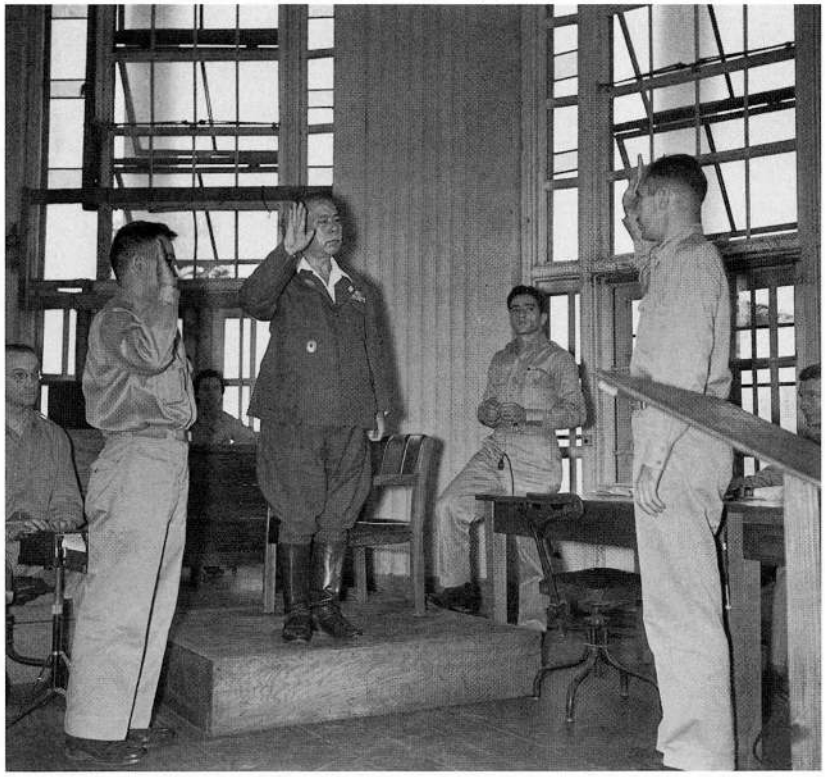
To use a more recent example to emphasize the point, Clarke was suggesting that under the prosecution's theory (as a number of scholars later argued), Generals Westmoreland and Abrams could be found criminally responsible for the massacre directed by Lieutenant William L. Calley, Jr. at My Lai in South Vietnam. In response, the chief prosecutor, Major Robert Kerr, stressed that the atrocities were so "notorious," "flagrant," and "enormous" that Yamashita must have known about them "if he were making any effort whatever" to meet his responsibilities, and that if he did not know "it was simply because he took affirmative action not to know."[14] Motion to dismiss was denied.

The trial, open to the public, lasted for nineteen days of testimony by 286 witnesses—including not only eyewitnesses, but also hearsay testimony upon hearsay, and even uncross-examined affidavits—spelling out the gruesome details. Only two witnesses offered testimony directly connecting General Yamashita to the brutality, and the defense so discredited this testimony that Major Kerr did not mention it in his final argument to the commission. In his defense, General Yamashita testified, without contradiction during cross-examination, that he neither directed nor even knew about the atrocities committed in Manila—that he had turned evacuation of the city entirely over to General Yokoyama while taking his own army north into the mountains. Yokoyama himself testified, confirming his superior's story. Even the butcher Fujishige was there to testify to the same effect, admitting his own personal responsibility.[15]

In closing argument, Major Kerr featured as legal precedent a recent Connecticut case in which the officers and employees of a circus company were found criminally responsible for the deaths of spectators in a circus tent that caught on fire because of the defendants' failure to take the steps necessary to prevent it. The commission retired on December 5 to review the evidence, announcing it would issue its findings in open court two days later. The only twelve reporters who had covered the entire trial—American, British, and Australian journalists—took a secret poll and voted 12–0 for acquittal.[16]

On December 7, 1945, the fourth anniversary of the Japanese attack on Pearl Harbor, the commission reconvened. Its presiding officer, Major General Russell B. Reynolds, summarized the evidence presented by each side and announced the commission's findings (in part):

> The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time



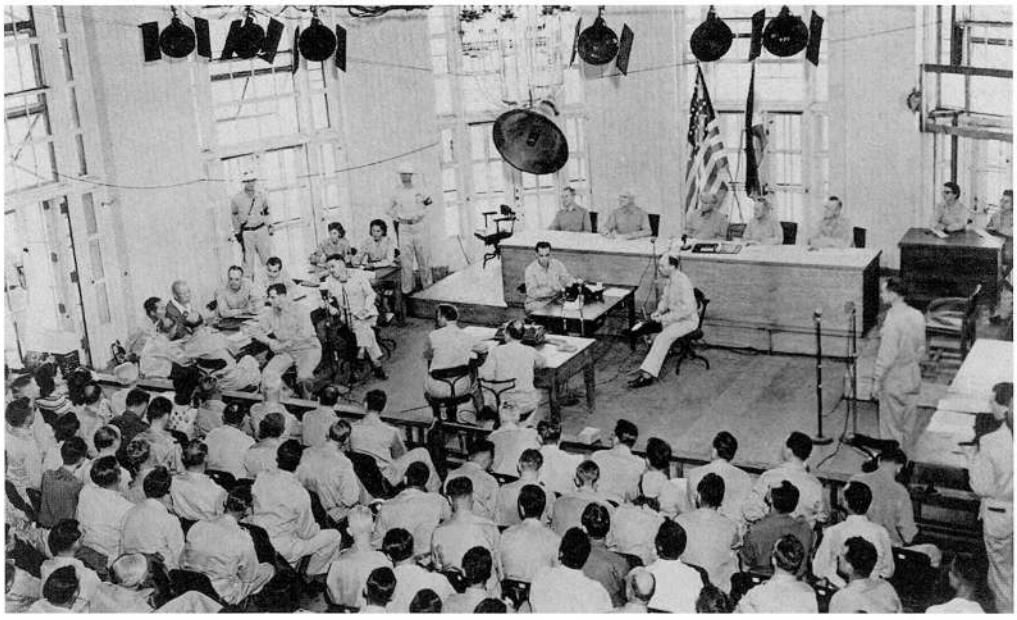
Major Robert M. Kerr (right) administers the oath to Yamashita (the interpreter is at left). Kerr argued that the atrocities committed by Yamashita's soldiers—including rape, pillage, and torture of civilians—were so "flagrant" and "enormous" that he must have been aware of them.

> and area, that they must have been wilfully permitted by the Accused or secretly ordered by the Accused. . . .
>
> It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[17]

Then, after hearing a final claim of innocence from General Yamashita personally, General Reynolds announced the commission's ruling. Based on "a series of atrocities and other high crimes . . . committed by members of the Japanese armed forces under your command," and given the failure "to provide effective control of your troops as was required by the circumstances," the commission—"upon secret written ballot, two-thirds or more of the members concurring"—"finds you guilty as charged and sentences you to death by hanging."[18]

* * * * *

While the trial was in progress, Yamashita's defense team filed an appeal with the Philippine Supreme Court challenging the commission's jurisdiction to try the general and contending that he had not violated the law of war. The appeal was denied—one justice dissenting—on November 27, whereupon defense counsel petitioned



Scene in the courtroom during the war crimes trial of General Yamashita. The defendant is seated at left, surrounded by his defense lawyers. The trial was held in Manila, arguably not the most emotionally stable venue.

the U.S. Supreme Court for review. In the meantime, the day after the commission decision, an angry MacArthur notified the War Department that he did not recognize any right of appeal to civilian courts and that he accordingly planned to go forward under his own announced procedures, which allowed for review of Yamashita's conviction only by General Styer and then by MacArthur himself. This notification telegraphed an intention to approve the commission's ruling and hang Yamashita forthwith. The next day, an alarmed Secretary of War, Robert Patterson, ordered MacArthur to stop immediately. On December 17, the U.S. Supreme Court stayed all further proceedings.[19]

After three contentious conferences on December 18, 19, and 20, a Supreme Court majority tended toward agreement not to hear the case, and Chief Justice Harlan Fiske Stone prepared a draft denial of the petitions. Justice Wiley Rutledge—President Roosevelt's last appointee to the Court three years earlier—penned a dissent. The granting of review requires the votes of only four Justices, and after a final conference on December 20, four of the Brethren—Justices Hugo Black, Frank Murphy, Rutledge, and, probably, Harold Burton—voted to hear the case.[20] Argument was scheduled for an extraordinary six hours on January 7 and 8, 1946. To a former law clerk, Victor Brudney, Rutledge later wrote: "[T]here was a three-day battle in conference over whether we would hear the thing at all. From then on the pressure was on full force."[21]

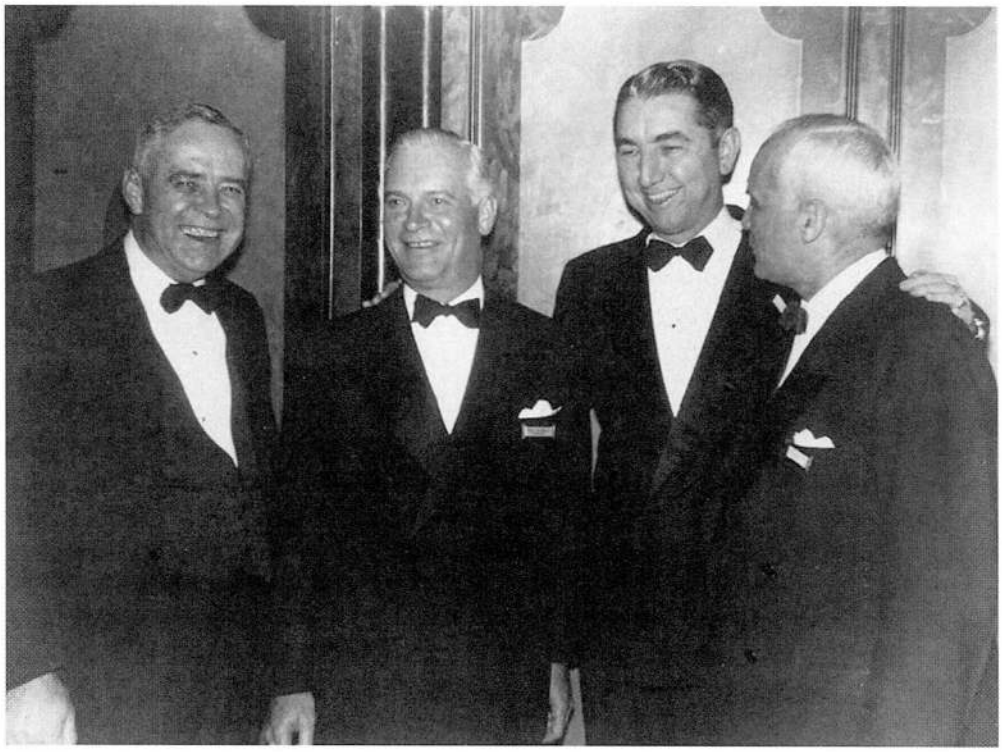
Pressed hard in the barrage of questions from the bench, the government acknowledged "the lack of direct proof of Yamashita's guilt" but argued that, by failing to carry out his duty to control his troops, he was culpable on grounds of "criminal negligence" tantamount to "manslaughter"—under the circumstances, a hanging offense. Four days later, at the Saturday conference, Chief Justice Stone proposed denial of all writs sought, making way for Yamashita's execution upon approval by General MacArthur unless commuted by President Truman. Strongly supported by Reed, Frankfurter, and Douglas—and opposed by Murphy and Rutledge—the Chief Justice assigned the opinion to himself, presumably in the belief that he could attract either Black or Burton, if not both. Stone soon circulated a draft, on January 22, expressing a desire for

Three members of the defense counsel for Yamashita, acting on orders from Secretary of War Robert Patterson, flew to Washington in January 1946 to file arguments for a motion to save him from hanging. Pictured during a conference with the prosecution at the Justice Department are, left to right: Major Robert Kerr, prosecution; Attorney General Tom C. Clark (prosecution); Assistant Solicitor General Harold Judson (prosecution); Captain Milton Sandberg (defense); and Captain Frank Reel (defense).

the Court's opinion to come down less than a week later, on January 28, which placed unusual pressure on the two colleagues who had announced their intentions to dissent.[22]

Citing the case of the German saboteurs, *Ex parte Quirin,* as his underlying text, Stone noted initially that the Constitution authorized Congress to create military commissions "for the trial and punishment of offenses against the law of war," and that federal court scrutiny of military commissions was limited to "habeas corpus" review. This meant that the courts had authority to examine only whether the commission had "lawful power" to try the accused for the offense charged, leaving the military authorities alone with power to review the legality of the charges, the commission's factual findings, and—as a result—the accused's guilt or innocence.[23]

Stone quickly rejected the first defense contentions by opining that General Styer, as military commander of the area where the Manila atrocities occurred, had lawfully created the commission to try General Yamashita, and that its authority continued in the absence of a peace treaty after hostilities had ceased. The Chief Justice then turned to meatier issues: the substance of the charge and the commission's procedures for dealing with it. Stone had no difficulty demonstrating that the charge against Yamashita, buttressed by bills of particulars specifying 123 offenses, adequately identified violations of the law of war. Next, he asked how detailed the Court's inquiry would have to be to determine whether the commission had "lawful power" to adjudicate Yamashita's "command responsibility" for those violations. Not very, concluded the Chief Justice. Citing the Fourth and Tenth Hague Conventions and the Geneva Red Cross Convention of 1929, Stone announced that the law of war imposed "an affirmative



Justice Wiley Rutledge (far left) was photographed in November 1946 with (left to right) Governor Dwight Green of Illinois, Attorney General Tom Clark, and fellow Justice Harold H. Burton at the Mayflower Hotel. A month later, Burton and Rutledge—along with Justices Black and Murphy—voted to hear Yamashita's case.

duty to take such measures" as are within a commander's "power" and are "appropriate in the circumstances" for protecting "prisoners of war and the civilian population." The prosecution's charge, he said, satisfied that standard in alleging that General Yamashita had committed an "unlawful breach of duty" by "'permitting'" troops under his command—whom he had an obligation to "control"—to commit "the extensive and widespread atrocities specified."[24]

But this conclusion begged a fundamental question the defense had raised before the commission and brought again to the Supreme Court: should not the prosecution have to prove that the general knew of the atrocities before he could be charged criminally with failing to prevent them? If not actual knowledge, should not the general at least have had reason to know that the carnage was taking place? Stone never expressly addressed the "knowledge" issue, but, confusingly, he did inject it indirectly. After emphasizing that, in sustaining the charge, the Court did "not weigh the evidence," he added inexplicably: "We . . . hold . . . that the commission, *upon the facts found,* could properly find petitioner guilty" of a command violation. To be sure, he was not evaluating the quality of the evidence against Yamashita; but he appeared to be saying that the very power of the commission to adjudicate the general's guilt depended not only on a correct legal formulation of the charge but also on the adequacy of the commission's factual findings in support of it. Was he using the "facts found" to amplify the ambiguous charge enough to cover and satisfy—albeit in conclusory fashion—the "knowledge" issue? Even if so, Stone's failure to address that question more clearly by explaining the

importance of the commission's factual findings in determining the commission's "lawful power" over General Yamashita bred substantial confusion.[25]

Yamashita's next contention—that the commission lacked jurisdiction because its procedures permitted conviction on evidence not admissible under the Articles of War (enacted by Congress), the Geneva Convention (adopted by treaty), and Fifth Amendment due process (established by Constitution)—gave the Court a most difficult issue. Over defense objection, the commission had admitted not only live testimony subject to cross-examination but also depositions, hearsay, and opinion evidence contrary to the plain language of the Articles and the Convention. Specifically, Article of War 25 prohibited deposition evidence in capital cases before military commissions; Article of War 38 limited the "procedure, including modes of proof," in cases before military commissions—insofar as the President "shall deem practicable"—to the "rules of evidence" generally applicable in federal district court criminal trials, which excluded hearsay and lay opinion; and Article 63 of the Geneva Convention of 1929 limited sentencing of prisoners of war "to the same procedures" applicable to members of "the armed forces of the detaining power"—that is, in military courts-martial.[26]

Stone held for the Court majority, however, that, because Article of War 2 specified that the Articles applied to "persons subject to military law," Articles 25 and 38 applied only to "members of our own Army" and to personnel who "accompany the army"—not to "[e]nemy combatants." Further, concluded Stone, Article 63 of the Geneva Convention, while applicable to enemy prisoners, pertained only to offenses while in captivity, not to war crimes before capture. Finally, Stone summarily held the Due Process Clause of the Fifth Amendment inapplicable by writing cryptically that for "reasons already stated," only the military authorities—not the courts—had authority to review the "commission's rulings on evidence" and "mode of conducting these proceedings."[27]

* * * * *

In response to Stone's draft, Rutledge suggested to Murphy, "You take the charge; I'll take the balance." Justice Murphy—a former high commissioner of the Philippines as well as governor of Michigan and Attorney General of the United States—soon circulated a broadside against the majority. Proclaiming that "due process of law applies to "'any person,'" including "an enemy belligerent," Murphy perceived "no serious attempt" to charge Yamashita with "a recognized violation of the laws of war." The general had not been charged with "personally participating" in "acts of atrocity," whether by "ordering," "condoning," or even knowing about them. Rather, opined Murphy, he had been charged merely with failing to discharge a duty "to control" the troops under his command, a charge without the "slightest precedent" in international law, especially in the context of a defeated army in disarray from "constant and overwhelming assault." Murphy called Stone's reliance on "vague and indefinite references" in the Hague and Geneva Conventions to define violations of the law of war "misplaced," stating that the provisions cited were "devoid of relevance." Reiterated Murphy, "In no recorded instance . . . has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war." Fundamentally, Murphy was accusing the majority of applying an ex post facto law by permitting the "military commission to make the crime whatever it willed" depending on its "biased view" of Yamashita's "duties" and "disregard thereof."[28]

Murphy was preaching a sermon based on natural law, not just on the Constitution. "The *immutable rights* of the individual, *including* those secured by the Due Process Clause of the Fifth Amendment, belong not alone to the members of those nations that

Justice Murphy led a vituperative attack against the majority, saying "In no recorded instance . . . has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war."

excel on the battlefield or that subscribe to the democratic ideology." Rather, "[t]hey belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs." And, because prisoners of war lack direct access to the courts, the "judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable," added Murphy. "Indeed," he concluded, "an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit."[29] Murphy overstated his case. The international conventions cited by Stone offered a substantial basis—albeit with little precedent—for charging criminal liability for breach of command responsibility. Moreover, some of Murphy's analysis featured assertion over documentation.[30] It remained for Justice Rutledge—formerly dean of two midwestern law schools (Washington University and Iowa), then federal appellate judge of the District of Columbia Circuit—to expose, with intellectual precision, the flaws in Stone's presentation.

Murphy had begun writing his dissent before the Court heard from Stone. Because Rutledge's task was more complex, he waited until he received Stone's "full opinion" on January 22 so that he would know his target precisely. Stone had seemed so determined that the Court's opinion issue on Monday, January 28, that one of the Justices even had suggested that the majority honor that deadline by requiring the dissenters to file their opinions later. "I was not going to do that," Rutledge wrote a friend. Not trusting that the majority would extend the usual courtesy of

waiting to issue the Court's opinion until all who were writing had finished, the dissenting justice "worked night and day until Saturday noon [the 26th], finishing the first draft one minute before the conference bell." He worked "one night until five o'clock" in the morning, and collaborated Friday night with law clerk and secretary "until after midnight."

> Then I went home and worked the rest of the night, not taking off my clothes, and coming back the next morning without either breakfast or shaving, to spend the next two hours driving here at my desk with all my might.... I notified the conference that my opinion would be circulated that afternoon....[T]he brethren all at once realized that *they* might not be ready Monday morning.... Now that the tables were somewhat turned they agreed that we would meet on Monday morning at ten o'clock to discuss whether the case should be sent down at noon.

Stone and the majority decided they needed another week.[31]

Rutledge later wrote to Victor Brudney, "I had not heretofore had an experience here, and hope never to have another one, of being forced to the gun as we were in that case." The Justice added, "I didn't give the boys as much hell in *Yamashita* as I wanted to. I felt like turning loose with all the fire that Murphy poured on." Concerned about Murphy's vituperation, however, Rutledge believed that, for maximum impact, he had to keep his own "tone within some bounds of restraint." So the Rutledge dissent began respectfully:

> Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.
>
> More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law...
>
> With all deference to the opposing view of my brethren, whose attachment to...[our great constitutional] tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command.[32]

In a dissent scholars have called "masterful" and "penetrating," "undoubtedly a great opinion"—a "careful examination of detail" that exemplifies "the fairness" which the Justice himself "commends as a precept"—Rutledge then produced an exhaustive analysis that combined scholarship with eloquence. It is one of the Court's truly great—and influential—dissents. Wrote Charles Fairman, then of Stanford, later of the Harvard law faculty, "Whether one agrees with him or not on his several points—and individuals will vary greatly in their evaluation of the competing interests involved—one must respect the ideal of justice" for which Rutledge was striving.[33]

In apt summary of the disagreement, Justice Rutledge observed in dissent:

> The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

In one of the greatest and most influential Supreme Court dissents, Rutledge used intellect and careful reasoning to refute Chief Justice Stone's legal analysis in *In re Yamashita* and argue that the Japanese general was entitled to due process.

In elaborating his position, Rutledge first agreed, briefly, with the defense's argument that *Ex parte Quirin* did not justify trial by military commission in lieu of a civilian court, since cessation of hostilities had removed all "military necessity" for such a commission. Rutledge accordingly disagreed with Justice Murphy's acknowledgment that the commission had been legally established. For that reason, in addition to his concern about his colleague's tone (Murphy had even used the word "vengeance"), Justice Rutledge did not formally join Murphy's opinion (although Murphy joined his). Rutledge did, however, join unequivocally in Murphy's condemnation of the charge against General Yamashita.[34]

Specifically, in Rutledge's view, the law of war permitted conviction of a commander for failure to control his troops only if there was credible proof that the commander knew of the crimes his troops had committed in time to stop or at least punish them. According to Rutledge, however, Stone's opinion would uphold the general's conviction on the ambiguous charge that he had failed in his duty simply by "permitting" his troops "to commit brutal atrocities and other high crimes." Although some might read the word "permitting" to imply knowledge and acquiescence, noted Rutledge, others would say it implied "mere failure to discover" through the institutional structure of command—at worst, negligence. Because the charge, fairly read, authorized conviction on the latter interpretation—which did not state a law-of-war violation—Rutledge concluded that it was fatally defective.[35]

But, assuming that the charge adequately informed Yamashita of the conduct and "knowledge" that made him legally accountable under the law of war for what his troops were doing, Rutledge argued that the

commission's findings were inadequate. As noted earlier in this article, the only two witnesses who proclaimed Yamashita's direct knowledge of the brutality had been so substantially discredited that the prosecutor ignored them in closing argument. Years later, Major William H. Parks, in an exhaustive analysis of the record, identified circumstantial evidence that the commission might have specified to find that Yamashita at least had had reason to know of several alleged brutalities as they were going on. The commission, however, made no such express finding.[36] At most, according to Rutledge (and to others who have studied the case), the commission—referring to no facts—proffered "inferential findings" that Yamashita had "had knowledge." In the commission's words, the prosecution had "presented evidence" tending to show that the crimes had been "so extensive and widespread" that the general must have "willfully permitted" or "secretly ordered" them. On their face, these findings revealed no more than surmise, maintained Rutledge.[37]

Furthermore, the "ultimate findings"—commonly called conclusions of law—on which the commission premised guilt did not mention the general's knowledge. As Rutledge noted, the commission based conviction on no more than "(1) the fact of widespread atrocities and crimes" and (2) Yamashita's failure "to provide the effective control... required by the circumstances." In sum, stressed Rutledge, whatever findings the record may have supported, the commission—sustained by the Stone majority—had found Yamashita guilty and recommended death by hanging without either specifying the level of knowledge, if any, legally required for culpability or attributing to the general any awareness of a particular atrocity. Because of its ambiguity, Rutledge concluded, the commission's ruling could be read as no more than a conviction for negligence.[38]

Moreover, proposed Rutledge, assume that these ultimate findings—ambiguous, at best, as to knowledge—would suffice nonetheless for conviction if supported by the evidence. The required proof was lacking, he concluded, because the evidence was tainted by the "complete abrogation of customary safeguards" required for its admission. The commission's regulations allowed in evidence "[e]very conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed or oral, and one 'propaganda' film." The commission thus condemned the general to death, Rutledge observed, with findings based substantially on "untrustworthy, unverified, unauthenticated evidence" not questioned—or even effectively questionable—by "cross-examination or other means of testing credibility, probative value, or authenticity." As a result, reasoned Rutledge, Yamashita had been convicted based on knowledge merely imputed to him from evidence that, in fair part, "would be inadmissible in any other capital case or proceeding under our system, civil or military." Nor, finally, had Yamashita received a real opportunity to prepare his defense, according to the Justice, if only because the commission had denied a requested continuance after the prosecution—three days before trial—served on defense counsel "a supplemental bill of particulars" that contained "59 more specifications" in addition to the 64 originally charged.[39]

Critical to the dissent, of course, was Rutledge's legal analysis showing why these procedural shortcuts violated enforceable rights of a Japanese general tried for war crimes in the Philippines. Even the majority would have agreed that the Articles of War, the Geneva Convention of 1929, and the Fifth Amendment Due Process Clause, if applicable, would have required reversal of Yamashita's conviction and a retrial, because the commission's loose charges and methods of proof had not conformed to the standards prescribed. Accordingly, Rutledge detailed the arguments refuting Stone's legal analysis.

In the first place, noted Rutledge, Articles of War 25 and 38—respectively excluding uncross-examined deposition evidence in capital cases and incorporating, insofar as "practicable," the rules of evidence applicable to criminal trials in federal district courts—expressly applied to trials by "military commissions." Rutledge recognized, along with Stone, that Article 2 specified categories of military and related personnel who were "subject to these articles": namely, members of the Regular Army, cadets, Marines attached to the army, "retainers to the camp" and other civilians "accompanying or serving with" the army, persons sentenced by court-martial, and residents of the "Regular Army Soldiers' Home." But he emphatically rejected Stone's conclusion that Article 2 should be read to delimit the entire universe of persons eligible for Article 25 and 38 protections.[40]

Where, more specifically, was the Stone-Rutledge conflict? After Congress revised the Articles of War in 1916, the articles recognized, as they always had, the military "court martial" traditionally used to try U.S. military personnel for military crimes. In addition, as Justice Rutledge observed, the revised articles acknowledged, for the first time, the "military commission." Since the days of the Mexican War, the military had convened such commissions—without statutory authority—to try civilians for ordinary crimes committed in the "theater of hostilities" and to prosecute both civilians and enemy belligerents for offenses against the common law of war. Confusion developed, however, because the revised articles did not retain courts-martial and military commissions as mutually exclusive tribunals; to some extent they became overlapping. Specifically, field commanders were given court-martial authority to try civilians and enemy belligerents who, when charged with violating the law of war, had hitherto been triable only by military commission. But that broadened authority was optional. Accordingly, to make clear that expanded court-martial jurisdiction did not contract the jurisdiction of military commissions, the revised articles expressly stated that the provisions expanding court-martial jurisdiction should not be interpreted to deprive "military commissions" of "concurrent jurisdiction" for trial of "offenders or offenses" under the "law of war."[41] The question for interpretation, then, was whether the procedural protections in the revised Articles of War—newly applicable in courts-martial of civilians and enemy belligerents—also now applied to trials before military commissions. Stone answered "no"; Rutledge said "yes."

Stone acknowledged that the revised articles did grant protection, for the first time, to U.S. military (and related) personnel if tried by military commission, but he perceived no congressional intent to extend those protections to others. Rutledge, on the other hand, found no such bifurcation of rights; to him, the revised articles' plain language and legislative history—both of which he addressed in detail—conferred rights and protections, such as those in Articles 25 and 38, on trials before courts-martial and military commissions alike, without differentiation among particular classes of defendants. After illustrating various anomalies revealed by the Stone interpretation—including the unavailability of the articles' procedural protections to American civilians tried before military commissions—Rutledge concluded that Congress could not have intended "two types of military commission" in the articles, the first conducting trials of American military personnel and civilian followers in one way, the second trying other American civilians and enemy belligerents in a different way.[42]

Through similar, meticulous textual analysis, Rutledge also countered Stone's conclusion that the Geneva Convention applied only to offenses committed by prisoners while prisoners. If, as Rutledge contended,

Geneva Convention protections applied to trial of war crimes committed prior to capture, then the Articles of War—court-martial protections—would have applied by way of that treaty. Finally, Rutledge invoked Fifth Amendment due process "[w]holly apart from the violation of the Articles of War and of the Geneva Convention," and rejected the majority's denial of "all such safeguards." To Rutledge, due process was "the great issue in the cause." "Not heretofore," according to the Justice, "has it been held that any human being is beyond [the Fifth Amendment's] universally protecting spread in the guaranty of a fair trial in the most fundamental sense." Warned Rutledge, "That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all."[43]

Specifically, Rutledge added, "the heart of the security" of a fair trial—especially a trial on charges carrying the death penalty—lies in two elements of due process. "One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend," including a timely understanding of "the exact nature" of the charged offense, a "reasonable time for preparing to meet the charge," the "aid of counsel," and reasonable continuances to deal with "surprise."[44]

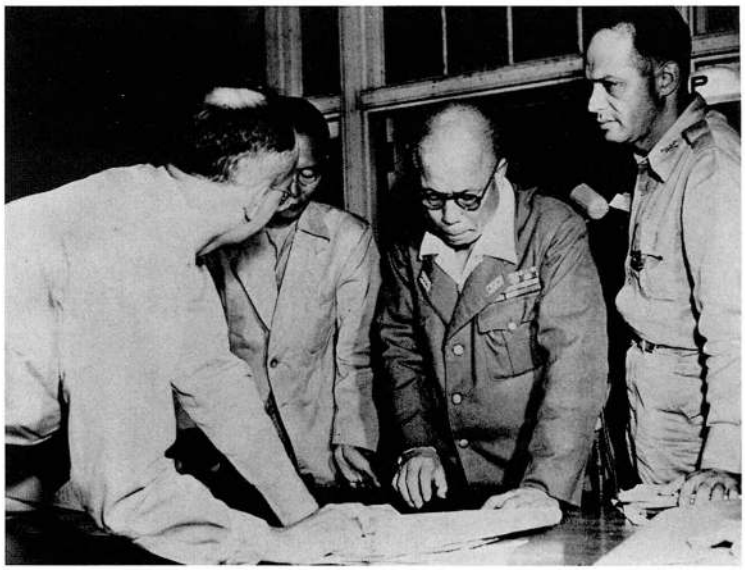
In conclusion—after forty printed pages (compared with Stone's twenty-one and Murphy's sixteen)—Rutledge wrote, "What military agencies or authorities may do with our enemies in battle or invasion . . . is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute."[45] (Rutledge did not elaborate how due process as applied to prisoners of war might differ, if at all, from the protections guaranteed to our own military by the Articles of War.)

* * * * *

Upon receiving the Rutledge dissent, Stone drafted over the weekend a section on due process, concluding that the military commission, by analogy to an expert administrative agency, had used a procedure and applied an evidentiary standard high enough to satisfy the Fifth Amendment. His colleagues Reed, Frankfurter, and Douglas remained on board, and Burton joined for the first time. But Justice Black balked. He found Stone's administrative agency analogy too strained; the commission had conducted a judicial proceeding carrying criminal sanctions. If due process applied, Black said, the commission had failed. Black accordingly drafted a concurring opinion to explain why constitutional due process was unavailable for trials by military commission. In order to avoid a fractured majority, the Chief withdrew all discussion of due process. Black withdrew his own draft and joined Stone. The others in the majority remained. The opinions came down on February 4, 1946. Four days later, President Truman denied executive clemency. By sunrise on February 23, 1946, General Tomoyuki Yamashita was dead.[46]

* * * * *

The majority's refusal to address due process in *Yamashita*, according to Princeton's eminent constitutional historian Edward S. Corwin, reflected "a complete [retreat], as well as [a] completely *silent* retreat," from *Ex parte Quirin*, on which Stone had relied to establish the commission's authority and the Court's standard of review. In *Quirin,* Stone himself had written that "the detention and trial" of enemy aliens, charged before a military commission with sabotage in the United States, are "not to be set aside by the courts without the clear conviction that they are



General Yamashita conferring with his counsel. He was hanged on February 23, 1946, nineteen days after the Supreme Court issued its opinion.

in conflict with the Constitution or laws of Congress constitutionally enacted." But, the Chief Justice had emphasized, "constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." The *Quirin* Court accordingly had to evaluate, on habeas corpus, whether the Constitution permitted trial of "unlawful combatants"—in that case, spies without uniforms—before a military commission, rather than a civilian court. It held the commission proceeding constitutional. In so ruling, the Court not only addressed the power of a military commission to try "unlawful combatants" for alleged violations of the law of war, but also necessarily analyzed (before rejecting) the defendants' claimed Fifth Amendment right to presentment before a grand jury and Sixth Amendment right to a jury trial. Four years later, however, the *Yamashita* Court, in dealing with a uniformed prisoner of war—a "lawful combatant"—altogether avoided constitutional analysis in rejecting the general's Fifth Amendment due-process claim without discussion.[47]

As to construing the Articles of War, Charles Fairman, a military and constitutional law expert, wrote at the time that "Mr. Justice Rutledge would seem to have the better of the argument."[48] Other scholars have agreed.[49] But this is not to say the Chief Justice lacked a plausible interpretation. When Stone's statutory approach is compared with Rutledge's analysis, one must say that persons trained in the law could reasonably differ on this first-time case. Critical statutory language was ambiguous; some provisions, literally construed, conflicted with others; legislative history was confusing as witnesses before congressional committees, in focusing on one point, ignored the implications of their testimony for other issues perhaps not even visible at the time.

For difficult cases such as *Yamashita*, the interesting question often is not what judge is "correct" when interpreting a statute or treaty, especially since Congress, in drafting or approving the legislation, probably did not come to grips with the issue. In these situations, there is no "right" answer short of what a majority of the appellate bench says it is. Rather, the intriguing inquiry concerns how a conscientious judge goes about marshaling the statutory language, committee reports, hearing testimony, and floor speeches in a way that leads to a particular, coherent result. Initially, the judge will examine these data and, when the "answer" is not readily apparent, will

try to find the most reasonable interpretation by applying time-honored canons of statutory construction and scrutinizing the legislation by reference to external sources, such as earlier versions of the statute that may suggest a change of congressional policy and prior judicial decisions that give answers to analogous questions. But there is a deeper influence at work—the judge's own persona—that in the most complex and controversial cases is likely to channel the judge, at the threshold of the inquiry, in a particular direction, if not toward a foreordained result.

Three members of the *Yamashita* majority—Stone, Black, and Douglas—evidenced profound concern for civil liberties over the years. But they joined Justices Reed and Frankfurter—and Rutledge—to comprise the majority during the Court Term prior to *Yamashita* in *Korematsu v. United States,* upholding six to three (with Justices Roberts, Murphy, and Jackson dissenting) the military directive that ordered relocation and internment of all persons—even American citizens—of Japanese ancestry living in designated areas on the West Coast.[50] After Japan's attack on Pearl Harbor, the Constitution's war power left these six Justices unwilling to interfere with Congress, the President, and the military.

Once hostilities ceased, with Japan's surrender in early September 1945, a different reality confronted the Court. Although the nation technically remained at war with Japan (there was no peace treaty until 1952), this defeated enemy posed no threat. And yet, in the war's aftermath, a new mix of anti-Japanese psychology in the general public—including the judiciary—took hold. There was a powerful American feeling that the Philippine people, whom Japanese forces had brutalized, deserved to have those responsible for the carnage brought to justice as soon as possible. Manila, after all, had been "the second-most devastated city of World War II, after Warsaw." Thus, beginning with the trials of Generals Yamashita and Homma, already in captivity, the pursuit of justice in the Philippines proceeded swiftly, beginning less than two months after the fighting stopped. Indeed, these first war-crimes trials required expedition for another reason: by November 1945, 2,000 Japanese awaited prosecution before U.S. military commissions.[51]

In addition to pressure for speed, other factors affected these initial prosecutions. The trials were held in Manila, not an emotionally stable venue. Furthermore, all members of the commissions appointed to try the two generals were affiliated with the American military command (plus a Philippine general, in Homma's case). Neither of these commissions, therefore, had even the increment of detachment that might have been possible through appointment of a member or two from another allied country. [52] Moreover, there surely was concern in the air that unless the prosecution obtained convictions in these first "command responsibility" trials under international law, subsequent trials might go nowhere. This widely felt need for conviction surely affected commission procedure. MacArthur's headquarters knew that evidence-gathering in war-torn areas was difficult, and particularly that arranging for testimony subject to cross-examination would often be impossible. Had MacArthur prescribed for military commissions the evidentiary standards of our Constitution, or even of the Articles of War and the Geneva Convention, he would have imposed requirements that made trial of war crimes more problematic. Finally, because no commission member was a lawyer—not even the commission president, designated the "law member," with final authority over legal rulings—there was serious risk that, both in conducting the trials and in preparing their findings, the Yamashita and Homma commissions could stumble badly, or at least make a reviewing court's task far more difficult than it would be if the commission members had legal training.[53]

For all these reasons, the first trials of Japanese generals before U.S. military

commissions in the Philippines immediately after World War II were likely to deviate from the norms that governed criminal trials in federal and state courts on the American mainland. U.S. Supreme Court justices looking at what happened in those first commission proceedings, therefore, had to know that under the circumstances, not much better could have been expected. Thus, one can at least understand why a Justice would not have been willing to set the bar higher than the Stone majority placed it. Moreover, at some level a Justice may have asked himself, were not the war crimes trials part of the war itself—a final reckoning—rather than severable accountings under the system of justice applicable in peacetime? Rutledge and Murphy were taking standards of criminal procedure prevalent in a stable society and applying them to judgment of behavior in a chaotic, war-torn environment. This arguable disconnect between wartime evil and peacetime justice was a powerful pressure to temporize. The Supreme Court Justices could not have avoided thinking about the predictable impact of a decision to reverse the first conviction of a Japanese general. Other commission proceedings in progress would have had to be redone or even abandoned. Feeling in America—not to mention the Philippines—would run high. And there was likely to be damage to the Court as an institution if it was publicly branded again as an obstructionist institution out of touch with the nation's idea of justice (recall the "Court-packing" days less than a decade earlier[54]), particularly when the country was coming out of a war with several brutal enemies. And what if the President—or even General MacArthur himself—decided to execute General Yamashita no matter what the Court said? These possibilities may not have been as far-fetched as modern Court-supporters might assume.[55] The Justices'

When Gordon K. Hiribayashi (center, teaching at the University of Alberta in Canada) was a college senior in 1942, he refused to obey orders that required Japanese-Americans such as himself to comply with a curfew and to register for evacuation to relocation centers. In 1943, a unanimous Supreme Court—including Justices Rutledge and Murphy—held that the threat of invasion and sabotage justified the curfew limiting the constitutional rights of Japanese-American citizens. But later, in the *Korematsu* case, Murphy dissented while Rutledge joined when the Court upheld the evacuation program.

inevitable concern about the Court's reputation thus compounded the pressure on them not to interfere with military commission justice.

Undoubtedly aware—especially after reading Stone, Murphy, and Rutledge—that the *Yamashita* decision could reasonably go either way, each Justice had to make a judgment that, realistically, would not be purely legal. Its content, unavoidably, would be intellectual, practical, and emotional. In deciding General Yamashita's fate, would it be more sound and responsible for a Justice to invoke separation of powers doctrine, meaning deferral to the President and General MacArthur, or to extend rights specified in international treaties and the U.S. Constitution to enemy prisoners of war in trials of charges condemning belligerent acts prior to capture? Put another way, should the Court clear the way for the democratically elected branches of government to assume the moral and political responsibility for determining, ultimately, the rules for going forward against captured enemy commanders—subject only to the most limited scrutiny by the small cadre of lifetime judicial appointees in the Marble Palace on Capitol Hill? Or should the only branch of government the Founders had established to protect the individual against majority passions hold firm—for the sake of the very principles the war was fought to protect—against procedural shortcuts which, upon reflection in less stressful moments, might be seen to suggest vengeance more than justice?

It is doubtful that any Justice put questions to himself in quite this way. Any issue presented to a court, at least initially, is posed in a conscientious judge's mind as a purely legal one. And, in most instances, it stays that way, because the law has developed to a point at which the result is indicated without serious doubt. Yet sometimes the issue is novel, the result is far from clear, the consequences are enormous, and the judge—after hard work and deep debate—is honest enough to acknowledge, privately, that an opinion will "write"—that is, it will reflect sufficient intellectual integrity—with more than one outcome. At that point, as Rutledge himself would have agreed,[56] the judge inevitably confronts a question of personal values that ultimately will drive the judge's decision, however clothed in legal language. Once that inherently emotional "values" content is added to the mix, moreover, a decision on which reasonable minds can differ often will become transmuted in the particular judge's mind into a decision that could come out only one way. Merger of emotion with intellect becomes complete. The inquiry, initially laden with doubt, becomes a conviction, finally suffused with certainty—sometimes even permitting anger at a colleague who disagrees.

Armed with conviction by this intellectual-practical-emotional process, the Court majority in *Yamashita,* led by Stone but influenced significantly by Black, opted for the war power over individual rights—indeed, for forbearance and deference to the executive branch over prerogative and engagement as a Court. Black's desire to avoid compromising due process jurisprudence—as Stone's revisions in response to Rutledge would have required—achieved some damage control. And Stone's desire—shared by others—for as close to a unanimous opinion as possible accomplished an authoritative decision without dilution by separate concurrence. But, as we have seen, by skipping discussion of the Fifth Amendment, the *Yamashita* majority voted for constitutional avoidance.

To Justice Rutledge, as well as to Justice Murphy, any rationale for compromising a constitutional protection of individual rights was suspect. Rutledge is not known to have written or spoken about *Korematsu* in connection with the later war-crimes rulings. But there can be little doubt that the anguish he felt in joining that decision—however correct he believed it was—must have fed his emotions while writing, in his *Yamashita* dissent, that "the Constitution follows the flag" to the Philippines.[57]

Rutledge cared very much about the Court as an institution; he was not temperamentally a contrarian; and in war matters he had shown his respect for congressional and executive prerogatives. Furthermore, he tried conscientiously to discern and apply the law in every case with intellectual honesty, come what may. And there can be no doubt that he tried very hard to evaluate Stone's positions with an open mind. But his highest personal, political, and judicial value was the worth—the dignity—of the individual. And once, by his lights, the war was over, everything in his makeup encouraged a reading of the Constitution and our international treaties that would protect the due-process rights of every individual within this country's jurisdiction.

But where, more precisely, did Rutledge get the idea that uniformed enemy combatants, taken as prisoners of war and tried overseas by military commissions for atrocities violating the law of war, were entitled to constitutional due process? At the time, that was not established law. "[W]e enter wholly untrodden ground," Rutledge acknowledged.[58] Squarely presented in *Yamashita,* however, the issue would be decided.

As a Justice vigilant to protect constitutional rights in all criminal prosecutions, Rutledge proceeded from an inclination—call it a rebuttable presumption—that General Yamashita could rely on the Fifth Amendment. Rutledge was aware, as noted above, that the Court never before had "held that any human being is beyond its universally protecting spread in the guaranty of a fair trial." This perspective accordingly affected how he expressed the specific question presented: whether "our system of military justice" shall, alone "among all our forms of judging," remain outside constitutional protection. He found no useful legal precedent in the Court's jurisprudence or in that of any other democratic nation. But, Rutledge observed, "[p]recedent is not all-controlling in law." He then outlined his approach to constitutional decision-making. "There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead." His eye was on a new world order under law. "If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice . . . The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand."[59]

In ratifying the Constitution, Rutledge emphasized, the American people had created a government with a "basic scheme," reflecting "basic concepts" and "elementary protection[s]" formulated into trial standards that incorporated "the fundamentals of fair play." Significantly, Rutledge found no indication in text or history that these protections did not apply to everyone within the reach of our government institutions. Particularly as our post-war government anticipated joining a world community—with enlightened legal protections reciprocally enforced, he hoped—it was important, he believed, that this country, in its own interest, not fail to enforce norms it would expect others to extend to our own nationals.[60]

By saying simply that the commission's evidentiary rulings and "mode" of procedure were "not reviewable by the courts,"[61] the *Yamashita* majority held cryptically but unequivocally that the Fifth Amendment was not available to the general. In the next Term of Court, moreover, Justice Frankfurter—over the dissenting votes of Justices Black, Douglas, Murphy, and Rutledge—rejected due process for enemy aliens in greater detail than in Chief Justice Stone's *Yamashita* ruling. Frankfurter held for the Court that, during a declared war, the President had authority under the Alien Enemy Act of 1798 to deport

an enemy alien unfettered by due process.[62] Later, in the 1950 Term, Justice Jackson for the Court—in ruling that German enemies tried and held by the U.S. military on foreign soil were not entitled to habeas corpus review of their detention after convictions by military commission—expressly rejected the contention that the petitioners were entitled to Fifth Amendment protection.[63] Justices Black, Douglas, and Burton dissented. Of perhaps enduring significance, Justices Tom Clark and Sherman Minton, who had taken the seats vacated in 1949 upon the deaths of Justices Murphy and Rutledge, respectively, helped form the majority.

* * * * *

Scholars have debated, in light of the Yamashita commission's conclusory findings, whether the decision held the general "strictly accountable" for his troops' criminal acts or whether instead, given the commission's reference to "extensive and widespread" crimes "both as to time and area," the commission found, implicitly, that General Yamashita either knew or must have known what was going on.[64] Justice Jackson's successor as chief prosecutor at Nuremberg, Telford Taylor, pressed for the stricter understanding at German war-crimes trials two years after *Yamashita,* but he failed.[65] The military tribunals conducting the multidefendant trials known as the German *Hostage* and *High Command* cases took the knowledge issue seriously. The first applied a standard expressly limiting criminal responsibility to a commander who "knew or should have known" what the troops were doing. The second appeared to impose an even higher standard, requiring "personal dereliction" amounting to a "wanton, immoral disregard" of subordinates' actions tantamount to "acquiescence."[66]

In the years after *Yamashita,* war crimes trials took place around the world, not only in Manila and Nuremberg and Tokyo but also in Britain, Australia, China, Russia, Canada, New Zealand, and the Netherlands. *Yamashita* established for use in these trials the doctrine of criminal liability under the international law of war for violating the duty of command responsibility, as refined case by case to resolve a variety of issues inherent in a chain of command. But, the World War II war-crimes tribunals after *Yamashita* and *Homma* rejected strict accountability in favor of holding a commander criminally responsible only if he either had actual knowledge or, under all the circumstances, should have had knowledge of his troops' derelictions—and, with means at his disposal, failed to act. By 1956, this standard was appearing in the U.S. Army *Field Manual.*[67]

Fast-forward to the late nineties. Under Article 7 (3) governing individual criminal responsibility for war crimes tried at The Hague by the International Criminal Tribunal for the Former Yugoslavia, a commander will be adjudged criminally responsible for the acts of a subordinate only if the commander "knew or had reason to know" of those acts and "failed to take the necessary and reasonable measures" to "prevent" them or to "punish the perpetrators." In contrast, one panel of the International Criminal Tribunal for Rwanda required, for conviction, proof that the commander's "negligence was so serious as to be tantamount to acquiescence or even malicious intent." The point is that in war-crimes prosecutions after *Yamashita* and *Homma* to the present day, the "knowledge" deficiency identified by Justices Rutledge and Murphy has been recognized the world over, beginning almost contemporaneously at Nuremberg and reaching the atrocities in Bosnia and Rwanda over a half-century later.[68]

* * * * *

Is *Yamashita,* nonetheless, still good law in the United States, with its "must have known" (or lesser) standard for imputing to commanders criminal responsibility for their subordinates' war crimes, and with its largely

carte blanche deference to military commission trials of U.S. prisoners of war? Because *Yamashita* did not permit conviction of a commander expressly found to be *without* knowledge of a subordinate's atrocities—indeed, because the military commission probably should be understood to have found, however imprecisely, that the general must have had an inkling or more of what was going on in Manila—*Yamashita* does not stand in the way of an argument that an appreciable level of commander knowledge is required.[69]

Furthermore, important amendments in Geneva—which the United States has accepted—brought change to U.S. military commission treatment of prisoners of war, effectively overruling *Yamashita.* Not long after World War II, tribunals in France, the Netherlands, and Italy, in line with *Yamashita*, rejected arguments that the 1929 Geneva Convention applied to trials for war crimes allegedly committed before capture (although later the French Supreme Court of Appeal, taking the Rutledge view, reversed that position).[70] Then, in 1949—a month before Justice Rutledge died of a stroke at age 55—the International Committee of the Red Cross revised the Geneva Convention to conform to Rutledge's understanding of the 1929 provisions, applying the Convention's protections to "prisoners of war" charged with offenses "prior to capture" as well as after.[71] The 1949 revisions—ratified by the U.S. Senate in 1955[72]—also assure that prisoners of war held by the United States for war-crimes prosecution will receive the same procedural safeguards guaranteed to members of the U.S. military, beginning with notice of the charge "as soon as possible and at least three weeks before . . . trial"[73] and with the right to "qualified" counsel and to a "competent" interpreter.[74] Of greatest significance overall, in language virtually identical to that of the 1929 Geneva Convention, a "prisoner of war can be validly sentenced only . . . *by the same courts according to the same procedure*" applicable to the "armed forces of the Detaining Power."[75] And a convicted war criminal is entitled to the same "right of appeal or petition from any sentence" available to the Detaining Power's armed forces.[76] As a result, by reflecting the United States's treaty obligation to try prisoners of war in a forum and with right of appeal under rules equivalent to those of a military court-martial, the Geneva Convention of 1949 effectively has satisfied—and thus substantially mooted—Justice Rutledge's procedural concerns derived from the Court's failure to apply the Articles of War either by their own terms or via the earlier Geneva Convention.[77] (It is unlikely that Fifth Amendment due process, if applicable to prisoners of war as Rutledge contended it should be, would have afforded greater protections than those guaranteed by the Articles of War to the United States military.[78])

The *Yamashita* dissents doubtless contributed to the eventual acceptance around the world of the rights the dissenters espoused for prisoners of war charged with war crimes. By preventing a unanimous Court in the first postwar trial, and by articulating their legal views with precision and passion, Justices Rutledge and Murphy offered lawyers and judges in subsequent war-crimes trials—as well as international delegates soon to revisit the Geneva Convention itself—persuasive alternatives to the rules of law and procedure applied in *Yamashita*. Undoubtedly, lawyers in subsequent trials would have argued, without help from Rutledge and Murphy, that guilty knowledge is required before imposing criminal liability on a commander for atrocities committed by the troops. But with Rutledge and Murphy in dissent, that effort was all the more credible. Their dissents also had a chastening impact on the press and the public. They made opinion leaders think, as editorials reflected nationwide—some praising them greatly.[79] These dissents energized the American liberal community, in particular, to monitor the increasing number of war-crimes trials

taking place around the world.[80] And the dissents stood out as expressions of national conscience at a time when feelings of hate and revenge otherwise might have overwhelmed the nation.

* * * * *

Near the beginning of his *Yamashita* dissent, Justice Rutledge wrote:

> In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

He closed by quoting Thomas Paine: "'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.'"[81]

Note:* *Senior Judge, District of Columbia Court of Appeals. This article is taken from a forthcoming biography,* ***Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge.*

ENDNOTES

[1]Lawrence Taylor, **A Trial of Generals: Homma, Yamashita, MacArthur** 1–7, 111 (1981).

[2]James J. A. Daly, "The Yamashita Case and Martial Courts," 21 *Conn. B. J.* 136 (part 1) (1947); Lawrence Taylor, *supra* note 1, at 103–112.

[3]Lawrence Taylor, *supra* note 1, at 112–113; *In re Yamashita*, 327 U.S. 1, 16 (1946); Richard L. Lael, **The Yamashita Precedent: War Crimes and Command Responsibility** 7–9 (1982).

[4]Richard L. Lael, *supra* note 3, at 9–13, 21–22; Lawrence Taylor, *supra* note 1, at 116, 122.

[5]Richard L. Lael, *supra* note 3, at 16, 23, 26, 28, 30–31; Lawrence Taylor, *supra* note 1, at 120, 123.

[6]Richard L. Lael, *supra* note 3, at 31–32; Lawrence Taylor, *supra* note 1, at 124–126.

[7]Richard L. Lael, *supra* note 3, at 14, 18, 33–37.

[8]*Id.* at 34–35, 37; Philip R. Piccigallo, **The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951** 50 (1979).

[9]Richard L. Lael, *supra* note 3, at 59–65.

[10]*Id.* at 66–69.

[11]*Id.* at 2, 56, 58–59, 68–69, 72; Philip R. Piccigallo, *supra* note 8, at 51, 63; *see id.* at 49, 57, 214.

[12]Richard L. Lael, *supra* note 3, at 71–73; Lawrence Taylor, *supra* note 1, at 131–135; *see* A. Frank Reel, **The Case of General Yamashita** 35–39 (1949).

[13]Lawrence Taylor, *supra* note 1, at 135–136; Philip R. Piccigallo, *supra* note 8, at 51; Richard L. Lael, *supra* note 3, at 80–81.

[14]*Id.* at 81–83; Lawrence Taylor, *supra* note 1, at 131, 208, 223. For scholars who have cited *Yamashita* to argue for imputing criminal responsibility to high commanders for atrocities in Vietnam, see Telford Taylor, **Nuremberg and Vietnam: An American Tragedy** 181–182 (1970); Richard A. Falk, "The Circle of Responsibility," in Richard A. Falk, Gabriel Kolko, and Robert J. Lifton, eds., **Crimes of War** 222, 224–226 (1971); *see also* Richard A. Falk, **A Global Approach to National Policy** 146 (1975); Richard L. Lael, *supra* note 3, at 129 and n. 16; Philip R. Piccigallo, *supra* note 8, at 59; William H. Parks, "Command Responsibility for War Crimes," 62 *Mil. L. Rev.* 1, 1 n. 2, 24 n. 76 (1973).

[15]*In re Yamashita, supra* note 3, 327 U.S. at 5; Richard L. Lael, *supra* note 3, at 81, 83–87, 89–90; Lawrence Taylor, *supra* note 1, at 137, 161–162; William H. Parks, *supra* note 14, at 29–30.

[16]Lawrence Taylor, *supra* note 1, at 166–167; A. Frank Reel, *supra* note 12, at 165–166,174; Richard L. Lael, *supra* note 3, at 94–95.

[17]*Id.* at 82, 95; A. Frank Reel, *supra* note 12, at 171–172.

[18]*Id.* at 173–174; *accord* Richard L. Lael, *supra* note 3, at 95 (citing trial transcript at 4061–4063).

[19]*Id.* at 92–94, 99; Philip R. Piccigallo, *supra* note 8, at 57; "Yamashita Case Ordered Held Up Pending Writ," *Chicago Sunday Tribune*, December 9, 1945, part 1, p. 14, col. 6.

[20]Because Justice Jackson was chief prosecutor at the war crimes trial in Nuremberg, only four other Justices—Stone, Stanley Reed, Felix Frankfurter, and William O. Douglas—were participating.

[21]Letter from Wiley Rutledge (hereafter WR) to Victor Brudney (April 1, 1946), Papers of Wiley Blount Rutledge, Jr. (hereafter Rutledge Papers), Library of Congress, Manuscript Division, Washington, D.C.; typewritten draft

memorandum denying petitions for writ of habeas corpus and writ of prohibition and for writ of certiorari, respectively, in No. 61, *In re Yamashita*, and No. 672, *Yamashita v. Styer*, Case File *In re Yamashita*, Box 137, Rutledge Papers; Justice Wiley Rutledge, handwritten draft dissent from denial of petitions in Nos. 61 and 672, Case File *In re Yamashita*, Box 137, Rutledge Papers; Richard L. Lael, *supra* note 3, at 100, 105 and n. 28, 106 and n. 32; Sidney Fine, **Frank Murphy: The Washington Years** 453 (1984); *see* letter from WR to John L. [sic] Frank (February 22, 1946), Rutledge Papers; draft letter from WR to John Frank (February 13, 1946), Rutledge Papers (apparently not sent in view of shorter, similar—and less revealing—letter to Frank of February 22, 1945. Fowler V. Harper, **Justice Rutledge and the Bright Constellation** 185 (1965)); Diary of Harold H. Burton, December 18–20, 1945, Library of Congress, Manuscript Division.

[22]Philip R. Piccigallo, *supra* note 8, at 54–55; Richard L. Lael, *supra* note 3, at 105–106, 118 (Yamashita had filed a petition for writ of certiorari and requested leave to file writs of habeas corpus and prohibition); Sidney Fine, *supra* note 21, at 454–455; *see* Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** 667 (1956); J. Woodford Howard, Jr., **Mr. Justice Murphy: A Political Biography** 368–370 (1968); *see* draft letter from WR to John Frank (February 13, 1946), Rutledge Papers; letter from WR to John L. [sic] Frank (February 22, 1946), Rutledge Papers.

[23]*Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita, supra* note 3, 327 U.S. at 7–9; *see id.* (courts have "no power to review" military commission "determinations" save only power to inquire, on habeas corpus, whether detention is "within the authority of those detaining the petitioner"); *see also* Boris I. Bittker, "The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of *Nunc Pro Tunc* Jurisdiction," 14 *Const. Commentary* 431 (1997); David J. Danelski, "The Saboteurs' Case," 1 *J. of S. Ct. Hist.* 61 (1996).

[24]*In re Yamashita, supra* note 3, at 7–18.

[25]*Id.* at 17 n. 4 (italics added). The Chief Justice acknowledged that, even with knowledge, "an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had 'the power to prevent it.'" *Id.* at 16 n.3. Defense counsel had argued before the commission that Yamashita had lacked power to control his troops. A. Frank Reel, *supra* note 12, at 163. Moreover, the commission itself, while concluding that the general had not taken the measures "required by the circumstances," had acknowledged Yamashita's difficulties of command attributable "to the swift and overpowering advance of American forces," as well as to "weaknesses in organization, equipment, supply . . . training, communication, discipline and morale of his troops." *Id.* at 17 n. 4. Before the Supreme Court, defense counsel renewed the argument; Yamashita brief in support of motion for leave to file petition for writs of habeas corpus and prohibition and of petition for writ of certiorari (January 7, 1946), at 20, 26. Nonetheless, the Chief Justice wrote—inaccurately—that Yamashita did not contend before the Supreme Court that the commission erroneously had held him "responsible for failing to take measures that were beyond his control." *In re Yamashita, supra* note 3, 327 U.S. at 16. In any event, Stone covered the point by ruling that the commission had found that Yamashita had not taken the required measures and that the Court would "not weigh the evidence." *Id.* at 17 n. 4. One scholar who has reviewed the record in detail faults the commission for failing "to consider sufficiently" the mitigating factors that raised serious questions about whether the general had sufficient control of Japanese forces to prevent the butchery. Richard L. Lael, *supra* note 3, at 139–141.

[26]Articles of War, 39 Stat. 650, 655, 656 (1916); Geneva Red Cross Convention of 1929, 47 Stat. 2021, 2052 (1932); *In re Yamashita, supra* note 3, 327 U.S. at 6, 18 nn. 5 and 6, 21.

[27]Articles of War, 39 Stat. 650, 651 (1916); *In re Yamashita, supra* note 3, 327 U.S. at 19–23. Accordingly, Stone also ruled inapplicable the commission's alleged violation of Article 60 of the Geneva Red Cross Convention of 1929: failure to notify Japan's "protecting power," Switzerland, before the trial. *In re Yamashita, supra* note 3, 327 U.S. at 24.

[28]Note from WR to Frank Murphy (undated), File 61, Box 136, Murphy Papers, *quoted in* J. Woodford Howard, Jr., *supra* note 22, at 370; *In re Yamashita, supra* note 3, 327 U.S. at 26, 28, 35–37, 39 (Murphy, J., dissenting).

[29]Note from WR to Frank Murphy (undated), File 61, Box 136, Murphy Papers, *quoted in* J. Woodford Howard, Jr., *supra* note 22, at 370, emphasis added; *In re Yamashita, supra* note 3, 327 U.S. at 26, 28 (Murphy, J., dissenting).

[30]William H. Parks, *supra* note 14, at 2–20; Charles Fairman, "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case," 59 *Harv. L. Rev.* 833, 869–870 (1946).

[31]Draft letter from WR to John Frank (February 13, 1946), Rutledge Papers; letter from WR to John L. [sic] Frank (February 22,1946), Rutledge Papers.

[32]Letter from WR to Victor Brudney (April 1, 1946), Rutledge Papers; draft letter from WR to John Frank (February 13, 1946), Rutledge Papers; letter from WR to John L. [sic] Frank (February 22, 1946), Rutledge Papers; *In re Yamashita, supra* note 3, 327 U.S. at 41, 42 (Rutledge, J., dissenting).

[33]John T. Ganoe, "The Yamashita Case and the Constitution," 25 *Or. L. Rev.* 143, 148 (1946); J. Woodford Howard, Jr., *supra* note 22, at 369, 374; Charles Fairman, *supra* note 30, at 870.

[34]*In re Yamashita, supra* note 3, 327 U.S. at 46–47, 81 (Rutledge, J., dissenting); *id.* at 29 (Murphy, J., dissenting). *Compare id.* at 47–56 (Rutledge, J., dissenting) with *In re Yamashita, supra* note 3, 327 U.S. at 31 (Murphy, J., dissenting).

[35]*In re Yamashita, supra* note 3, 327 U.S. at 14; *id.* at 50–51, 52 and n. 17, 53–55 (Rutledge, J., dissenting); draft letter from WR to John Frank (February 13, 1946), Rutledge Papers. Justice Rutledge elaborated his own view later: "I would have no trouble in saying, if it were shown by clear proof of an admissible sort under our Constitution that an enemy general had known of criminal action on the part of his troops and had failed to take whatever measures he could to stop the conduct, that a charge valid under the laws of war would be stated. I doubt that I could go beyond that, for I still believe that it would be in essence ex post facto law to subject to hanging or shooting an enemy general for merely having failed to discover that his troops were misbehaving. Perhaps a person so negligent as not to know of widespread atrocities going on around him by his own troops should be dealt with capitally, but if so I think that rule should be framed in advance of the act, clearly announced, and supported by incontrovertible evidence of a legal sort." *Id.*; William H. Parks, *supra* note 14, at 87.

[36]*In re Yamashita, supra* note 3, at 53 (Rutledge, J., dissenting); William H. Parks, *supra* note 14, at 24–30.

[37]Arthur Rovine, "The Air War and International Law," in Raphael Littauer and Norman Uphoff, eds., **The Air War in Indochina** 124, 139–141 (1972); William H. Parks, *supra* note 14, at 87–88 (quoting Rovine); Bruce D. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now," 149 *Mil. L. Rev.* 293, 297–298 (1995); *In re Yamashita, supra* note 3, 327 U.S. at 50–51 (Rutledge, J., dissenting).

[38]*In re Yamashita, supra* note 3, 327 U.S. at 51–53 (Rutledge, J., dissenting).

[39]*Id.* at 49, 53, 57–58 (Rutledge, J., dissenting).

[40]Articles of War, 39 Stat. 650, 651, 655, 666; *In re Yamashita, supra* note 3, at 61 n.29, 63–64 (Rutledge, J., dissenting); James J. A. Daly, *supra* note 3, at 158; James J. A. Daly, "The Yamashita Case and Martial Courts," 21 *Conn. B.J.* 210, 223 (part 2) (1947).

[41]*Id.* at 221–225; *In re Yamashita, supra* note 3, 327 U.S. at 64 and nn. 30 and 31 (Rutledge, J., dissenting).

[42]*In re Yamashita, supra* note 3, at 20; *id.* at 62–63, 68–69, 71 (Rutledge, J., dissenting).

[43]*Id.* at 72–79 (Rutledge, J., dissenting).

[44]*Id.* at 79, 80 (Rutledge, J., dissenting).

[45]*Id.* at 81 (Rutledge, J., dissenting).

[46]Richard L. Lael, *supra* note 3, at 115–119; letter from Hugo L. Black to Harlan F. Stone (January 28, 1946), papers of Hugo Black, Box 283, Library of Congress, Manuscript Division; *see* draft letter from WR to John Frank (February 13, 1946), Rutledge Papers; *In re Yamashita, supra* note 3, 327 U.S. at 1.

[47]Edward S. Corwin, **Total War and the Constitution** 121 (1947); *In re Yamashita, supra* note 3, 327 U.S. at 7–9; *Ex parte Quirin, supra* note 23, 317 U.S. at 25, 31, 38–40, 44–45. The Court in *Quirin* also found no right to a jury trial under Article III, Section 2, of the Constitution. *Id.* at 44.

[48]Charles Fairman, *supra* note 30, at 872.

[49]*See* John T. Ganoe, *supra* note 33, at 155; James J. A. Daly, *supra* note 40, at 225; L. B. Brody, "Recent Decision," 44 *Mich. L. Rev.* 855 (1946).

[50]*Korematsu v. United States,* 323 U.S. 214 (1944).

[51]Richard L. Lael, *supra* note 3, at 66–73, 137–139; *see* Philip R. Piccigallo, *supra* note 8, at 56, 61–62; *Homma v. Patterson,* 327 U.S. 759 (1946).

[52]Philip R. Piccigallo, *supra* note 8, at 56, 60–61; Lawrence Taylor, *supra* note 1, at 171.

[53]Charles Fairman, *supra* note 30, at 878–882; William H. Parks, *supra* note 14, at 130; Philip R. Piccigallo, *supra* note 8, at 37, 51.

[54]*See, e.g.,* William E. Leuchtenburg, "FDR's 'Court-Packing' Plan," in his **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** 132 (1995).

[55]*See* John T. Ganoe, *supra* note 33, at 155.

[56]*See* letter from WR to Clarence Morris (March 21, 1940) ("subconscious process" and "feeling" have role in judicial decision-making), Rutledge Papers.

[57]*Korematsu v. United States, supra* note 50; *Hirabayashi v. United States,* 320 U.S. 81, 114 (1943) (Rutledge, J., concurring); *In re Yamashita, supra* note 3, 327 U.S. at 47 (Rutledge, J., dissenting).

[58]L. B. Brody, *supra* note 49, at 860 n. 20; *In re Yamashita, supra* note 3, 327 U.S. at 79 (Rutledge, J., dissenting); *see Johnson v. Eisentrager,* 339 U.S. 763, 783 (1950).

[59]*In re Yamashita, supra* note 3, at 42, 43, 45, 79 (Rutledge, J., dissenting).

[60]*Id.* at 42–44, 46, 49, 56, 79, 80 (Rutledge, J., dissenting).

[61]*In re Yamashita, supra* note 3, 327 U.S. at 23.

[62]*Ludecke v. Watkins,* 335 U.S. 160 (1948).

[63]*Johnson v. Eisentrager*, *supra* note 58, 339 U.S. at 783, 785.

[64]*E.g.*, Bruce D. Landrum, *supra* note 37, at 297–298; William H. Parks, *supra* note 14, at 37, 87–88; Arthur Rovine, *supra* note 37, at 139–141; *see* Tim Maga, **Judgment at Tokyo: The Japanese War Crimes Trials** 25–27 (2001); William A. Schabas, **Genocide in International Law: The Crime of Crimes** 312 (2000).

[65]William H. Parks, *supra* note 14, at 14 n. 2, 24 n. 76.

[66]Some scholars have perceived no material difference in *High Command* from the "knew or should have known" standard in *Hostage.* But others have found in *High Command*'s formulation a mere "fragment of should have known logic," permitting citation of that decision for an "actual knowledge" standard—the one used in the acquittal of Captain Ernest Medina for the 1969 massacre of

civilians by his immediate subordinate, Lieutenant Calley, at My Lai in South Vietnam. Richard L. Lael, *supra* note 3, at 124–125,131–132; M. Cherif Bassiouni, **The Law of the International Criminal Tribunal for the Former Yugoslavia** 362 (1996); Bruce D. Landrum, *supra* note 37, at 298–299; William H. Parks, *supra* note 14, at 38–64; Mary McCarthy, **Medina** 3 (1972). *See* Arthur Rovine, *supra* note 37, at 141–142.

[67]William H. Parks, *supra* note 14, at 40–41 (intermediate commanders), 83–84 (command responsibility divided between "operational" and "administrative" control), 95; U.S. Department of the Army, **United States Army Field Manual, The Law of Land Warfare** (FM 27–10), ch. 8, sec. II, cl. 501, at 178–179 (1956); M. Cherif Bassiouni, *supra* note 66, at 363; Richard L. Lael, *supra* note 3, at 127–128; Arnold C. Brackman, **The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials** 52 (1987); *see generally* Philip R. Piccigallo, *supra* note 8.

[68]M. Cherif Bassiouni, *supra* note 66, at 340. The Yugoslav tribunal standard itself contains ambiguities—failing to resolve, for example, whether imputed knowledge ("reason to know") is derived from an objective, "reasonable person" analysis or from a subjective, "actual personal knowledge" perspective. *Id.* at 345; William A. Schabas, *supra* note 64, at 309.

[69]On June 8,1977, international delegates at Geneva adopted "Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)." Article 86 incorporated a new imputed-knowledge standard: commanding officers must have "had information which should have enabled them to conclude in the circumstances at the time, that [a subordinate] was committing or was going to commit" a war crime. This largely subjective standard, premised on receipt of "information," required a higher, more specific level of knowledge than a defeated United States proposal for a more objective standard holding a commander criminally responsible for a subordinate's war crime if the commander "knew or should *reasonably* have known in the circumstances at the time that [the subordinate] was committing or was going to commit such a breach" (emphasis added). Richard L. Lael, *supra* note 3, at 134. Although most nations, including China, France, Germany, Great Britain, and the Russian Federation have adopted Protocol I (many with "reservations"), the United States has not done so. The text of the Geneva Conventions of August 12, 1949 and June 8, 1977 are available online at http://www.icrc.org/eng/party_gc.

[70]Jean S. Pictet, ed., **Commentary on III Geneva Convention Relative to the Treatment of Prisoners of War** 413–414 (1960).

[71]Art. 85, Convention (III) relative to the Treatment of Prisoners of War (Geneva, August 12, 1949) (hereafter "Geneva Convention 1949"); Jean S. Pictet, ed., *supra* note 70, at 413–427; Richard L. Lael, *supra* note 3, at 121.

[72]Richard L. Lael, *supra* note 3, at 122.

[73]Art. 104, Geneva Convention 1949, *supra* note 71; Jean S. Pictet, ed., *supra* note 70, at 480–484.

[74]Art. 105, Geneva Convention 1949, *supra* note 71; Jean S. Pictet, ed., *supra* note 70, at 484–492; Richard L. Lael, *supra* note 3, at 121.

[75]Art. 102, Geneva Convention 1949, *supra* note 71 (emphasis added); Jean S. Pictet, ed., *supra* note 70, at 476.

[76]Art. 106, Geneva Convention 1949, *supra* note 71; Richard L. Lael, *supra* note 3, at 121; Jean S. Pictet, ed., *supra* note 70, at 492–495. Curiously, Pictet adds: "It would not seem . . . that the drafters of the Convention intended by this wording to give prisoners of war access to certain means of appeal which are available only to nationals of the country concerned." *Id.* at 493.

[77]William H. Parks, *supra* note 14, at 38 n. 119.

[78]*See Reid v. Covert,* 354 U.S. 1, 19 and n. 36 (1957); *Johnson v. Eisentrager*, *supra* note 58, 339 U.S. at 783.

[79]*E.g.*, "Yamashita Case," *Washington Post*, February 6, 1946, sec. A, p. 6, col. 2; "The Japanese Trials," *Chicago Daily Tribune*, March 9, 1946, p. 8, col. 1; Editorial, "Making Our Own Liberty Secure?," *St. Louis Star-Times*, March 22, 1946, p. 22, col. 1–2.

[80]J. Woodford Howard, *supra* note 22, at 377.

[81]*In re Yamashita, supra* note 3, 327 U.S. at 41–42, 81 (Rutledge, J., dissenting) (quoting Philip S. Foner, ed., 2 **The Complete Writings of Thomas Paine** 588 (1945)).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

The death of Justice Byron R. White on April 15, 2002, occasioned numerous assessments, as had happened when he retired in 1993. From his perspective, he was the accidental jurist. "Well, I never wanted to be a judge," he confessed to a reporter in a rare interview in 1999. "I said to the president I would give it a try."[1] White's "try" lasted thirty-one years, among the longest tenures of twentieth-century Justices. Yet many appraisals of White passed over a critical point: the Supreme Court in 1993 was a very different institution from the one he joined in 1962. This was true beyond the obvious changes in personnel. No one on the bench in 1962 was still sitting when White retired. In 1962, Ruth Bader Ginsburg, who succeeded him, was only four years out of Harvard Law School and was completing a year as a research associate at Columbia University Law School prior to joining the professorate at Rutgers in Newark.

The Court was a different place because of vast changes in its agenda. The first cases in which White participated fell late in volume 369 of the **U.S. Reports**. His first opinion for the Court came down on June 18, 1962, in volume 370.[2] His last opinion for the Court was published on June 25, 1993, in volume 509.[3] The contrast in the Court's business between the earlier and later volumes is striking. Some matters that consumed the Court's time in 1962 were nonexistent or much less visible by the early 1990s. Volumes 369 and 370 contain a sprinkling of cases under the Jones Act and the Longshoremen and Harbor Workers Compensation Act and a variety of other labor cases as well. The Court reined in the power of judges to punish adverse public comment as a constructive contempt of court, sit-ins challenged racial segregation in the waiting rooms of bus stations, a state legislative committee had a recalcitrant witness jailed for refusing to answer questions, and so on.

Similarly, some issues dominating the docket in White's last years on the Court were either absent or only small dots on the constitutional horizon in 1962. Just weeks before White arrived, the Court had ventured into the "political thicket" of legislative districting.[4] By 1993, not only was the one-person, one-vote standard well in place, but the Court had already confronted partisan gerrymandering and had engaged the problem of majority-minority districts.[5] Few perceived immediately after the 1961 ruling in *Mapp v. Ohio*[6] that the

Court had become the superintendent of law-enforcement practices in every town across the land. In 1962, the Court was still nine years shy of its first invalidation of a statute on grounds of gender discrimination[7] and three years from a forthright declaration of a constitutional right to privacy,[8] with its implication for abortion rights in the 1970s and beyond. The Justices had yet to hold unconstitutional any state financial aid to sectarian schools,[9] and debates over affirmative action were still more than a decade from reaching the High Court.[10] Only about half the protections in the Bill of Rights had been made applicable to the states by way of the Fourteenth Amendment.[11] Issues of workplace discrimination could not make their claim on the Justices' time until after passage of the Civil Rights Act of 1964, and application of environmental standards still seemed far removed from the Marble Palace. Frontal assaults on the death penalty might be read about in law reviews but were not yet being seriously developed in briefs and oral argument.

Reluctant jurist Byron R. White in 1962, the year he was appointed to the Supreme Court.

Although free-expression cases were plentiful enough in the 1950s and early 1960s, the Court by 1962 had not clearly staked out the stringent and systematically articulated protection for speech—political, symbolic, social, and otherwise—that would be in place a decade later.[12] This fact should not surprise anyone who reads **Free Speech, "The People's Darling Privilege"**[13] by Michael Kent Curtis of Wake Forest University. Just as White's tenure mirrors a docket being recast by politics and culture, Curtis demonstrates how politics and culture recast an idea, and eventually the Supreme Court.

Americans today make an immediate and correct association between the Court and the First Amendment's guarantee of free speech. For reasons clear to anyone who follows judicial decisions each Term, it is difficult to talk for more than a few seconds about free speech without mentioning the Court. Yet for Americans living more than a century ago, that association did not exist. Many, no doubt, had strong views about freedom of speech, but there would have been little cause for them to associate free speech with the federal judiciary, or perhaps even with their state courts. What those associations were consumes most of Curtis's book.

Curtis does not mention *Ex parte Curtis*,[14] but he might have. It illustrates a thesis of the book: values undergirding the primacy accorded free speech today largely took shape outside the judicial arena. In *Curtis*, the Supreme Court upheld an act of Congress aimed at ending the corrupt practice of assessing government workers as a condition for employment. But it did so by sweeping broadly: no officer or employee of the government could give to, or receive from, another officer or employee anything of value for political purposes. Justice Joseph Bradley filed a lone dissent: "The freedom of speech and of the press . . . are expressly secured by the Constitution. The spirit of this clause covers and

embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammeled by inconvenient restrictions."[15] The date of *Curtis* is 1882, and it may well be the Supreme Court's first free-speech decision. Yet by then, serious debate about free speech had been going on in the United States for at least eighty-four years. To be sure, the Court would occasionally revisit free speech in a few other cases, such as *Patterson v. Colorado*,[16] but not until well into the twentieth century would the Justices begin to speak routinely about what the clause protected and to whom it applied. The Court arrived late at the free-speech party.

The book is not a survey of free-speech history or doctrine. Readers looking for summaries of decisions on picketing, flag-burning, flag-saluting, or other specific topics will have to go elsewhere. Rather, the book is largely confined to the seventy-year period between 1798 and 1868, dates that demarcate the seedtime of free speech as the tradition developed on this side of the Atlantic. Those years began with enforcement of the Sedition Act and concluded with the ratification of the Fourteenth Amendment. In between came efforts to silence abolitionists in both North and South, including attempts to close the mails to abolitionist literature, attacks on dissent in the North during the Civil War, and endeavors to protect speech through congressional construction of the Fourteenth Amendment in 1866. Only in the final pair of chapters, out of a total of seventeen, does Curtis connect those conflicts and movements with current Supreme Court doctrine and to contemporary proposals on matters as varied as campaign finance reform and group libel, wisely noting that an appreciation of the nineteenth century will inform policy debate today. It is from these, mainly nineteenth-century episodes, which highlighted widely divergent ideas about free speech, that Curtis believes modern thinking about free speech emerged. In them, one finds nearly every imaginable argument in favor of speech and nearly every imaginable excuse for its suppression. Moreover, the episodes taught valuable lessons about essentials (and risks) of democratic government.

Collectively, those free-speech conflicts highlight two questions that have infused Supreme Court decisions since the 1920s. First, was freedom of speech to be a national right, applying to all Americans, or would it be left to the discretion of state governments? In 1798, of course, that question was phrased somewhat differently: did the national government have any authority over speech at all? If not, where might one look for redress if it overstepped the line? During the debates over ratification of the Constitution, Federalists had maintained that no bill of rights was necessary because, under a scheme of enumerated powers, the proposed national government lacked authority to restrict speech or the press. The First Amendment, ratified because of the dubiousness of that claim, seemed to add a second line of defense. Congress, however, thought otherwise in 1798 and enacted a seditious libel statute that criminalized abusive comments about the President and members of Congress (but not the Democratic-Republican Vice President, President Adams's presumed opponent in 1800). The Kentucky and Virginia resolutions, drafted by Thomas Jefferson and James Madison, called on the states to defend federally protected liberties through interposition once it became clear that Supreme Court Justices, sitting as circuit judges, had no misgivings about applying the act.

The trials and convictions of Republican newspaper editors undercut the argument, borrowed from Jefferson, that Madison made in June 1789 on the floor of the House of Representatives concerning the efficacy of a bill of rights: "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive."[17] Madison thus encountered first-hand a tension

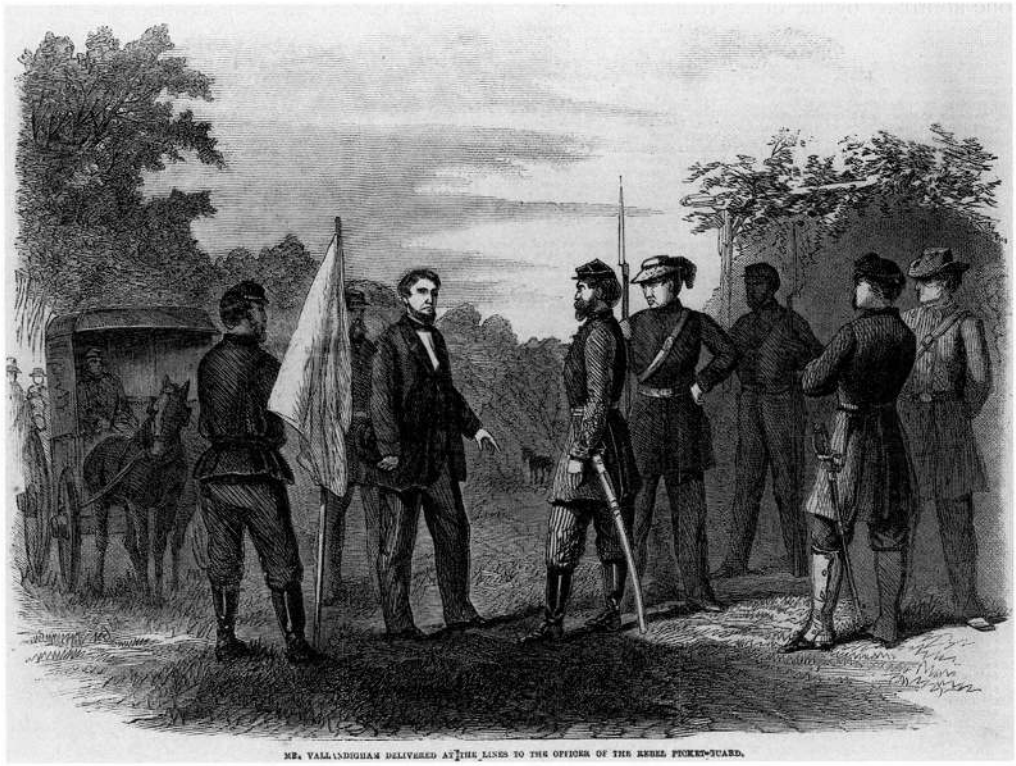
that not only pervaded the 1798–1868 period but persisted well into the twentieth century. "[T]here were two American approaches to free speech," Curtis explains, "an orthodox legal view and a more popular free speech tradition." The first was the understanding of the right as applied by most judges. In the controversy over the Sedition Act, the orthodox view found punishment of seditious libel acceptable and considered the First Amendment a bar only against prior restraints on speech. The second view of free speech was the right that many people thought they had: a freewheeling freedom to criticize government. Although it lacked solid official footing, the popular view "had real-world effects—in elections, in legislatures, for at least some judges, and in actions by government officials." The popular tradition was "popular" in that it "grew up outside the courts . . ., and it had significant popular appeal."[18] Thus, the story of free speech in America is that of the gradual replacement of one approach by the other. In a first step, for example, a salutary result of the Sedition Act controversy was the near total fall from favor by the early 1800s of the most crabbed view of the First Amendment: that it was a barrier only against prior restraints.

The question whether free speech was a national or state right resurfaced as abolitionism grew into a formidable political force after 1830. Advocates of suppression emphasized that speech was a matter reserved to the states, a position reinforced in 1833 by Chief Justice John Marshall in *Barron v. Baltimore*,[19] reiterating the prevailing view that the federal Bill of Rights restrained the national government, not the states. In the mid-1850s, however, abolitionist authors in the south found themselves under indictment because their thinking presented a public danger.[20] Similarly, the newly established Republican party found its message against the expansion of slavery muffled in the South—hence its slogan of 1856: "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont."[21] In an example of necessity begetting invention, theories combined the privileges and immunities clause of Article IV with the guaranty of a republican form of government for each state as a way of asserting a federally protected right of free speech against invasion by the states. Thus, Curtis finds the record convincing that when a Privileges and Immunities Clause was inserted into the Fourteenth Amendment after the war, the "original meaning" of section one included protection for freedom of speech.[22] Again, the orthodox view did battle with the popular view. In decisions such as the *Slaughterhouse Cases* and *United States v. Cruikshank*,[23] a Supreme Court Bench now heavily populated by Republican jurists made sure that fundamental liberties such as speech remained rights derived from state, not national, citizenship, and so lacked federal protection against state infringement. In this respect, at least, President Lincoln's call at Gettysburg for a "new birth of freedom" remained premature.

The second question highlighted by the 1798–1868 conflicts probed the circumstances under which speech might be legitimately abridged. The orthodox view that underlay the Sedition Act of 1798 (and that the Supreme Court articulated arguably as late as 1951[24]) held that speech crossed into the unprotected realm if it had a "bad tendency" or advocated serious harm. The popular view (translated in the twentieth century into the clear-and-present-danger test and the more stringent incitement test) allowed greater play for the exchange of ideas. Yet when war broke out in 1861, the party that had trumpeted free speech to broadcast its antislavery message took a very different view of antiwar speech in the North. To be sure, there were those willing to commit treasonous acts, but that was not the same as dissent about war policy or the war itself. For instance, William B. Woods, a distinguished Union combat officer whom President Grant appointed as U.S. circuit judge in the South in 1869 and whom President Hayes elevated to the Supreme Court in 1881, was the Democratic speaker of the house and the minority

leader in the Ohio legislature when Lincoln was elected. Before finally accepting the need to protect the northern states, he forthrightly opposed every Republican measure, including a loan bill for defense after the firing on Fort Sumter.[25]

Far more outspoken was a former Democratic member of Congress from Ohio named Clement L. Vallandigham, one of Lincoln's most persistent and vociferous critics whom Republicans redistricted out of his seat in 1862. Lincoln's proclamation of September 24, 1862, authorized military commissions to try persons "discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice" and suspended the writ of habeas corpus for those so detained. On April 13, 1863, General Ambrose Burnside (fresh from the demonstrable incompetence he had exhibited in December at the Battle of Fredericksburg) issued an order in Ohio promising to arrest those in "[t]he habit of declaring sympathies for the enemy." On May 1, Vallandigham spoke at a Knox County Democratic rally in Mount Vernon, Ohio, and was arrested on Burnside's directive on May 5. According to specifications in the charges against him, he referred in his address, among other things, to "a wicked, cruel, and unnecessary war," "a war not being waged for the preservation of the Union," and "a war for the freedom of the blacks and the enslavement of the whites" and insisted "that if the Administration had so wished, the war could have been honorably terminated months ago . . . [through] the intermediation of France." After a federal judge refused a writ of habeas corpus, announcing that there was "too much of the pestilential leaven of disloyalty in the community,"[26] Vallandigham was found guilty and remanded to prison, a sentence later



MR. VALLANDIGHAM DELIVERED AT THE LINES TO THE OFFICER OF THE REBEL PICKET-GUARD.

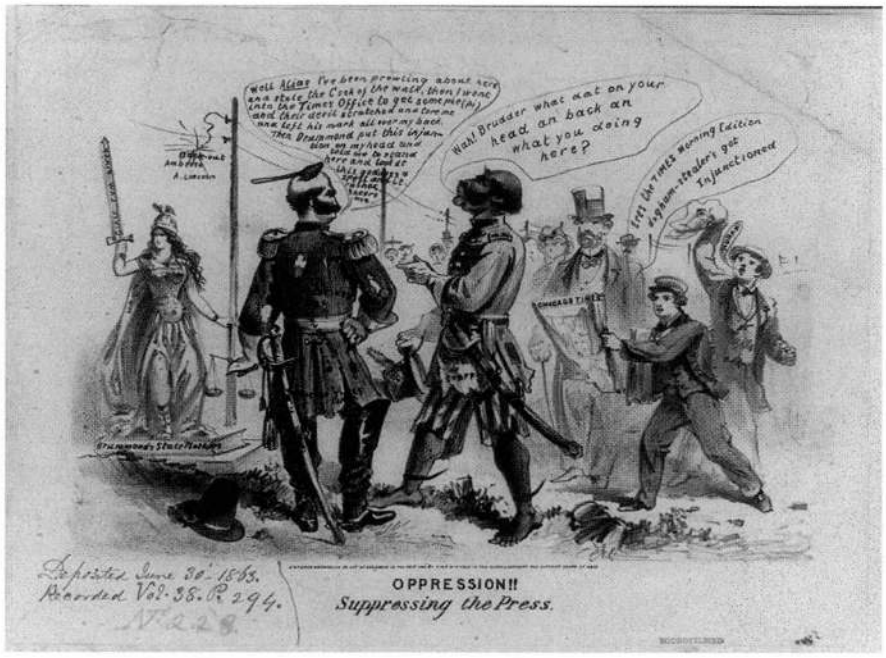
Former Democratic member of Congress from Ohio Clement L. Vallandigham was arrested in May 1863 for publicly declaring his sympathies for the South and condemning the Civil War. This engraving shows him being delivered at the lines to the officer of the rebel picket guard.

modified to banishment to the Confederacy. (The Supreme Court declined jurisdiction over the commission.[27]) So emboldened, Burnside had the offices of the opposition newspaper *Chicago Times* seized in June, but reaction to that was so negative that Lincoln revoked the order. Defenders of Vallandigham and the *Times* drew on core ideas of free speech: that it encompassed criticism of government officials and policies and that it was essential to popular government. Defenders of suppression insisted that both Vallandigham and the *Times* had crossed the line from free speech into license, and that their ideas might undermine the war effort and so bring about harmful results.

While dissent in wartime poses special difficulties, the trial of Vallandigham and reaction to it, like the other episodes Curtis recounts, were lessons in democracy. Americans have sometimes been uncomfortable with the reality that, because ultimate power is vested in "We the people," political combat is invariably a contest for votes. Indeed, elections are opportunities for the legal subversion of those in power. "Politics . . . ain't beanbag,"[28] observed Mr. Dooley three decades after the Civil War. Without wide latitude for criticism of public officials and policies, the promise in the Declaration of Independence for government "by the consent of the governed" falls short. Democracy presupposes rule by the majority—but also the freedom of minorities to try to become the majority. A rigorous guarantee of free speech presupposes a population capable of rational thought and considered judgment; it also assumes a population prepared to squelch unpopular ideas. The ultimate irony of the stories Curtis tells so well is that "the people" who fought for broader freedom of speech, as well as their elected officials, were (are) neither always correct nor tolerant. It fell to the Supreme Court to place speech in a preferred constitutional position to protect democracy from itself. In order for it to be fully shared and maintained, the "popular" approach, as Curtis calls it, has required an embrace by the judiciary. Exactly *why* things have worked out this way is a puzzle that lies beyond the bounds of **Free Speech, "The People's Darling Privilege,"** but is one that remains to be solved.

The half-decade after passage of the Sedition Act witnessed remarkable events. The first political party system took shape, a development Federalists tried to prevent by suppressing their opponents. Jefferson's Democratic-Republicans triumphed by winning control of the presidency and Congress in the elections of 1800. Even though partisan tensions were exceedingly high (Jeffersonians accused Federalists of wanting to reestablish a monarchy; Federalists labeled Jefferson's followers as Jacobins), the world, for the first time, watched the surprisingly peaceful transfer of political power from one party to another.[29] Moreover, the country faced the novelty of divided government because the federal judiciary remained thoroughly Federalist in its membership. Against this backdrop, Chief Justice John Marshall issued his opinion for the Court in *Marbury v. Madison*[30] in February 1803.

That case is the title of a monograph[31] by New York University's William E. Nelson, one of the most recent of at least fifteen books now available in the "Landmark Law Cases and American Society" series, published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N. E. H. Hull. Much of the series focuses on twentieth-century landmark decisions, but Nelson's fits in well. Without *Marbury* or another decision like it, most of the later cases in the series would never have happened. Within a lean 135 pages of text, Nelson firmly places *Marbury* in its historical context and offers perspective that complements other recent studies[32] on this distinctively American contribution to political science. He then contrasts Marshall's judicial review with its transformations in the late nineteenth and twentieth centuries, adds an overview of its adoption by other nations, and concludes with an extensive bibliographical essay on Marshall, the Court, and the period. The book belongs in the library of anyone,



Union General Ambrose Burnside ordered the offices of the pro-Confederate *Chicago Times* seized in June 1863, but reaction by supporters of free speech was so negative that President Lincoln rescinded the order. Burnside stands in the center of this cartoon in a tattered uniform stamped repeatedly with the legend "*Chicago Times*."

novice or expert, interested in constitutional development.

At its most basic level, Marshall's opinion ended the suit filed by William Marbury and three others to become justices of the peace for the District of Columbia. Congress had authorized the judgeships early in 1801, President Adams had made his nominations, and the still-Federalist Senate had confirmed them. But Marshall, still serving as Secretary of State, had not delivered the commissions before he swore in the new President on March 4. Disinclined to ensconce more Federalists on the bench, the new administration refused to hand over the credentials of office to Marbury and the others. At the outset, Marbury's suit appeared mainly partisan—an attempt to ruffle the new administration. However, by the time the litigation concluded fourteen months later, the case had accomplished much more.

Claiming that the minor judgeship was his, Marbury requested a writ of mandamus from the Supreme Court, under its original jurisdiction, to Secretary of State Madison. But the premise of the writ was that the executive branch was answerable to the judicial process in the course of exercising presidential powers such as appointments. In this instance, that meant a Democratic-Republican executive official answering to a Federalist Court. By early 1803, when the case was argued, the atmosphere was such that Marshall and his colleagues must have realized that Secretary of State Madison, with the President's blessing, would almost certainly ignore a writ. The Justices' recourse was a decision that avoided a confrontation with the executive, addressed the Court's role, and handed Marbury nothing more than a moral victory.

The Court achieved the third objective by excoriating the Jefferson administration for withholding the commissions from the would-be magistrates. The Court achieved the first objective by concluding that it was powerless to order delivery of the commissions because Section 13 of the Judiciary Act of 1789, which

authorized the Court to issue writs of mandamus as part of its original jurisdiction, violated Article III of the Constitution. Because Article III spelled out the Court's original jurisdiction, Marshall reasoned that Congress could no more add to that jurisdiction than take it away. If there was no order for Madison to disregard, there could be no confrontation.

Marshall's opinion addressed the second objective in two ways. First, in support of the position that the statute conflicted with the Constitution, the Court for the first time articulated a defense of the doctrine of judicial review. That is, the Court explained why the judiciary could not apply a statute passed by Congress that, in the Justices' view, conflicted with the Constitution. In so doing, Marshall implicitly countered competing theories, dating from the Kentucky and Virginia resolutions and from congressional debates over the Judiciary Act of 1802 (the latter erased the circuit judgeships created by Federalists in the Judiciary Act of 1801), that a state legislature or Congress, respectively, was the appropriate forum for adjudicating the constitutionality of national policy. Second, Marshall's opinion explained why the executive must be answerable to the Court, although in doing so Marshall was careful to distinguish between discretionary (that is, "political") actions that were not judicially cognizable and other actions that were. "By the constitution of the United States," conceded Marshall, "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and *is accountable only to his country in his political character and to his own conscience*."[33] But delivery of commissions fell into the second category. "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[34] Marshall thus assumed the authority to do what he concluded later in his opinion that the Court could not do.

Nelson's goal in ***Marbury v. Madison*** is to present the case as a key step in the development of American and, much later, global constitutionalism. The decision rested on "what the justices and nearly all their fellow citizens found best in eighteenth-century constitutionalism"[35]—a distinction between law and politics. This itself was an elaboration of the rule of law, a concept that distinguished between rules and rulers that lay at the heart of the Declaration of Independence. Liberty derived from application of fixed and knowable law; tyranny and arbitrary government were associated with law that changed with the whims of those in power. Even though the elections of 1800 themselves commanded changes in the laws, maintenance of liberty remained identified with the preservation of something that did not change. "The core thesis of this book," contends Nelson, "is that in *Marbury v. Madison*, Chief Justice John Marshall drew a line, which nearly all citizens of his time believed ought to be drawn . . . between those

In his new work, *Marbury v. Madison*, William Nelson notes that one of Chief Justice John Marshall's principal critics was John Bannister Gibson of the Pennsylvania Supreme Court. Gibson opposed judicial review because he believed that the people were the best defenders of the Constitution. Art historians have questioned whether this image is indeed a portrait of Gibson.

matters on which all Americans agreed and which therefore were fixed and immutable and those matters which were subject to fluctuation and change through democratic politics."[36]

Judicial review was hardly an accomplished fact in 1803; it took several decades for it to work its way thoroughly into the American legal and political consciousness. After all, one could agree with the premise of the necessity of maintaining the line between the fixed and the fluctuating without adopting Marshall's device for doing so. Indeed, one of Marshall's chief critics, as Nelson notes,[37] was John Bannister Gibson of the Pennsylvania Supreme Court, who believed that the people were the most resolute defenders of the Constitution. In the otherwise obscure 1825 ejectment case of *Eakin v. Raub*,[38] he deployed a dissenting opinion that many scholars regard as the most telling rebuttal by a sitting judge to Marshall's defense of judicial review. Denying its legitimacy in any court, state or federal, unless expressly authorized by the appropriate constitution,[39] Gibson's opinion remains a storehouse of arguments against judicial review.

Yet it is helpful in the context of Nelson's ***Marbury v. Madison*** to recall why Gibson changed his mind. As Nelson acknowledges, Gibson recanted on judicial review in the 1840s because the people's representatives had "sanctioned the pretensions of the courts to deal freely with the acts of the legislature, and from experience of the necessity of the case."[40] What exactly did Gibson mean? The former reference was to the state convention, which produced the new constitution of 1838 that, by its silence on the subject, seemed to countenance judicial review. Reformers had managed only to impose fixed judicial terms and senate confirmation of judicial nominees.

Gibson's second reference harkened to a peculiarity of Pennsylvania law: the commonwealth long had no system of equity jurisprudence. Instead, judges administered some equity through common-law channels, and, in a sharp departure from the principle of separation of powers, the legislature routinely dispensed equity through private bills. Largely as a result of Gibson's nudging, the legislature granted complete equity jurisdiction to the state courts in 1836, but in succeeding years it continued to intrude statutorily into matters now presumably the province of the judiciary.[41] In 1843, for example, a statute seemed to allow an illegitimate child to dispose of property that the mother had willed to others. That construction, Gibson held, would sanction arbitrary power and would violate the "law of the land" clause in the state constitution. Were that the intention, "it would become our plain and imperative duty to obey the immediate and paramount will of the people expressed by their voices in the adoption of the Constitution, rather than the repugnant will of their delegates acting under a restricted, but transcended authority."[42] This had been precisely the basis of Marshall's reasoning in *Marbury* in defense of judicial review. Perhaps Gibson had come to the conclusion that the people were not always the trusted guardians of the constitution, as he had supposed nearly two decades before. As Edward S. Corwin remarked a century later, "Judicial review represents an attempt by the American Democracy to cover its bet."[43]

Nelson believes that *Scott v. Sandford* and *Pollock v. Farmers' Loan & Trust Co.*[44] heralded a transformation of judicial review into the mechanism for policy that is familiar today. "No longer a device for protecting the people as a whole from faithless legislators, judicial review had become a means for sectional and political minorities or individuals lacking control of the legislative process to . . . overturn the legislature's political judgments." After 1937, judicial review became a tool "to protect the interests of powerless minorities identified on racial, ethnic, religious, or sexual grounds."[45] In both instances, politics merged with law.

However, it may be that Marshall's attempt to draw a line between law and politics (on the assumption that widespread agreement existed on what "the law" was) had begun to disintegrate well before *Dred Scott*. The decade of

the 1820s, after all, was a veritable petri dish of proposals in and out of Congress to rein in the judiciary, as Gibson's opinion illustrates. With Jacksonianism on the march, Marshall's opponents were hardly blind to the policy implications of his jurisprudence. The merger of the two, as Nelson suggests, may have been inevitable all along.[46]

Scholars usually characterize the Marshall era or others based more on larger-than-life rulings than on run-of-the-mill decisions. Even decisions important at the time may fade from sight as a period recedes in time. The Warren Court (1953–1969) is no exception. Measured by its impact on the nation, it was one of the most important epochs in Supreme Court history. With landmark rulings on race discrimination, legislative districting, criminal justice, privacy, and the First Amendment, little of life seemed to go untouched. By one count, in the approximately 150 years before Earl Warren's appointment as Chief Justice, the Court had overruled eighty-eight of its precedents. In Warren's sixteen years, it added another forty-five to the list.[47] Closer examination, however, reveals that, aside from *Brown v. Board of Education*[48] in 1954 and 1955, most of the decisions that today are most vividly associated with the Warren Court fell into the second part of Warren's Chief Justiceship, after Justice Felix Frankfurter's retirement in 1962 and the arrival of Justice Arthur Goldberg. According to conventional wisdom, the liberal bloc of four Justices (Warren, William J. Brennan, Hugo L. Black, and William O. Douglas) could not reliably prevail without the addition of Goldberg's fifth vote. As a result, the last seven Warren Terms have tended to overshadow the first nine, leading some commentators to speak of "two Warren Courts" or to apply words such as "beginnings" or "stalemate" to the first period, as if, in view of what lay ahead, little of consequence happened aside from *Brown*.

Yet many people in the late 1950s thought plenty was going on wholly apart from *Brown*. Even before the first school-prayer case in 1962,[49] the Court had gotten into hot water. While the most severe forms of political witch-hunts had dissipated by 1956, fear of the "Red Menace" had not. Thus when the Court rendered a series of decisions limiting the authority of both state and federal governments to investigate and to penalize suspected subversives,[50] some critics accused the Justices of following the "Communist line." "I'm not accusing . . . [Warren] of being a [Communist] Party member," declared Mississippi Senator James Eastland, "[b]ut he takes the same position they [the Communists] do when he says the Communist party is just another political party."[51] Southerners already perturbed by *Brown* now acquired new allies in their campaign against the Supreme Court.

What followed was the first significant national debate on the Supreme Court since 1937, outside as well as inside Congress. Alongside protests such as the "Impeach Earl Warren—Save the Republic" billboards erected by the John Birch Society[52] were mainstream attacks on Warren and the Court, as happened at a London meeting of the American Bar Association in 1957 to which the Chief Justice had been invited. Warren was so embarrassed and offended that he resigned his long-standing membership in the ABA.[53] Another unprecedented rebuke followed in 1958, when the Conference of State Chief Justices overwhelmingly adopted six resolutions that highlighted questionable decisions. "It has long been an American boast that we have a government of laws and not of men," read a report that the conference adopted. "We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast."[54] Former Justice James Byrnes called for Court-curbing.[55]

On Capitol Hill, Senator William Jenner of Indiana introduced a measure that would have stripped the Court of its appellate jurisdiction in several classes of national security cases. Other senators and representatives tried to reverse particular decisions that they found objectionable. The Senate defeated the

Jenner bill 49 to 41, and another anti-Court bill failed by the close vote of 41 to 40. By late summer of 1958, only one relatively mild reprimand had actually become law.[56] Nonetheless, the Court had been taken to the congressional woodshed.[57] Congressional virulence waned only when the Court moderated its stance in late 1958 and 1959, avoiding further high-profile national security rulings that went against the government.[58] Had the pattern of 1956–1957 persisted, the Court might well have been an issue in the 1960 election. Instead, the campaign was virtually silent on the Court.

In **The Eisenhower Court and Civil Liberties**,[59] Oklahoma State University's Theodore M. Vestal returns to these and other decisions and events. He prefers to call the hardly quiescent judicial years between 1953 and 1962 by the name of the President who appointed five Justices during his two terms (1953–1961).[60] Vestal's intention is to rescue those nine Terms from obscurity and to "pay retrospective homage to a Court that has not received proper accolades for its achievements." Keeping in mind "the complexity of issues that form the daily work of the Court"[61] and with an appreciation of the times, the author successfully supports three propositions using a combination of statistical data, case analysis, and contemporaneous commentary.

First, while most Eisenhower appointees were not judicial liberals in the Black and Douglas mold, neither were they as conservative as Justice Tom Clark who, by 1958, was the sole remaining Truman appointee. Rather they fell into a "middle ground . . . with Justice Frankfurter occupying a central position in their midst."[62] For instance, in federal and state civil liberties cases in the nine Terms, Frankfurter voted for the civil-liberty claim in 28 percent of cases from state courts but in

The Eisenhower Court and Civil Liberties, by Theodore M. Vestal, seeks to rescue the 1953–1961 terms from obscurity and to "pay retrospective homage to a Court that has not received proper accolades for its achievements." Pictured are Justices William O. Douglas and Stanley Reed, Chief Justice Earl Warren, and Justices Hugo L. Black, and Felix Frankfurter with newly elected President Eisenhower in 1953.

42 percent of federal cases, a greater differential than with any other member of the Court and ranking just below the Court norm in the latter category.[63] Frankfurter was literally surrounded by Eisenhower appointees. Immediately below Frankfurter in this ranking were Justices John Harlan and Charles Whittaker. Immediately above were Justices Brennan and Potter Stewart.

Second, the cumulative effect of these more or less moderate Justices was to lend the Court a more civil-libertarian shading than is commonly recognized. Here the author spots a probably coincidental parallel with the Eisenhower presidency itself. Crediting "hidden-hand" techniques and ploys, later scholarship on Ike has given him higher marks on leadership than did many observers at the time.[64] Similarly, the Court's "indirect correction of oppressive actions of the government accomplished much more than was realized."[65] The pair of *Brown* cases fit this pattern as well. Although the Eisenhower Court had little to say about racial discrimination after 1955 other than in the Little Rock imbroglio,[66] the Justices had "tossed this moral question squarely into the forum of public opinion. The result was rational thought and action in an area where only a decade before there had been silence and complacency."[67]

Third, even without counting the 1954 and 1955 school decisions, the Court set in motion major constitutional changes with considerable long-run influence. Justice Brennan's opinion in *Roth v. United States*[68] "radically liberalized standards to be applied in obscenity cases."[69] Chief Justice Warren's opinion in *Trop v. Dulles*,[70] the expatriation case, looked to a maturing society's "evolving standards of decency" as the preferred method of construing the Eighth Amendment. Justice Harlan's opinion in *NAACP v. Alabama*[71] not only blocked a clever form of race discrimination but also expressly established a First Amendment right to association. It was the Eisenhower Court that set the due-process revolution in motion with its decision in *Mapp v. Ohio*, with Justice Clark (a former U.S. attorney general) writing the majority opinion. Justice Brennan's opinion in *Baker v. Carr* not only applied the Equal Protection Clause to redistricting issues but was "the predecessor of a new body of law encompassing substantive equal protection [dealing with] alienage, illegitimacy, age, mental retardation, gender-based classifications, and indigency."[72]

In his newly published memoir, John Knox, former law clerk to Justice James Clark McReynolds (above), describes how the Court-packing episode of 1937 heightened the seventy-five-year-old Justice's desire to remain on the Bench.

Robert G. McCloskey's early assessment of the Eisenhower period makes a thoroughly

fitting conclusion to the book: "This may not be quite all a Court could have done. But it is a lot to do nonetheless."[73]

Four Justices in the first Term of the Eisenhower Court had also sat with Justice James Clark McReynolds. An unsuccessful "Gold Democrat" candidate for Congress in 1896, an assistant attorney general in the administration of Theodore Roosevelt, and Woodrow Wilson's first Attorney General, McReynolds was moved to the Court in 1914 after Wilson found him to be a disruptive force in the cabinet. Probably because of his irascible personality, his anti-Semitism, and a jurisprudence that was obsolete before he retired, the literature on McReynolds remains scanty compared to that on other twentieth-century Justices, despite his twenty-seven years on the bench. For that reason alone, publication of **The Forgotten Memoir of John Knox**[74] is a welcome event. The volume will not elevate the Justice's abysmal "performance ranking,"[75] but it illuminates him as a person and as an official serving in an era that, from the distant perspective of the early twenty-first century, seems quaint.

John Knox was "secretary" or law clerk to McReynolds during the historic October 1936 Term. The volume is an entertaining (and even suspenseful[76]) memoir that Knox began in the early 1950s on the basis of a detailed diary he had kept as a young man during his year with McReynolds immediately after completion of the L.L.M. at Harvard Law School in 1936. Indeed, the memoir's editors (Dennis J. Hutchinson of the University of Chicago, where Knox spent his undergraduate years before going to law school at Northwestern, and David J. Garrow of Emory University) report that Knox was an habitual diarist, having begun recording impressions and events as a shy high-school student in Chicago during the 1920s. In 1978, with qualms about confidentiality apparently eased, Knox released different parts of his memoir to several law schools and to the library at the Supreme Court. Nonetheless, "[t]he work, so long in genesis and distributed so hesitantly, has been neglected to the point of being forgotten."[77]

To be sure, this is not a memoir on the scope of Malvina Shanklin Harlan's **Some Memories of a Long Life, 1854–1911**.[78] Her recollections have the perspective of a mature woman's thoughts about many people in many settings over many years. **Forgotten Memoir** is far more narrowly conceived. As Knox begins, "This is the story of a bachelor seventy-five years old, and of my experience with him and his negro [sic] maid and butler."[79] Despite its limited focus, the editors believe, Knox's memoir is not only unique but valuable. "No other work," they write, "captures the tightly knit relationship between a justice and his tiny staff: secretary cum law clerk [Knox], 'messenger' (driver, valet, general factotum) [Harry Parker],[80] and cook [Mary Diggs]."[81] It is also a story about socially and racially stratified life in Washington before World War II, when both personal and professional engraved calling cards were still a social necessity for someone in Knox's position.[82]

Knox had Justice Willis Van Devanter to thank for his job with McReynolds. As a law student Knox had begun a correspondence with Van Devanter (as well as with Justice Holmes). His shyness evidently a thing of the past, Knox even invited himself to visit Van Devanter, who entertained the young man with a tour of Mount Vernon and Arlington Cemetery. But Knox's initial meeting with McReynolds in the latter's spacious ten-room apartment—like most of the senior Justices, McReynolds worked at home and not at chambers in the new Supreme Court Building—almost scuttled the clerkship. When McReynolds asked if he could take dictation, Knox replied that he used a stenotype machine. McReynolds said he could not have such a device in his apartment and would have to find someone else. Knox saved his job by promising that he would devote six weeks of the summer, while the Justice was away, learning pencil shorthand. The Justice agreed, then added, "Of course, you won't be

paid any salary during those six weeks, you understand."[83]

One senses something of what it was to work for McReynolds in the instructions Knox received from two quarters. The Justice was firm to the point of being brittle. "You will do no work at the new Court building. If you need any books, a messenger from the Court will bring them out to you in a truck.... In your work here," McReynolds continued, "you will be both a secretary and a law clerk. I have no use for women secretaries.... They ultimately became very possessive and wished to run the whole show.... And please do not come here after seven o'clock unless you telephone me first. A dinner party might be in progress, and I would not want the noise of a typewriter to be heard at such a time."[84] Messenger Parker also advised Knox, "You can't smoke or drink, and you can't have no dates with girlfriends during the year. If anybody is going to do any dating, it will be the Justice and nobody else. You will also be fired if the Justice ever calls up his apartment during the day and finds that you are not there. You cannot eat at the Justice's, and you will have to walk six or seven blocks to a restaurant at Eighteenth and Columbia Road."[85]

The Court-packing plan of 1937, made public immediately after the Justice's seventy-fifth birthday, occupies a chapter of its own. Knox believed that it steeled McReynolds to stay on the bench no matter what. "To think that the President would bring us to this," Knox records McReynolds saying in exasperation. "He was determined to stand his ground, but he had by now resolved to withdraw... and wait out the hurricane." Bundles of unsolicited correspondence soon arrived and made matters worse. Knox remembers "smell[ing] smoke coming from his study. He was burning his correspondence again—and doing so each morning. [It] was causing both of us embarrassment." The letters included sentiments such as "Just-Ice," "You old Crab," and "RESIGN."[86]

McReynolds is not among those profiled in **Great American Lawyers**.[87] Edited by John R. Vile of Middle Tennessee University, this two-volume encyclopedia contains biographical essays, written by more than fifty law professors, historians, and political scientists[88] on one hundred individuals who achieved fame as trial litigators and appellate advocates. Each essay is approximately 2,500 words in length and concludes with a bibliography.[89] "Assessing lawyers, like assessing presidents and justices," writes Vile, "often requires making complex moral judgments"[90] (although notoriety as a courtroom trickster was apparently not an automatic disqualification from inclusion)—and numerous professional judgments, too. Given the multitude of attorneys who have populated the nation for more than two centuries, such assessment is a task no one lightly undertakes. To make the "top" one hundred lawyers in American history, the editor employed a combination of methods. A survey allowed legal scholars both to rate individuals Vile had preselected and to suggest some of their own. The editor's own careful preselection research was exhaustive. While someone might quibble with the final list, no one is present who does not arguably belong. The roster contains the names of persons who left (or who are leaving—nineteen of the essays are about persons who were very much alive when **Great American Lawyers** went to press) indelible marks on the practice of law. Thus, part of the challenge of selection was to confine the encyclopedia to those who achieved genuine prominence as lawyers, not lawyers who achieved their prominence elsewhere. Accordingly, the challenge for each contributor was to emphasize a subject's legal practice and to resist the temptation to wander far into other activities, such as elective office, that might have engaged a subject's time. The fact that Vile, as general editor, is not an attorney (although he is trained as a political scientist in the judicial process) may well have enhanced the balance of the final selection of subjects and the overall utility of the essays themselves.

Although most Supreme Court Justices[91] are missing from the set, thirteen are included:

Brandeis, Campbell, S. P. Chase,[92] Curtis, Fortas, Ginsburg, Harlan II, Hughes, R. Jackson, J. Marshall, T. Marshall, Roberts, and Story. In addition, the list includes at least three Supreme Court might-have-beens: Jeremiah Black, nominated by James Buchanan; Caleb Cushing, probably Grant's third choice in his search to fill Chief Justice Chase's seat; and Roscoe Conkling, who declined to sit after nomination by Chester Arthur and confirmation by the Senate. More than one Supreme Court wanna-be is included as well. Also present are a host of those who earned a reputation as advocates before the High Court: Joseph Choate, Archibald Cox, Francis Biddle, Hayden C. Covington, John W. Davis, and Rex E. Lee, to name but some, plus the "dream team"[93] (William Pinkney, Daniel Webster, William Wirt, Walter Jones, Joseph Hopkinson, and Luther Martin) that presented arguments in *McCulloch v. Maryland*.[94]

Aside from the information and perspective it contains, **Great American Lawyers** has a civic mission too. This is apparent in Vile's hope that the pair of volumes "will be one way of directing renewed focus on those who have distinguished themselves as litigators and of rekindling serious thought about those qualities that make for a great lawyer." On balance, the editor concludes that the categories "great lawyers" and "great men (and women)"[95] are not mutually exclusive and that the profession has served the nation well.

"America is the paradise of lawyers," Justice David J. Brewer is supposed to have said.[96] That claim aside, a glance through the directory of names in Vile's encyclopedia is a sufficient reminder of the varied roles that lawyers have played in public affairs since colonial times. The legal profession has been a source of civic leadership "far exceed[ing] its proportion in the population."[97] That much seems apparent, whether the context is our own day, the distinct eras of Justices White and McReynolds, the Eisenhower Court, the free-speech battles of the nineteenth century, or the Marshall Court itself.

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

CURTIS, MICHAEL KENT. **Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History** (Durham, NC: Duke University Press, 2000). Pp. x, 520. ISBN: 0-8223-2529-2 (cloth).

HUTCHINSON, DENNIS J., AND DAVID J. GARROW, EDS. **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington** (Chicago: University of Chicago Press, 2002). Pp. xxii, 288. ISBN: 0-226-44862-2 (cloth).

NELSON, WILLIAM E. ***Marbury v. Madison*: The Origins and Legacy of Judicial Review** (Lawrence: University Press of Kansas: 2000). Pp. xii, 142. ISBN: 0-7006-1062-6 (paper).

VESTAL, THEODORE M. **The Eisenhower Court and Civil Liberties** (Westport, CT: Praeger, 2002). Pp. xiii, 329. ISBN: 0-275-97284-4 (cloth).

VILE, JOHN R., ED. **Great American Lawyers: An Encyclopedia**, 2 vols. (Santa Barbara, CA: ABC-CLIO, 2001). Pp. xxix, 820. ISBN: 1-57607-202-9 (cloth).

ENDNOTES

[1]Bill McAllister, "Beltway," *Denver Post*, April 21, 2002, A-36.

[2]*Drake Bakeries v. Local 50, American Bakery & Confectionery Workers International*, 370 U.S. 254 (1962).

[3]*United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

[4]*Baker v. Carr*, 369 U.S. 186 (1962).

[5]*Davis v. Bandemer*, 478 U.S. 109 (1986); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Shaw v. Reno*, 509 U.S. 630 (1993).

[6]367 U.S. 643 (1961).

[7]*Reed v. Reed*, 404 U.S. 71 (1971).

[8]*Griswold v. Connecticut*, 381 U.S. 479 (1965).

[9]*Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[10]*DeFunis v. Odegaard*, 416 U.S. 312 (1974).

[11]White's first published dissent was in *Robinson v. California*, 370 U.S. 660 685 (1962), in which the Court expressly applied the Eighth Amendment's ban on cruel and unusual punishments to the states.

[12]*Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cohen v. California*, 403 U.S. 15 (1971).

[13]Michael Kent Curtis, **Free Speech, "The People's Darling Privilege"** (2000) (hereafter cited as Curtis). The words in the title within quotation marks were uttered by Federalist Representative Harrison Gray Otis of Massachusetts during congressional debates on the Sedition Act in 1798. Otis accused Jeffersonians of frightening the people by claiming that the law would threaten their "darling privilege." *Id.*, 5.

[14]106 U.S. 371 (1882).

[15]*Id.*, 377.

[16]205 U.S. 454 (1907).

[17]Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (13th ed., 2002), 423.

[18]Curtis, 3-4.

[19]32 U.S. (7 Peters) 243 (1833).

[20]The 1859 conviction in North Carolina of Hinton Helper, author of **The Impending Crisis of the South: How to Meet It** (1857), figures prominently in the book. See Curtis, 1–2, 271–288.

[21]Curtis, 281.

[22]*Id.*, 360–368.

[23]83 U.S. (16 Wallace) 36 (1873); 92 U.S. 542 (1876).

[24]*Dennis v. United States*, 341 U.S. 494 (1951).

[25]Louis Filler, "William B. Woods," in **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions**, vol. 2 (1969), 1328–1329.

[26]Curtis, 308, 310, 311.

[27]*Ex parte Vallandigham*, 68 U.S. (1 Wallace) 243 (1864). The question of the jurisdiction of military commissions over civilians was revisited in a forthright matter after the war in *Ex parte Milligan*, 71 U.S. (4 Wallace) 2 (1866).

[28]From the preface to Finley Peter Dunne's **Mr. Dooley in Peace and War** (1898), quoted in William Safire, **Safire's New Political Dictionary** (1993), 46.

[29]Richard Hofstadter, **The Idea of a Party System** (1969), 128.

[30]5 U.S. (1 Cranch) 137 (1803).

[31]William E. Nelson, ***Marbury v. Madison*** (2000) (hereafter cited as Nelson).

[32]For example, see Christopher L. Eisgruber, "John Marshall's Judicial Rhetoric," **1996 Supreme Court Review** (1997), 439; Robert Lowry Clinton, ***Marbury v. Madison* and Judicial Review** (1989); Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (1996); and, Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (1990).

[33]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–166 (1803) (emphasis added).

[34]*Ibid.*, 167.

[35]Nelson, 7.

[36]*Id.*, 8.

[37]*Id.*, 85–86.

[38]12 Sergeant & Rawle 330 (Pa. 1825).

[39]Gibson conceded that a Pennsylvania court might invalidate a state statute if it violated the *federal* constitution, but that was only because of a grant of authority Gibson found in the supremacy clause in Article VI of the U.S. Constitution.

[40]*Norris v. Clymer*, 2 Pa. 277, 281 (1845).

[41]Thomas T. Cowan, "Legislative Equity in Pennsylvania," 4 *University of Pittsburgh Law Review* 1 (1937).

[42]*Norman v. Heist*, 5 Watts & Sergeant 171, 174 (Pa. 1843).

[43]Edward S. Corwin, book review, 56 *Harvard Law Review* 487 (1942).

[44]60 U.S. (19 Howard) 393 (1857); 158 U.S. 601 (rehearing, 1895).

[45]Nelson, 93.

[46]*Id.*, 124.

[47]Mason and Stephenson, **American Constitutional Law: Introductory Essays and Selected Cases**, 7.

[48]347 U.S. 483 (1954); 349 U.S. 294 (1955).

[49]*Engel v. Vitale*, 370 U.S. 421 (1962).

[50]The most controversial of these included: *Slochower v. Board of Education of New York City*, 350 U.S. 551 (1956), holding that a public university could not dismiss a professor merely because he invoked the Fifth Amendment during questioning by a congressional committee; *Communist Party of the U.S. v. Subversive Activities Control Board*, 351 U.S. 115 (1956), refusing to accept the Subversive Activities Control Board's findings that the American Communist Party was not a "Communist action organization" under the Internal Security Act of 1950; *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), holding invalid state laws punishing sedition against the United States, on grounds of federal pre-emption; *Jencks v. United States*, 353 U.S. 657 (1957), overturning the conviction of a union official who had falsely sworn that he was not a member of the Communist party, after defense counsel had been denied access to FBI reports on the key witnesses; *Watkins v. United States*, 354 U.S. 178 (1957), overturning a conviction for contempt of Congress of one who, on First Amendment free-speech grounds, had refused to answer questions about former Communists from the House Committee on Un-American Activities and boldly casting doubt on the constitutionality of Congress's investigative power when used to expose someone's political beliefs; and *Yates v. United States*, 354 U.S. 298 (1957), reversing convictions for subversive activity under the Smith Act by requiring a higher level of proof for the "advocacy" of overthrow that the statute prohibited.

[51]*New York Times*, June 27, 1956, 18.

[52]Earl Warren, **The Memoirs of Earl Warren** (1977), 303–304. The billboards remained in place through Warren's last year on the Court.

[53]*Id.*, 325.

[54]The text of the report and the resolutions was reprinted in *U.S. News & World Report*, October 3, 1958, 92–102.

See also Charles S. Hyneman, **The Supreme Court on Trial** (1963), 22–24.

[55]James F. Byrnes, "The Supreme Court Must Be Curbed," *U.S. News & World Report*, May 18, 1956, 50.

[56]This law altered the Jencks decision (see note 50 above) by allowing the trial judge—not defense attorneys—to decide what material was properly relevant for the defense. See Walter F. Murphy, **Congress and the Court** (1962), 127–153, for an analysis of the various versions of the Jencks Act.

[57]By comparison, in the Court-packing fight of 1937, Senator Joseph Robinson, the president's floor leader in the Senate, was never certain of more than thirty affirmative votes, even with the prestige of FDR behind him. *Id.*, 200.

[58]William Lasser, **The Limits of Judicial Power** (1988), 174–175. For example, see *Barenblatt v. United States*, 360 U.S. 109 (1959), which upheld a conviction for contempt of Congress by distinguishing *Watkins*, mentioned in note 50 above.

[59]Theodore M. Vestal, **The Eisenhower Court and Civil Liberties** (2002) (hereafter cited as Vestal).

[60]C. Herman Pritchett may have been the first to use a president's name to identify a period of Supreme Court history. See his **The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947** (1948). See also David M. Silver, **Lincoln's Supreme Court** (1956, reissued 1998). Note that only five other Presidents—Washington included—have appointed more than half the bench.

[61]Vestal, 3, 7.

[62]*Id.*, 6.

[63]*Id.*, 246.

[64]Fred Greenstein, **The Hidden-Hand Presidency: Eisenhower as Leader** (1982).

[65]Vestal, 7.

[66]*Cooper v. Aaron*, 358 U.S. 1 (1958).

[67]Vestal, 155.

[68]354 U.S. 476 (1957).

[69]Vestal, 290.

[70]356 U.S. 86 (1958).

[71]357 U.S. 449 (1958).

[72]Vestal, 292.

[73]Robert G. McCloskey, "The Supreme Court Finds a Role: Civil Liberties in the 1956 Term," 42 *Virginia Law Review* 735, 760 (1956), quoted in Vestal, 295.

[74]Dennis J. Hutchinson and David J. Garrow, eds., **The Forgotten Memoir of John Knox** (2002) (hereafter cited as Knox).

[75]A 1970 survey rated the ninety-six individuals who had completed their service on the Court as of 1967. Eight Justices, including McReynolds, were assigned to the "failure" category. Henry J. Abraham, **Justices and Presidents** (3rd ed., 1992), 413. In the survey, twelve Justices were deemed "great," fifteen "near great," fifty-five "average, and six "below average." Of the eight failures, two (Justice Willis Van Devanter and Justice Pierce Butler) were on the bench with McReynolds during the 1936 Term. Abraham's own assessment of McReynolds is typical of what one finds across the literature: "Politically and jurisprudentially, the lifelong bachelor, a confirmed misogynist, came to embrace a philosophy of reaction to progress second to none, and in his personal demeanor on the bench was a disgrace to the Court." *Id.*, 178.

[76]Knox seemed constantly in fear of losing his job.

[77]Knox, ix.

[78]The memoir by Mrs. Harlan was published in book form in 2002 by Random House as part of The Modern Library. It had earlier appeared in 26 *Journal of Supreme Court History* 109 (2001).

[79]Knox, 3.

[80]Among Parker's extrajudicial duties was that of retriever when the Justice went duck-hunting on Maryland's Eastern Shore. After McReynolds retired, Parker worked for Justice Robert H. Jackson as messenger until 1953. Among the photographs in **Forgotten Memoir** following page 154 is one taken in the spring of 1952 showing Parker and Jackson's two clerks, C. George Niebank, Jr., and William H. Rehnquist.

[81]Knox, x.

[82]That practice lingered for many years. In 1968, when the author of this review essay was posted to Fort McNair in Washington as an exceedingly green first lieutenant, Army etiquette dictated that he leave a calling card at the residence of the post commander and one at the residence of the commandant of the National War College where he had been assigned. And the cards were engraved.

[83]*Id.*, 10.

[84]*Id.*, 11, 17, 18.

[85]*Id.*, 13.

[86]*Id.*, 173–174.

[87]John R. Vile, ed., **Great American Lawyers**, 2 vols. (2001) (hereafter cited as Vile).

[88]Professor Vile wrote eighteen of the essays himself.

[89]In addition, several dozen other lawyers receive much briefer treatment in boxed inserts within the one hundred essays.

[90]*Id.*, vol. 1, xviii.

[91]Four presidents did make the cut: John Adams, John Quincy Adams, Martin Van Buren, and Abraham Lincoln.

[92]The author of this review essay wrote the essay on Salmon Portland Chase. See *id.*, vol. 1, 91–98.

[93]Vile., vol. 1, xviii.

[94]17 U.S. (4 Wheaton) 316 (1819).

[95]Vile, vol. 1., xxiii.

[96]Champ Clark, **My Quarter Century of American Politics** (1920), vol. 2, 180.

[97]James Willard Hurst, **The Growth of American Law: The Law Makers** (1950), 352.

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