Introduction

Melvin I. Urofsky

Those of us responsible for the contents of the *Journal of Supreme Court History* have learned, much to our joy, that there appears to be no real limit on what can legitimately come within the stated parameters of our mission—namely, to chronicle the history of the Supreme Court of the United States. We do not, of course, run articles of doctrinal analysis, considering that area to be the purview of the law reviews. Clearly, some doctrinal analysis is necessary when dealing with a court, but our rule is that the historical aspects take precedence to the doctrinal, always aware that the two cannot be easily separated.

In making our selections, I am often reminded of that wonderful quote from the legendary Harvard law teacher, Thomas Reed Powell: "If you think that you can think about a thing, inextricably attached to something else, without thinking of the thing it is attached to, then you have a legal mind." Those of us at the *Journal* do have to think about connections. In that way, at least, perhaps we can distinguish between the legal and the editorial minds.

This issue of the *Journal* once again ranges across a wide spectrum of topics. Justice Sandra Day O'Connor gave the annual lecture at the Society's meeting last June, and her topic is of great importance to students of the Court. Certainly no Chief Justice since John Marshall was as concerned about the Court speaking with one voice as William Howard Taft, a man once dismissed as inconsequential but who has been greatly redeemed by newer scholarship that emphasizes his real skills at leadership on the bench.

We have other articles in this issue on Justices, and this gives me a great deal of satisfaction, since I have spent much of my professional life dealing with biography. John D. Fassett, once a clerk to Justice Stanley Reed, writes about the rather bizarre relationship between his Justice and that great proselytizer, Felix Frankfurter. What is interesting is that many new Justices, once they had been assaulted by Frankfurter, wanted as little as possible to do with him. But Reed seems to have taken it all in stride, and aside from Robert

H. Jackson, may have had the best relationship with Frankfurter of anyone on the Court at that time.

My article derives from a talk I was invited to give at the Woodrow Wilson House in Washington. I am grateful to the organizers for getting me to rethink some of the issues involved in that appointment.

Separation of powers is, of course, one of the favorite topics of teachers of both law and political science, but what happens when past or future Presidents appear as attorneys before the high court? And how well do they do? Allen Sharp's interest in this question led him to do the research, and we are glad to publish the results.

The remaining two articles, Michael J. C. Taylor's on *Ableman v. Booth* and Scott E. Lemieux's on *Marbury v. Madison*, bring me back to my original comments on doctrinal analysis and history. In both of these cases, any effort to study the doctrine outside the context of history—or vice versa—is clearly useless. History and doctrine walk hand in hand through great cases, as they do through the pages of this *Journal*.

"A More Perfect Union": *Ableman v. Booth* and the Culmination of Federal Sovereignty

MICHAEL J. C. TAYLOR

Thesis

The discourse over federal versus state jurisdiction was ingrained into American politics at the nation's inception. It has been the premise of our most historically significant rivalries—between Thomas Jefferson and Alexander Hamilton, Andrew Jackson and Henry Clay, and Daniel Webster and Robert Hayne. Though this debate remains a contentious topic in contemporary political discourse, the U.S. Supreme Court settled the legal controversy on the eve of America's bloodiest conflagration. Unanimously, the Court ruled that the federal union was of greater importance than the authority of the individual states. The 1859 *Ableman v. Booth*[1] decision was wrought from moral controversy, legal precedent, and political necessity, coupled with the full force of law, and has endured as a compelling pronouncement on the need for continuity and stability in uncertain times.

The *Ableman* decision remains not only a constant and salient reminder of this nation's most trying time, but also a potent example of both the confrontational elements and the fragile nature of America's political system. The principle upon which it was based, the sovereignty of a central government, had been a controversial topic of contention since the Constitutional Convention in 1787, when delegates pursued the goal of a strong central government that did not encroach upon the power of the states. It was a decision wrought in reaction by one group of citizens hell-bent on the destruction of another's "peculiar" institution that sought to circumvent a Supreme Court decision. Throughout the past 150 years, it has endured as the most blunt statement of governmental hierarchy within the American nation, while providing an eloquent rationale for the subordination of state governments to a centralized authority. Yet only through a meticulous examination of the circumstances from

which it was wrought can the importance of the *Ableman* decision be established.

Towards a National Definition of Sovereignty

Once the thirteen English colonies had declared their independence from Great Britain in 1776, there arose the daunting task of uniting these separate, sovereign states under a single political entity. But the newly independent Americans did not want to merely replace a foreign tyrant with a native-born version of their own design, or to allow more populous states to hold the lion's share of political clout over the smaller states. The nation's first constitution, the Articles of Confederation, was the initial attempt at achieving this goal.[2] Under its auspices, a precarious union was created in which political administration was localized; but, as a catalyst for national unity, it failed. Under the Articles, according to Alexander Hamilton, "There is scarcely any thing that can wound the pride or degrade the character of an independent nation which we do not experience."[3] Throughout the summer of 1787, delegates from twelve of the thirteen states met in Philadelphia to draft a new constitution that specifically centralized power, yet also allowed the states to retain their regional autonomy.

Four years after the Constitution's ratification, the Supreme Court initiated a determined push toward federal jurisdiction over states, which began with its first critical case, *Chisholm v. Georgia*. In a 4–1 decision, the Court, anticipating the judicial review of state statutes established by the 1810 *Fletcher v. Peck* decision, determined that the Constitution vested "a jurisdiction in the Supreme Court over a state, that there may be various actions of the states which are to be annulled."[4] According to the majority opinion's author, Justice James Wilson, "Government itself would be useless, if a pleasure to obey or transgress with impunity should be substituted in the place of a sanction to its laws."[5] In rebuttal, Justice James Iredell argued that the Court, as "the organ of the Constitution," had the duty not to "take any other short method of doing what the Constitution has chosen . . . should be done in another manner."[6] It was his contention that though the federal government was forged from the sovereignty of the states, that alone did not require the states to defer to that government.

When the Court asserted its right of judicial review with its decision in the 1803 case of *Marbury v. Madison*, the equilibrium of dual sovereignty, as delineated by the *Chisholm* decision, was disturbed. As interpreted by Chief Justice John Marshall, Article III § 2 granted the Court final jurisdiction in "all Cases, in law and equity, arising under this Constitution."[7] In 1810, in the case of *Fletcher v. Peck*, the Court declared an act of the Georgia state legislature unconstitutional. In his majority opinion, Chief Justice Marshall reasoned that

> The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is part of a large empire; she is a member of the American union; and that union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none can claim a right to pass.[8]

The Court's decision in the 1812 case *United States v. Hudson and Goodwin* asserted that "All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer."[9] Later, in *Martin v. Hunter's Lessee* (1816),[10] the Court established its jurisdiction over appeals from state courts. Justice Joseph Story's majority opinion rejected the dual sovereignty argument and

Justice William Johnson explained federalist ideology in his majority opinion in *United States v. Hudson and Goodwin*, when he said that "Certain implied powers must necessarily result to our Courts of Justice from the nature of their institution."

insisted that the authority to interpret the Constitution rested solely with the federal Supreme Court.

With the 1819 case of *McCullough v. Maryland*,[11] the Marshall Court interpreted the Necessary and Proper Clause as a grant of federal power to the legislature branch that allowed for action in unforeseen crises. In tandem, Marshall's opinion also confirmed state deference to federal jurisdiction. *Cohens v. Virginia* (1821)[12] was one of several cases that challenged the *McCullough* decision; yet the effort proved futile. In his majority opinion, Marshall reasserted that a political administration empowered by the people had the right to preserve itself; thus, if a government lacked the necessary means to enforce its laws, its impotence dictated its eventual extinction. This line of speculation was similar to Hamilton's, as evidenced in his *Federalist* essay #59: "[E]very government ought to contain in itself the means of its own preservation."[13] Each of these Supreme Court decisions sparked a wave of protest in the South. In a letter to Judge Spencer Roane in 1819, ex-President Thomas Jefferson angrily proclaimed that "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[14]

In his 1833 book, *Commentaries on the Constitution of the United States*, Associate Justice Joseph Story argued that the Supreme Court was the exclusive interpreter of federal law, and that its assessments were "obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that constitution."[15] Although Justice Story did not specifically cite Article III § 2—"The judicial Power shall extend to all Cases . . . under this Constitution"—his writings implied it.[16] A claim of such authority, however, was not unusual for members of the Marshall Court. Federalist ideology, as stated by Justice William Johnson in his majority opinion in *United States v. Hudson and Goodwin*, maintained that "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."[17] In his *Federalist* essay #78, Hamilton had previously argued that such a final authority was the necessary result of a constitutional government "[t]o avoid an arbitrary discretion in the [state] courts."[18]

Under Marshall's leadership, the Court had systematically built a framework for its jurisdictional sovereignty and asserted its role as a power player equal to the legislative and executive branches. In *Democracy in America*, Alexis de Tocqueville was intrigued by this reverence and commented that

> The peace, the prosperity, and the very existence of the Union are vested in the hands of seven Federal judges. Without them the Constitution would be a dead letter.[19]

It was a popular affirmation that the Marshall Court had achieved its goal of judicial nationalism—a federal union based upon an established code of law. What was left for Marshall's successor, Roger Brooke Taney, was to define the perimeters of state governmental authority within the context of a sovereign centralized government.

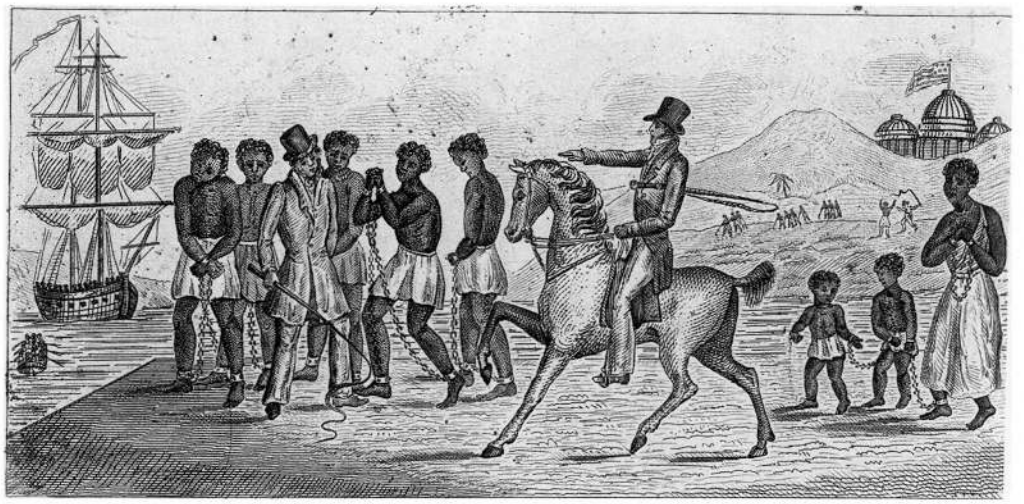
Comity and the Pursuit of Equilibrium

If John Marshall had established a workable foundation for federal government sovereignty, then it was Roger Brooke Taney who redefined it as being dependent upon two competing jurisdictions. As Chief Justice, Taney utilized due process to enjoin the means of private property with the ends of social responsibility. In doing so, he preserved the nationalistic prerogatives of his revered predecessor by moderating them. Taney endeavored to create a balance between two entities in which they coexisted within separate spheres of influence."[20] This tenuous relationship relied heavily upon comity, in which the federal government refrained from overextending its power in state matters and, in turn, state entities fully enforced federal laws.

By the time Taney took his seat on the Court in 1835, such deference had given way to confrontation between federal and state governments; therefore, questions regarding the buying and selling of slaves as chattel, and its impact upon comity between separate sovereign jurisdictions, were intentionally left ambiguous. During the Marshall era, the Court, in *Gibbons v. Ogden* (1824),[21] had empowered Congress to regulate interstate and foreign commerce—one of three decisions that had recognized the special status of slaves as chattel property.[22] Later, in the 1825 *Antelope* case, the Court recognized the slave trade as being socially sanctioned—"derived from long usage and general acquiescence."[23] However, the 1836 Massachusetts court case *Commonwealth v. Aves* set a precedent that was followed by other northern states and made it difficult for comity to be a viable element of constitutional interpretation.

The chief justice of the Massachusetts supreme judicial court stated that, with regards to slavery, the fundamental issue was not legal, but moral: "[A] relation founded in force, not in right, existing, where it does exist by force of positive law, and not recognized as founded in natural right, is intimated by the definition of slavery in the civil law."[24] The Constitution had only inferred a general protection to the human-chattel issue, such as the status of fugitive slaves; as such, the states had equally broad powers to do what was in their best interest and, thus, comity was not an issue. Though *Aves* was not the first case of its kind decided in a state court over the issue of comity, its repercussions were far-reaching. It was a demonstration of a perilous crevasse that had opened over positions on sectionalized moral issues. As this divide widened, legal cases that demanded decisions between legal precedent and moral conduct rose from the states—cases that eventually came under the purview of the Supreme Court of the United States.

In *Groves v. Slaughter*,[25] the Taney Court reaffirmed the federal government's jurisdiction over the slave trade; yet it also empowered both federal authorities to regulate and the states to police such trade. The following year, the Court stated in *Prigg v. Pennsylvania* (1842) that all state laws that impeded enforcement of the Fugitive Slave Clause were unconstitutional, for it had "constituted a fundamental article, without the adoption of which the Union could not have been formed."[26] That same year, in *Swift v. Tyson*,[27] the Court confirmed the power of the federal judiciary to execute established general rules embodied in judicial precedent, even if those principles were contrary to the decisions of state courts. Associate Justice Levi Woodbury, in his majority opinion for the Court in *Jones v. Van Zandt*,[28] asserted that all federal laws must be enforced by subordinate jurisdictions, and that citizens under the authority of the Constitution were bound to uphold the law, even if



UNITED STATES SLAVE TRADE.

1850.

As legal cases that demanded decisions between legal precedent and moral conduct rose from the states, the Supreme Court reaffirmed federal jurisdiction over slavery and the rights of states to enforce fugitive slave laws.

doing so conflicted with their moral conscience. In *Strader v. Graham*,[29] the Taney Court reaffirmed the *Jones* decision by refusing to grant runaway slaves their freedom and restating the sovereignty over a state's citizens and their chattel property under the sanction of federal law. Thus, in the two decades prior to *Ableman v. Booth*, the Taney Court had established a vast precedent that placed the federal government at the center of American politics. It was this legacy, coupled with the constitutional protections of Article IV § 2, that Taney drew upon when he rendered his decisions in both the *Dred Scott* and the *Ableman* cases.

The Taney Court and the *Dred Scott* Decision

Stare decisis—translated from the Latin as "let the decision stand"—is the basis for our system of jurisprudence. When any court, from the county level to the Supreme Court, issues a ruling, it becomes a guideline for future judges in deciding issues of contention along similar lines. Also, justices are bound by the letter of the Constitution, and must present a rationale based upon tenets of the document itself. Though vastly controversial for its racially biased interpretation of the Constitution, the majority decision in the 1857 case *Scott v. Sandford* was necessarily based upon a large body of both philosophical treatises and legal precedent. Upon close examination of the decision, it becomes obvious that Chief Justice Taney based his majority opinion upon a convincing body of precedent and both state and federal statutes as they stood at the time.

The first issue was one of property—in particular, human chattel. In his **Second Treatise of Government**, John Locke maintained that "[I]n Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions."[30] In Locke's view, though property had value in and of itself, it was within a social framework that the specificity of value was determined. In his *Federalist* essay #70, Hamilton echoed this concept when he wrote that it was the essential duty of the government to provide for "the protection of property against those

In his majority opinion for the Court in *Jones v. Van Zandt* (1847), Associate Justice Levi Woodbury asserted that all federal laws must be enforced by subordinate jurisdictions, and that citizens under the authority of the Constitution were bound to uphold the law, even if doing so conflicted with their moral conscience.

irregular and high-handed combinations which sometimes interrupt the ordinary course of justice."[31] Likewise, James Madison asserted in his *Federalist* essay #54 that "Slaves are considered as property, not as persons . . . [and] therefore to be comprehended in estimates of taxation which are founded on property."[32] Taney made reference to this axiom in his majority opinion in *Scott*:

> It is impossible, it would seem, to believe that the great men of the slave-holding states, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.[33]

Under the Articles of Confederation, the regulation of human-chattel slavery had been left to the sole discretion of the states. During the Constitutional Convention debates, slave owner James Madison argued for an eventual abatement of the slave trade. Virginia plantation owner George Mason made a forceful plea to put an end to the practice: "As nations cannot be rewarded or punished in the next world they must be in this."[34] New York's John Jay and Pennsylvania's Benjamin Franklin also argued for abolition. But the object of the gathering was to produce a governing document that would be ratified by the majority of the states; therefore, to ensure ratification by the southern states, compromises on slavery were made implicit within its text. One of those compromises was the Fugitive Slave Clause of Article IV § 2, which was at the heart of several Taney Court decisions regarding chattel property and comity issues.

The Taney Court stated in 1847 that a fugitive-slave law was "not repugnant to the Constitution."[35] Even though several states in the Union found slavery to be offensive "in all nations where the light of civilization and refinement has penetrated," only in rare cases did they refuse to abide by federal law, even if they did so in protest. An excellent example was the 1835 New York case of *Jack v. Martin*, which involved a runaway slave who was reclaimed by his owner.[36] Though New York had been among first states to abolish slavery, and its supreme court had ruled that the Fugitive Slave Law was unconstitutional, its court nonetheless declared that the slave, Jack, was to be returned to his master in Louisiana. Therefore, in Taney's view, neither federal nor territorial legislatures possessed the authority to prohibit slavery.

The Chief Justice viewed the *Scott* case as a legitimate interrogatory into the definition of citizenship. As interpreted by Taney, just as federal and state power existed within separate spheres of influence, so too did citizenship.

> [W]e must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow,

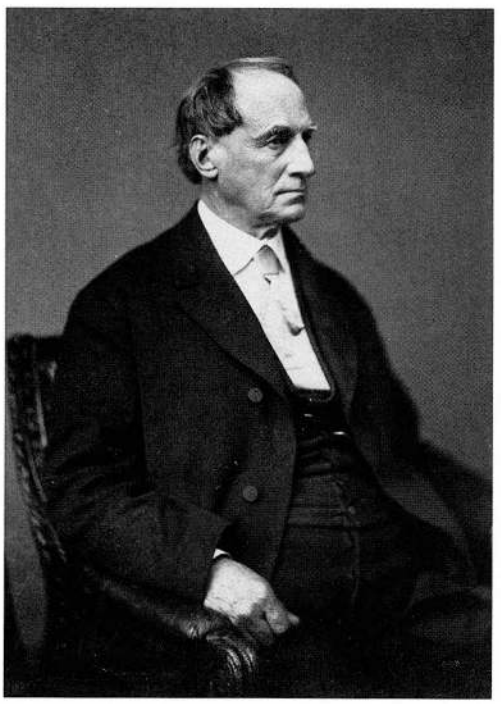
> because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State.[37]

Thus, each of the states had constructed a more stringent legal code of deportment for blacks than for whites. Though New York, Pennsylvania, and North Carolina had allowed blacks the voting franchise—a practice of citizenship—others, such as South Carolina, Arkansas, and Tennessee, had denied free blacks citizenship rights. The Chief Justice also referred to the fact that states such as Massachusetts, Connecticut, and New Hampshire, which accorded full citizenship rights to free blacks, enforced inflexible laws that effectively restricted interaction with whites on nearly every level of social contact. In addition, Taney noted that only a year before, Attorney General Caleb Cushing had refused to issue passports to "persons of color," as they were not recognized as citizens as defined by the Constitution. Therefore, because Dred Scott had not been recognized as a citizen by either legal precedent or social standard, Taney surmised that all blacks could "claim none of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States."[38]

Reaction to the Court's decision was immediate. Boston's *Zion's Herald and Wesleyan Journal* proclaimed that "The oligarchs of slavery are waxing bolder and bolder, more and more insulting."[39] In New Orleans, the *Daily Picayune* asserted the Court had provided "the sanction of established law, and the guarantees of the constitution, for all that the South has insisted upon in the recent struggles."[40] What had resulted in lieu of this decision, according to President Franklin Pierce, was "a sectional spirit in the land, counseling hatred and all uncharitableness, and which threatens at this moment to rock the Union to the centre."[41] But it was another slavery-related ruling by the Supreme Court, decided upon similar lines, that would have a more lasting effect upon American jurisprudence.

A State Challenge to Federal Sovereignty

The Supreme Court's 1859 decision in *Ableman v. Booth* was the final link in this chain of events that led to the tempest of civil war. Its trenchant assertion of federal jurisdictional sovereignty over state courts was the realization of the anti-Federalist warning of seventy years prior: that the federal government, under the aegis of the Supreme Court, would usurp the power from the states and claim original jurisdiction for themselves.[42] Because the decision had reaffirmed, at the expense of the states, the final authority of the central government, the southern states were appalled by it; and because it upheld pro-slavery statutes within the body of the Constitution, as well as previous court rulings with regards to slavery,



In his 1857 opinion in *Dred Scott v. Sandford*, Chief Justice Taney noted that a year earlier, Attorney General Caleb Cushing (above) had refused to issue passports to "persons of color" for they were not recognized as citizens as defined by the Constitution.

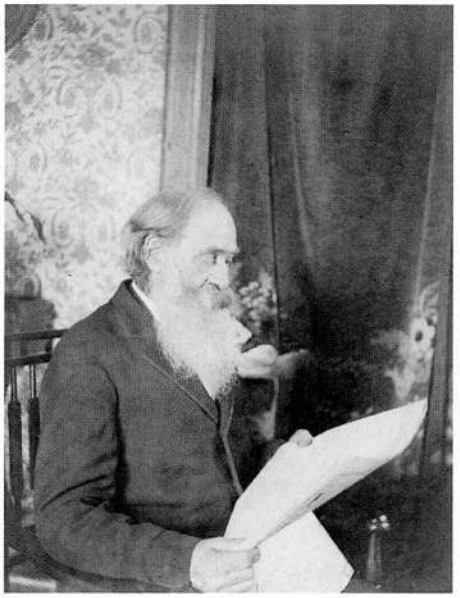
northern abolitionists condemned it. Two years earlier, the Court's decision in *Scott v. Sandford* had sparked a wave of dissent from ever-hostile constituent regions over its contention that property could not be denied to its lawful owner. Thus, the entire country was opened to human-chattel slavery. Free-soil states reacted by swiftly enacting personal-liberty laws meant to circumvent the overarching Court ruling. When the Court intervened and declared such acts unconstitutional, it closed the only course open to states hostile to slavery to undermine the decision. The implications of this for a volatile, sectionalized country were the legal equivalent of a lit match in a military arsenal.

In 1843, Justice John McLean had warned that "If convictions . . . of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and without protection."[43] On March 11, 1854, as the debates over the Kansas-Nebraska Act were raging in the House of Representatives, a crowd led by abolitionist newspaper editor Sherman M. Booth broke into a Milwaukee jail and released slave Joshua Glover, who was never recaptured. Glover, who was being held on a warrant issued from the District Court of United States, had escaped from his owner, Benjamin S. Garland of Missouri, two years prior and had found work in a gristmill near Racine, Wisconsin. Garland had both invoked the Fugitive Slave Act of 1850 and filed a complaint before U.S. Commissioner Winfield Smith in Milwaukee, who, in turn, issued the warrant for Glover's arrest.

Booth obtained a writ of habeus corpus from Justice A. D. Smith of the Wisconsin supreme court that asserted Glover "was restrained of his liberty" and that the 1850 Fugitive Slave law was unconstitutional.[44] When presented with the writ, Federal Marshal Stephen V. R. Ableman refused to release Glover, on the grounds that he was being properly held in federal custody and thus could not be released through a state court order. After assisting in Glover's escape, Booth and his accomplices were arrested, tried, and convicted of violating federal law. However, federal prosecution of Booth was repeatedly hampered by the defiance of the Wisconsin supreme court, which left him at liberty in defiance of the federal court's edicts and sought to thwart a federal review by ordering its clerk not to return the federal writ of error issued by the U.S. Supreme Court. "In the history of resistance by the states to federal authority," wrote historian David M. Potter in 1976, "few acts of defiance have approached this one, which involved nullification in a form that even John C. Calhoun had not advocated."[45]

When oral arguments were presented before the Taney Court on January 9, 1859, both Ableman's case against Booth and the federal case against the Wisconsin supreme court were unified under one decision, which was issued on March 7.[46] Chief Justice Taney's unanimous opinion condemned the Wisconsin supreme court as having "subvert[ed] the very foundations of this government."[47] In a clear repudiation of his earlier pro-states'-rights ideology, he asserted that the sovereignty of the U.S. Supreme Court was complete, for "If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own Courts, without the permission and according to the judgment of the Courts of the State."[48] With all the Justices in agreement, the Court stated categorically that the Constitution provided for the uniformity of judicial precedent, which would be ruined if the states claimed primacy over federal jurisdiction. Therefore, in the specific matter of fugitive slave Joshua Glover and the resulting fracas, the Wisconsin supreme court did not possess the right to circumvent federal laws and edicts: "There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and Courts of Wisconsin possess the jurisdiction they claim, they derive it either from the United States or the State."[49]

In defense of this statement, first and foremost was the Supremacy Clause of Article VI, which was either referred to or quoted directly



Joshua Glover, the Fugitive Slave.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

AT THE JUNE TERM, A. D. 1854.

In the matter of the petition of SHERMAN M. BOOTH, *for a Writ of Habeas Corpus, and to be discharged from imprisonment.*

In 1854, a crowd led by abolitionist newspaper editor Sherman M. Booth (left) broke into a Milwaukee jail and released slave Joshua Glover (right), who was never recaptured. Held on a warrant issued from the district court, Glover had escaped from his owner, Benjamin S. Garland of Missouri, two years prior and had found work in a gristmill near Racine, Wisconsin. Invoking the Fugitive Slave Act of 1850, Garland got a warrant issued for Glover's arrest. Booth, in turn, obtained a writ of habeus corpus (see above) that asserted Glover "was restrained of his liberty" and that the 1850 Fugitive Slave law was unconstitutional.

on several occasions within the text. At the heart of the case was the Wisconsin supreme court's assertion that the 1850 Fugitive Slave Law under which Glover's return had been mandated was not applicable to enforcement by the states. The implications of such a relationship between federal and state courts, and among the state courts themselves, was not lost on Chief Justice Taney:

> [I]f the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.[50]

Wisconsin's challenge to federal authority was alarmingly similar to that of South Carolina during the Nullification Crisis of 1832, in which the state legislature voided a national

The Supreme Court held that the Wisconsin State Supreme Court had overstepped its legal authority when it refused to prosecute those who had, by force, freed Glover from custody. Pictured is a drawing of a runaway slave.

tariff under the premise that it was independent to do what it deemed necessary to its self-survival. Not only did Taney confirm that the statute was "fully authorized by the Constitution of the United States," but he also argued that Glover had been released within the limits of state sovereignty against the property rights of his owner, the latter of which were fully protected under the force of federal law, as stated by *Scott v. Sandford*.[51] Therefore, the Wisconsin supreme court had overstepped its legal authority when it refused to prosecute those who had, by force, freed Glover from custody.

A concurrent constitutional principle cited by Taney within the text was the Necessary and Proper Clause of Article I § 8, in which Congress had seen fit to "carry into execution the powers vested in the judicial department."[52] By doing so, the Supreme Court had been empowered to exercise its authority as it deemed useful within the confines of the law. In tandem, the Court contended that habeas corpus, embodied in Amendments III through VII, was also essential to the maintenance of the established hierarchy between state and federal courts. "No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States," Chief Justice Taney asserted, "has any right to interfere with him, or to require him to be brought before them."[53]

At the heart of the Court's assertion of definitive authority over constitutional matters was Chief Justice Taney's reading of Article III, in which judicial power included oversight of "every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution."[54] The uniformity of law being indispensable for effective and efficient government in a multitiered system, by necessity one arbitrator had to possess the final authority—which the Framers placed in the judiciary. In turn, the Court's guarantee of such authority was judicial review, first asserted in *Marbury v. Madison* (1803), redefined as applicable to state legislation in *Fletcher v. Peck* (1810) and *United States v. Hartman and Goodman* (1812), and interpreted by Taney as "justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government."[55] The precedent for the Court's majority opinion was wholly consistent with *Abelman*, in that it was "the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead."[56] Taney argued that "[I]f such controversies were left to arbitrament of physical force, our government, state and national, would soon cease to be Governments of law, and revolutions by force would take the place of courts of justice and judicial decisions."[57] To reinforce this point, the Court reasserted the primary premise of its majority opinion in *Jones v. Van Zandt* (1847): that citizens under the Constitution must obey the law, even if doing so was counter to their personal conscience. Within the text of the *Ableman* decision itself, Taney stated this premise as follows:

> Now it certainly can be no humiliation to the citizen of a republic to yield ready obedience to the laws administered by constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it.[58]

Chief Justice Roger Brooke Taney had begun his public life as a close advisor to President Andrew Jackson and had assumed the Jacksonian premise of shared power between federal and state governments. Throughout his career on the Bench, he sought to create a union in which both federal and state governments worked concurrently, with separate, yet defined roles that complemented one another. As demonstrated by the *Ableman* decision, Taney ultimately concluded that a balance could not be ascertained between these

two entities and, therefore, that the "separate spheres of influence" theory was unworkable. A forceful assertion of federal sovereignty by the Court had thus been forced:

> We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this Government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.[59]

In the assessment of the Justices, the Wisconsin supreme court had operated under a "mistaken view of the jurisdiction they might lawfully exercise."[60] Such circumstances warranted not only a definitive statement of sovereignty from the body, but fully defined justification of that declaration. In this trenchant statement—the genesis of the decision itself—Chief Justice Roger Taney redefined the relationship between federal and state sovereignties: "No judicial process, whatever form it may assume, can have any lawful authority outside the limits of jurisdiction of the Court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."[61]

Application of the *Ableman* Decision

Though the bulk of its precedent has since been voided by the Thirteenth, Fourteenth, and Fifteenth amendments, the *Ableman* decision has remained relevant. Its bold arguments and confident statement of federal government ascendancy has been utilized in a variety of cases, all of which were in need of a clarification with regards to jurisdictional sovereignty. An excellent example of its impact on federal jurisprudence was *Tarble's Case* (1872), a standard reference with regards to cases involving federal versus state supremacy. Edward Tarble, an 18-year-old soldier who had enlisted in the armed forces while still a minor under a false name and without his father's consent, was incarcerated in Madison, Wisconsin. On August 10, 1869, a court commissioner for Dane County, Wisconsin issued a writ of habeus corpus at the behest of Tarble's father, who had charged the federal government with holding his son "confined and restrained of his liberty" and therefore maintained that he "was lawfully entitled to the custody, care, and services of his son."[62] The case was argued before the Court in April 1870, and the Court handed down its decision in March 1872. In his majority opinion, Justice Stephen J. Field cited *Ableman* several times throughout his text. In a similar ruling, the Supreme Court reinforced Taney's supposition that federal and state governments are "distinct and independent" and "restricted in their spheres of action, but independent of each other, and supreme within their respective spheres."[63]

Nearly a century later, in *Younger v. Harris* (1971), the Court ruled that there was no basis for equitable jurisdiction based upon the allegations of appellees. As such, a defendant who had not been indicted or arrested could not be blocked on the basis of speculative prosecution. John Harris, Jr. was charged by Los Angeles District Attorney Evell Younger with a violation of the California Syndicalism Act, which prohibited "any doctrine or precept advocating, teaching, or aiding and abetting the commission of a crime."[64] Harris claimed the act was unconstitutional because it violated his rights under the First Amendment. In his majority opinion, Justice Hugo Black cited the *Ableman* decision when he wrote that the Court "[does] not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution."[65]

Chief Justice Roger B. Taney skillfully developed the notion that federal and state authority inhabited separate spheres of influence, but that in all cases the states answered to the federal government.

Finally, Associate Justice Sandra Day O'Connor, within her concurring opinion in *Brockett v. Spokane Arcades, Inc.* (1985), wrote that:

> [T]his Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law.[66]

The case involved a First Amendment challenge to a Washington State law that codified "a comprehensive scheme establishing criminal and civil penalties for those who deal with obscenity or prostitution."[67] In the view of those who challenged the law, Washington's strict regulation against indecent and offensive materials was too vague to be applicable. The United States Court of Appeals reversed the law on these grounds. When the Supreme Court overturned the ruling, it was the *Ableman* decision that provided the necessary legal foundation for the Court's decision.

These decisions have reinforced Chief Justice Roger Taney's notion that federal and state authority inhabit separate spheres of influence, but that in all cases the states answer to the federal government. Because the *Ableman* decision, more so than any other opinion of the Court, sustained this relationship through a combination of sound reason and unanimous support of the Justices, it has remained a stable benchmark in an ever-changing interpretation of the Constitution. It is also the reason why, a century after his death, Justice Felix Frankfurter praised Taney: "[T]he intellectual power of his opinions and their enduring contribution to a workable adjustment of the theoretical distribution of authority between two governments for a single people place Taney second only to Marshall in the constitutional history of our country."[68]

Conclusion

The unique nature of the American national character is that citizens were loyal to both their state and to the central union, born out of the need of mutual protection; but establishing symmetry of authority between these sovereignties was a most arduous task. At the outset of the nineteenth century, the Marshall Court sought the "preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority."[69] By redefining the roles of federal and state governments and disallowing any and all challenges to that jurisdictional relationship, Roger Brooke Taney completed the work of the Federalists. This he did with the doctrine of federal sovereignty in *Ableman v. Booth*.

ENDNOTES

1 62 U.S. (21 How.) 506 (1859).

2 The Rev. John Witherspoon of New Jersey—a signer of the Declaration of Independence—conveyed his confidence in the Articles of Confederation, in that they were "the present enlightened state of men's minds." Quoted by Thomas Jefferson in **Thomas Jefferson: Writings**, ed. Merrill D. Peterson (New York: The Library of America, 1984), 29.

[3]Essay #15 in Alexander Hamilton, James Madison, and John Jay, ***The Federalist***, ed. Benjamin Wright Fletcher (Cambridge: Harvard University Press, 1961), 156.

[4]*Chisholm v. Georgia*, 2 U.S. (2 Dal.) 419, 420–421 (1793).

[5]*Ibid.*, 422.

[6]*Ibid.*, 433.

[7]U.S. Constitution, Art. III, § 2.

[8]*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

[9]*United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812).

[10]14 U.S. (1 Wheat.) 304 (1816).

[11]17 U.S. (4 Wheat.) 316 (1819).

[12]19 U.S. (6 Wheat.) 264 (1821).

[13]Essay #59, ***The Federalist***, 394.

[14]Thomas Jefferson to Spencer Roane, 6 September 1819, in **The Writings of Thomas Jefferson**, ed. Albert Ellery Bergh (Washington, DC: The Thomas Jefferson Memorial Fund, 1904), 15:213.

[15]Joseph Story, **Commentaries on the Constitution of the United States** (Boston: Hillard, Gray and Company, 1833), 1:357 (sec. 383).

[16]U.S. Constitution, Art. III § 2.

[17]*United States v. Hudson and Goodwin*, 34.

[18]Essay #78 in ***The Federalist***, 496. Within the text of his 1821 *Cohens* opinion, Chief Justice Marshall agreed with this approach: "[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter." *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 387 (1821).

[19]Alexis De Tocqueville, **Democracy in America**, ed. Henry Reeve (New York: Vintage Books, 1990), 1:151.

[20]The Chief Justice proclaimed this doctrine in his majority opinion for the 1837 case *Charles River Bridge v. Warren Bridge*: "[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547 (1837).

[21]22 U.S. (9 Wheat.) 1 (1824).

[22]The Taney Court reaffirmed the *Gibbons* stance with its decisions in *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), *The License Cases* 46 U.S. (5 How.) 504 (1847), and *The Passenger Cases* 48 U.S. (7 How.) 283 (1849).

[23]*The Antelope*, 23 U.S. (10 Wheat.) 66, 115 (1825).

[24]*Commonwealth v. Aves*, 18 Pick. (35 Mass.) 193, 215 (1836).

[25]40 U.S. (15 Pet.) 449 (1841).

[26]*Prigg v. Pennsylvania*, 41 U.S. 611 (1842).

[27]41 U.S. (16 Pet.) 1 (1842).

[28]46 U.S. (5 How.) 215 (1847).

[29]51 U.S. (10 How.) 82 (1851).

[30]John Locke, **Two Treatises of Government**, ed. Peter Laslett (Cambridge, UK: Cambridge University Press, 1960), 320.

[31]Essay #70, ***The Federalist***, 451.

[32]Essay #54, ***The Federalist***, 370.

[33]*Scott v. Sandford*, 60 U.S. (19 How.) 417 (1857).

[34]Quoted in Richard B. Morris, **Witnesses at the Creation: Hamilton, Madison, Jay, and the Constitution** (New York: Holt, Rinehart, and Winston, 1985), 215.

[35]*Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229 (1847).

[36]*Jack v. Martin*, 14 Wend. 507, 532 (N.Y. 1835).

[37]*Scott*, 405.

[38]*Ibid.*, 404.

[39]"The Late Decision of the Supreme Court of the United States," *Zion's Herald and Wesleyan Journal*, 18 March 1857, 2.

[40]"Citizenship," *New Orleans Daily Picayune*, 21 March 1857, 1.

[41]"President Pierce at Home," *New York Daily Times*, 3 October 1856, 1.

[42]"Essays by The Impartial Examiner," Letter to the Virginia Independent Chronicle, 27 February 1788; reprinted in **The Complete Anti-Federalist**, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1981), 5:182.

[43]*Jones v. Van Zandt*, 13 Fed. Cas. 1047, 1048 (C.C.D. Ohio, 1843).

[44]Background information culled from *Ableman v. Booth*; *United States v. Booth*, 62 U.S. (21 How.) 507–508 (1859).

[45]David M. Potter, **The Impending Crisis, 1848–1861** (New York: Harper & Row Publishers, 1976), 295.

[46]*Ibid.*, 507–14.

[47]*Ableman*, 525.

[48]*Ibid.*, 514–15. Taney made reference to this ideology within the text of the majority opinion: "And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Ibid.*, 516.

[49]*Ibid.* The issue of initial contention was whether a state court had the right to "supersede and annul the proceedings of a commissioner of the United States." More serious was the second charge: that the Wisconsin state supreme court had exercised authority over the proceedings and judgment of a district court that was beyond its sphere of influence. *Ibid.*, 513.

[50]*Ibid.*, 515.
[51]*Ibid.*, 526.
[52]*Ibid.*, 521.
[53]*Ibid.*, 524.
[54]*Ibid.*, 520.
[55]*Ibid.* The Chief Justice added that "[A]s the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void."
[56]*Ibid.*, 326.
[57]*Ibid.*, 521.
[58]*Ibid.*, 525.
[59]*Ibid.*, 525.
[60]*Ibid.*
[61]*Ibid.*, 524.
[62]*Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).
[63]*Ibid.*, 407. In tandem, the Court questioned "[w]hether any judicial officer of a State has jurisdiction to issue a writ of *habeus corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government." *Ibid.*, 402.
[64]California Penal Code §§11400 and 11401, quoted in *Younger v. Harris*, 401 U.S. 37 (1971).
[65]*Ibid.*, 42.
[66]*Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985).
[67]*Ibid.*, 493.
[68]Quoted in Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993), 104.
[69]*Cohens*, 391.

Presidents as Supreme Court Advocates: Before and After the White House

ALLEN SHARP

Prologue

Eight men who took the presidential oath also appeared before the Supreme Court of the United States as advocates. From Senator John Quincy Adams at the outset of the Marshall Court to Richard M. Nixon during the high-water mark of the Warren Court, future and past Presidents have argued before the Supreme Court on such varied and important topics as land scandals in the South, slavery at home and on the high seas, the authority of military commissions over civilians during the Civil War, international disputes as an aftermath of the Alaskan Purchase, and the sensitive intersection between the right to personal privacy and a free press. Here, briefly, are stories of men history knows as Presidents performing as appellate lawyers and oral advocates before the nation's highest court.

John Quincy Adams: Senator—Lawyer—Diplomat—Congressman

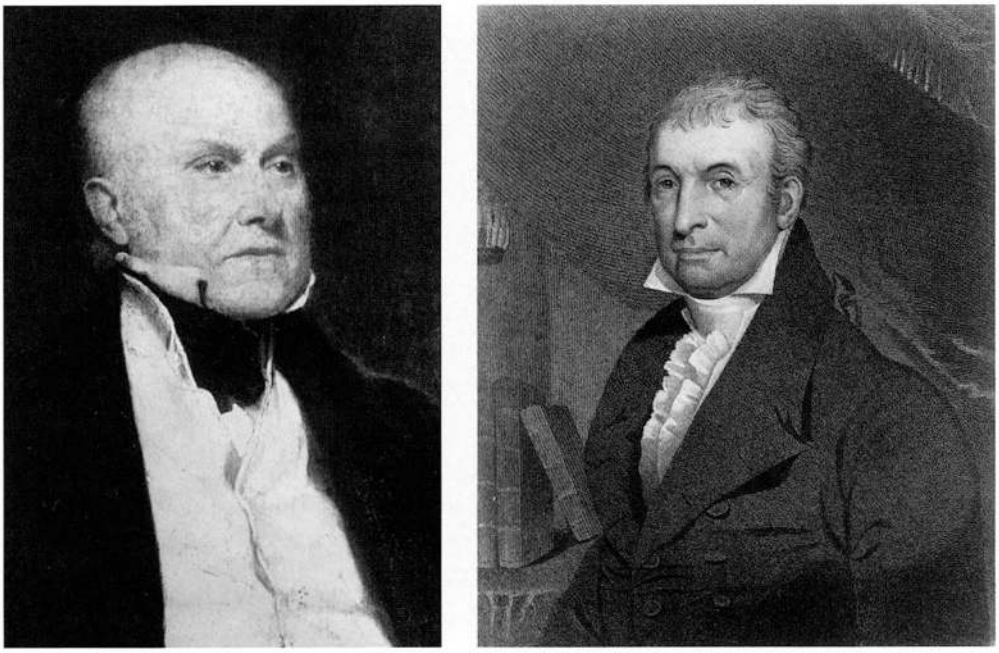
As a young man, John Quincy Adams was admitted to practice law but grew bored with it and performed diplomatic chores for the Washington and Adams administrations in the 1790s. Judge John Davis of the U.S. district court in Massachusetts then named Adams Commissioner of Bankruptcy, making him a federal employee with a regular paycheck. The coming of the Jefferson administration ended that employment, with legislation removing job appointments from judges' purview and placing them at the disposal of the President. So Adams was out of work except for a small law practice and a part-time teaching position at Harvard. He could now start a political career of his own.[1]

Adams was elected to the U.S. Senate by the Massachusetts legislature in 1802, but the Senate did not convene until March 4, 1803. By the time he arrived at the Capitol, space had finally been found in that crowded building for

the Supreme Court of the United States, and Adams became a regular spectator at its sessions. The Courtroom was only a few steps from the Senate chamber, and Adams was inspired to be admitted to practice before the Supreme Court.

Adams made his debut before the Supreme Court early in his Senate term. On February 23 and 24, 1804, Senator Adams argued before the Supreme Court in *Church v. Hubbart*,[2] a case from the federal circuit court in Massachusetts involving a maritime insurance policy excluding coverage for illicit trade with the Portuguese in Brazil. Despite Adams' best efforts, Chief Justice John Marshall remanded the case on a technical point for trial in order to authenticate certain edicts of Portugal. Adams' seasoned opponents in this case were Luther Martin and Richard Stockton. In the same 1804 term, Adams argued *Head and Amory v. Providence Insurance Co.*,[3] a case from the federal circuit court in Rhode Island. His co-counsel was John T. Mason, a prominent Jeffersonian lawyer from Maryland. Adams' opponent, once again, was Martin, the great "Federalist Bulldog" from Maryland. On February 25, 1804, Chief Justice Marshall ruled in favor of Head and Amory, Adams' clients, and remanded for new trial. After arguing his first two cases before the Supreme Court with mixed results, Adams wrote to a friend, "I have never witnessed a collection of such powerful legal oratory as at this session of the Supreme Court."[4]

Later in life, Adams would say harsh things about President Jefferson,[5] but during his single partial term in the Senate, he supported the President's embargo and efforts to purchase Louisiana. Senator Adams' pro-embargo stance did not endear him to his federalist constituency and the Massachusetts legislature took the unusual act of, in effect, terminating his term before he had served its full six years. Adams' Senate stint thus ended prematurely on June 8, 1808, by resignation. Historian Allan Nevins described it as a "rebuke":



Senator John Quincy Adams (left) found himself opposing counsel to Luther Martin (right) in several cases he argued before the Supreme Court. Martin, known as the "Federalist Bulldog," was a frequent advocate who had effectively represented Maryland at the Constitutional Convention in 1787.

> Adams's term as Senator was to expire March 4, 1809. By electing his successor so many months before it was necessary to do so, the Massachusetts legislature administered a stinging and insulting rebuke to him. The anti-Embargo resolves underlined this rebuke, and Adams' pride compelled him to resign forthwith. The son of John Adams lost his office for supporting Thomas Jefferson![6]

Former Senator Adams' next argument before the Supreme Court was delivered in Long's Tavern on Capitol Hill, near the present location of the Supreme Court building, on February 9, 1809. The case, *Hope Insurance Company at Providence v. Boardman and Pope*,[7] again came from the federal circuit court in Rhode Island, but this time Adams represented the insurance company. His opponent in *Hope* was Jared Ingersoll, an experienced advocate who had been a member of the Constitutional Convention of 1787 and who would become the unsuccessful vice-presidential candidate of the Federalist Party in its last gasp. The case itself is of little consequence, although Adams' own notes and at least two biographers indicate that he was unprepared for questions relating to diversity of citizenship jurisdiction of corporations. The case was decided against his client in a one-sentence, per curiam opinion.

Adams' fourth endeavor, *Fletcher v. Peck*, was a major case involving the notorious land-fraud controversy in the western area of Georgia called Yazoo County, now in Mississippi. Adams represented John Peck of Boston, who had purchased land grants in Yazoo provided by a corrupt Georgia legislature in 1794. Georgia soon rescinded the authorization for the Yazoo land grants, and Robert Fletcher of Amherst, New Hampshire, brought a "friendly suit" against Peck, apparently on the basis of diversity of citizenship jurisdiction, dragging the federal judiciary into the southern land dispute. The litigation came before Associate Justice William Cushing, sitting on circuit in Massachusetts,[8] who ruled for Peck. Adams argued the appeal before the Supreme Court on March 2, 1809, from 11:00 A.M. to 4:00 P.M.; a Federalist Congressman from South Carolina, Robert Goodloe Harper, was co-counsel. Opposing counsel was again Luther Martin, arguing for Fletcher. Spectators found Adams "dull and tedious."[9]

A few days after the arguments in *Fletcher*, Adams wrote in his memoirs about the proceedings:

> This morning the Chief Justice read a written opinion in the case of *Fletcher v. Peck*. The judgment of the circuit court was reversed for a defect in the pleadings. With regard to the merits of the case, the Chief Justice added verbally, that, circumstances as the court are, only five judges attended, there were difficulties which would have prevented them from giving any opinion at this term had the pleadings been correct; the court the more readily forbore giving it, as from the complexion of the pleadings they could not but see that at the time when the covenants were made the parties had notice of the acts covenanted against; that this was not to be taken as part of the clerk's opinion, but as a motive why they had thought proper not to get one at this term; I then required whether the court had formed an opinion upon the issue made upon the special verdict; to which he answered that on that and the right of the legislature itself, that the opinion of the court had been against the defendant they would have given it.[10]

Adams' memoirs also describe going to James Madison's presidential inauguration from the Court in the two-hour lunch break from oral argument:

> *March 4.* Going up to the Capitol, I met Mr. Quincy, who was on his way to Georgetown to get a passage to Baltimore. The court met at the usual

hour, and sat until twelve. Mr. Martin continued his argument until that time, and then adjourned until two.

I went to the Capitol, and witnessed the inauguration of Mr. Madison as President of the United States. The House was very much crowded, and its appearance very magnificent. He made a very short speech, in a tone of voice so low that he could not be heard, after which the official oath was administered to him by the Chief-Justice of the United States, the four other Judges of the Supreme Court being present and in their robes. After the ceremony was over I went to pay the visit of custom. The company was received at Mr. Madison's house; he not having yet removed to the President's house. Mr. Jefferson was among the visitors. The Court had adjourned until two o'clock. I therefore returned to them at that hour. Mr. Martin closed the argument in the cause of Fletcher and Peck; after which the Court adjourned. I came home to dinner, and in the evening went with the ladies to a ball at Long's, in honor of the new President. The crowd was excessive—the heat oppressive, and the entertainment bad. Mr. Jefferson was there. About midnight the ball broke up.[11]

The case was set over for further argument in 1810, resulting in Chief Justice Marshall's landmark decision to apply the reasoning of *Marbury v. Madison* to state legislation by way of the Contract Clause. By that time, however, James Madison had offered—and Adams had accepted—the position of Minister to Russia, thereby withdrawing as counsel for Peck. He was replaced by Joseph Story of Massachusetts. Adams would not appear in any U.S. courtroom again until 1841, when he made a significant legal comeback (described below).

Adams' experience arguing before the Court probably did not contribute to his reluctance to accept a position on the high Bench. When Justice Cushing died on September 13, 1810, President Madison attempted to replace him first with Levi Lincoln and then with Alexander Wolcott, both without success. Madison then nominated Adams for that seat on the Supreme Court, and the Senate at once confirmed him, all without his knowledge. From St. Petersburg, Adams turned down the $3,500-a-year job saying, "I am also, and always shall be, too much of a political partisan for a judge."[12] So the Supreme Court appointment ultimately went to Story, who had succeeded him as counsel in *Fletcher v. Peck*.[13] The time lag between Cushing's death and the Story appointment was severely extended by the time required to get word to and from Adams in Russia.

Old Man Eloquent Back to the Court

Adams served as President from 1825 to 1829, losing to Andrew Jackson in the era of the common man. He was elected to the U.S. House of Representatives in 1830, and his 18 years of service there probably represent the best use ever made of the talents of an ex-President. He became known as a Conscience Whig, a group generally from New England that was vocal in opposing slavery before the Civil War. Adams was outspoken on virtually every issue, and was utterly indifferent to political or personal criticism. His last gasp on the floor of the House in February 1848[14] was in opposition to the awarding of medals to certain officers who had served in the Mexican War. (Adams, along with Henry Clay and Representative Abraham Lincoln, had opposed the Mexican War.) He also vigorously and continuously fought the southern-imposed gag rule that prevented anti-slavery petitions from being filed in the House of Representatives.

Adams' credentials as an outspoken opponent of slavery no doubt prompted abolitionist lawyers Lewis Tappan and Roger Sherman

Baldwin to hire him in 1841 to argue before the Supreme Court on behalf of the *Amistad* mutineers. These Africans had been taken as slaves bound for Cuba, but along the way their charismatic leaders mutinied, and eventually the ship was taken into port near Long Island, New York. The Africans were taken into custody in Connecticut, where proceedings were held before U.S. District Judge Andrew Thompson Judson, and, at times, Supreme Court Justice Smith Thompson sitting on circuit. Some of the Africans were indicted by a federal grand jury in Connecticut on charges of piracy and murder. Justice Thompson and Judge Judson convened the federal circuit court, ruled that there was no jurisdiction over the alleged crimes that took place on the high seas in a foreign-owned vessel, and dismissed all criminal charges. At the same session, the circuit court also considered two writs of habeas corpus to release all the Africans from federal custody. Justice Thompson declined to release the Africans because they were subject to possible property claims that were before the U.S. District Court in Connecticut. Judge Judson heard these claims in January 1840 and ordered the Africans returned to their African homeland. By January 1841, the case was before the Supreme Court by virtue of the appeal of U.S. Attorney William Holabird, no doubt acting at the instance of the Van Buren administration.[15] The principal architect of the case in Connecticut was Baldwin, the grandson of Roger Sherman, a key member of the Constitutional Convention from Connecticut. Adams visited the Africans on a trip between Massachusetts and Washington D.C. and met their leader. His memoirs indicate that he was deeply impressed with them and their cause.

The case came up for argument at the time William Henry Harrison and John Tyler were being inaugurated, on March 4, 1841. In those days, lengthy arguments were heard in a single case and often ran for days. Adams argued for the better part of the first day, but Associate Justice Philip Barbour died that night and the argument was postponed until March 3.

Former President John Quincy Adams argued the *Amistad* case before the Supreme Court in 1841. A vociferous opponent of slavery, he eloquently reasoned that the slaveholders, not the African mutineers, were the criminals. Pictured is Joseph Cinquez, leader of the revolt aboard the Spanish slave ship.

This gave Adams more time to worry about his performance. In his diary entry, he prayed, "I implore the mercy of Almighty God so to control my temper, to enlighten my soul, and to give me utterance, that I may prove myself in every respect equal to the task."[16] He later added, "I walked to the Capitol with a thoroughly bewildered mind—so bewildered as to leave me nothing but fervent prayer, that presence of mind may not utterly fail me at the trial I am about to go through."[17]

His memoirs indicate that he was greatly concerned about the precedental value of two mid-1820s decisions of the Supreme Court involving slaves from a ship called *The Antelope.* Those cases had been argued by Francis Scott Key on behalf of the Africans under the sponsorship of the American Colonization Society. Key's principal tenet was that the free blacks from the slave ships should be

returned to their native Africa. Adams conferred with Key about the importance of the *Antelope* precedent, having been involved in the incident first as Secretary of State and later as President.[18] But by 1841, Adams had a different political agenda. He was incensed that Martin Van Buren, in an effort to be re-elected as President, would pander to the southern slavery interests in his own party by appealing an adverse decision made by the federal court in Connecticut. Although Smith Thompson was generally known as being opposed to slavery, Judge Judson was not, and his decision in favor of the Africans had come as something of a surprise.

There is no verbatim transcript of Adams' argument, but he published his own written document—undoubtedly corrected—which is extensive. The case was argued for the United States by Attorney General Henry Gilpin. Gilpin reasoned that Spain's proffered documentation that the Africans were slave property should be accepted. Historian Lynn Hudson Parsons describes Adams' eloquent argument:

> Then came Adams, with a withering attack on the Van Buren administration and the Spanish minister's charge that the Africans were robbers and pirates. "Who were the merchandise and who were the robbers?" he asked. "According to the construction of the Spanish minister, the merchandise were the robbers and the robbers were the merchandise. The merchandise was rescued out of its own hands, and the robbers were rescued out of the hands of the robbers.

Justice Joseph P. Story's decision in the case narrowly concluded:

> Upon the whole, our opinion is, that the decree of the Circuit Court, affirming that of the District Court, ought to be affirmed, except so far as it directs the negroes to be delivered to the President, to be transported to Africa, in pursuance of the act of the 3rd of March 1819; and, as to this, it ought to be reversed: and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without delay.[19]

Only Justice Henry Baldwin dissented. No Adams nominee was on the Court in 1841.[20] When Adams brought up the problem of the Africans' return home with Secretary of State Daniel Webster, Webster punted it to President Tyler. The new, slave-owning President was distinctly uninterested in helping the Africans. Adams even tried to get some legislation through Congress to assist in the return of the Africans, but did not succeed. Finally, in November, a group of American missionaries escorted 35 of the Africans on a ship from New York to Sierra Leone.

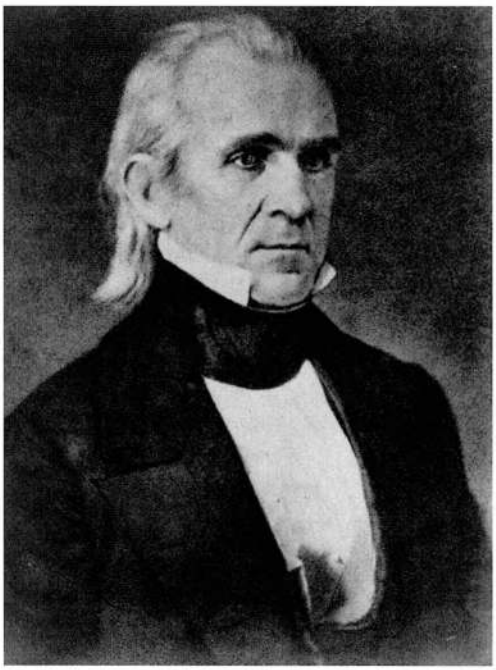
James Polk and the Tennessee Land Litigation

If one happened to stumble onto an obscure Marshall Court opinion in *Williams v. Norris*,[21] it would appear to be of little impori. Reading the very tedious description of the controversy would add to that impression. The case involved 1,288 acres of land in Lincoln County, Tennessee, and the interests of the Norris and Williams families. Yet if one gets past the technicalities of 18th- and early 19th-century western land law, this case reflects a major societal problem in the West, especially in western Tennessee. It was representative of what emerged as a major political dispute over land titles in western Tennessee, which eventually struck at the heart of Jacksonian dominance of Tennessee politics.

In 1784, homesteader Ezekiel Norris made a land claim in a public record called the Entry Taker of western land, but the margin of the document stated "detained for nonpayment." The land was then a part of North Carolina, but in 1789 the state ceded its western territory to the United States of America, reserving the right to protect land titles

where the entries had been made according to law. That western territory became the state of Tennessee in 1796. In 1803, the states of North Carolina and Tennessee made a compact that ceded to Tennessee the power to grant and protect titles to all claims of land lying in the state that had previously been reserved by North Carolina. Three years later, Congress ceded to Tennessee all of the rights it retained in western Tennessee, but at the same time drew a north/south line across the state and limited the collection of warrants to lands east of the line. Between 1794 and 1815, Congress passed a series of federal statutes dealing with the process of protecting the title to particular lands.

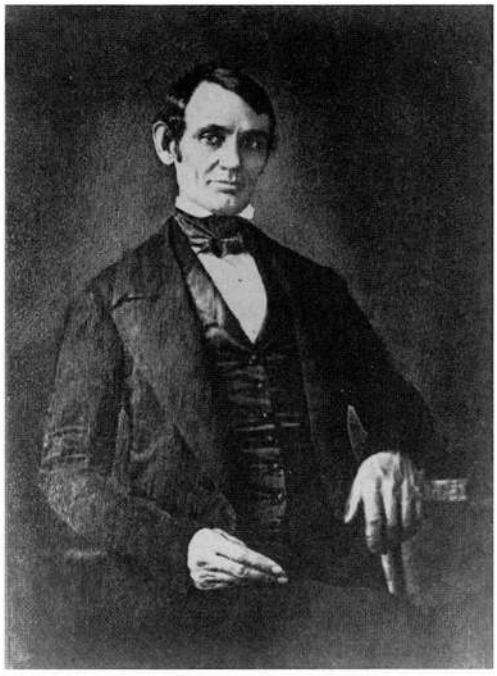
Limiting the area for the collection of specie certificates and land warrants to east Tennessee only did not work. So west Tennessee was opened up for that purpose, and the seeds were sown for a major political battle. Bad records and speculation in warrants were rampant. A person holding a later warrant who had improved land could be evicted as a squatter. Congressman Davy Crockett weighed in by introducing bills to protect the actual occupants of the land and offering to pre-empt land rights to squatters. But, alas, he left the Congress, went west, and died at the Alamo before the bills became law. Norris finally got the legislature of Tennessee to pass a special act to protect his land title, but the special statute was challenged as being in conflict with the Constitution, invoking Section 25 of the Judiciary Act of 1789.



James Polk's only appearance before the Court occurred in 1827, when he represented a Tennessee homesteader in a complex and political case involving land titles. At the time, Polk was representing Tennessee in the U.S. House of Representatives.

The *Norris* case attracted the participation of celebrity counsel. The interests of Oliver Williams in Norris's 1,288 acres were represented by Tennessee Congressman James Knox Polk, along with Thomas Hart Benton, then a United States Senator from Missouri. Polk was a rising star in the House of Representatives, where he was principally known for carrying the political water for Andrew Jackson. Also associated with Jackson, Benton had been a resident of Tennessee before moving to Missouri and becoming its first U.S. Senator, serving for five consecutive terms between 1820 and 1850. Representing the Norris family interest was John Eaton, then a Senator from Tennessee and later Secretary of War. He was married to Peggy Eaton, who became a cause célèbre during one of the Jackson administration's scandals. Eaton's co-counsel was Hugh Lawson White, a Senator from Tennessee who had succeeded Jackson in the Senate and often led the anti-Jackson faction. It would be hard to find four more powerfully placed politicians as counsel in this obscure land case from Tennessee, and their presence in *Norris* says more about the important political and economic issues underlying the case than the published decision of the Supreme Court might indicate.

The case was argued January 11 and 12, 1827. On the first day, Eaton led off for the plaintiffs, followed by Polk for the defendants. The next day, Benton argued for the



Representative Abraham Lincoln argued a minor case before the Supreme Court in 1849. His name is associated with four others, but his participation was probably minimal.

defendants, with White closing for the plaintiffs. The arguments focused on highly technical land-law questions. One question that attracted the Supreme Court's attention was whether the special act of the Tennessee legislature in favor of Norris's land claims violated the Contract Clause, after the fashion of *Fletcher v. Peck*. That issue was raised by Chief Justice John Marshall, but was summarily dismissed. Marshall, for all the Court, decided that it did not have jurisdiction in the land controversy and sent the case back to the supreme court of Tennessee.

In spite of the celebrity status of the counsel, the case settled nothing of the western Tennessee land controversy. As Polk's biographer asserts, "[T]his Tennessee land question was revived from time to time by both Polk and 'Davy' Crockett, and was one of the rocks on which the Jackson party in Tennessee would split into fragments."[22] Polk later served as Speaker of the House for two terms, briefly as governor of Tennessee, and then as President of the United States for a single term from 1845 to 1849. He never appeared before the Supreme Court again.

Abraham Lincoln: A One-Term Illinois Congressman Argues

Thanks to the scholarship of G. Cullom Davis at the Lincoln Legal Papers Project, we now know much about Lincoln's activities as a lawyer between 1836 and 1861. In his recent book, *Lincoln*, David Herbert Donald also gives a good and insightful general analysis of Lincoln's lawyering talents, particularly as a courtroom litigator.[23] Lincoln tried hundreds of jury cases, argued many cases before the supreme court of Illinois, and presented many cases in the federal courts in Springfield and Chicago. During the time Lincoln practiced law, Illinois was in a federal circuit with Indiana, Ohio, and Michigan, and John McLean of Ohio was the Supreme Court Justice riding that circuit. Lincoln and McLean came to know each other well. In fact, Lincoln was employed in the patent case of the Cyrus McCormick reaper, originally filed in Chicago but then transferred by Justice McLean for trial in Cincinnati.[24] Lincoln followed the case to Cincinnati, but was treated badly by other cocounsel, including seasoned advocate Edwin McMaster Stanton and patent lawyer George Harding. Stanton froze Lincoln out of discussions about the reaper case and would not allow him to participate.

Lincoln served a single term as a Whig in the U.S. House of Representatives, from 1847 to 1849. While in Washington, he argued a land-title case, *William Lewis v. Thomas Lewis*,[25] at the time of President Taylor's inauguration. Lincoln was admitted to practice before the Supreme Court on March 7, 1849, the day of the argument, which continued on March 8. Chief Justice Roger B. Taney ruled against Lincoln in *Lewis* on a technical issue of the statute of limitations under the law of Illinois, speaking for the entire Court except Justice McLean, who dissented. (One of the

peculiarities of the Judiciary Act of 1789 was that McLean, who had acted in the case while sitting on the circuit court of Illinois,[26] could act on it again in the Supreme Court.) Lincoln would later support McLean for the Republican presidential nomination in 1856. There is no evidence that Taney's decision contributed to the coolness between the Chief Justice and Lincoln in the late 1850s and early 1860s, but it could not have helped their relationship. Recent scholarship gives Lincoln good grades for his professional competence in his only appearance before the Court.[27]

Although he did not again argue before the Court, Lincoln was hired in four other cases as counsel—perhaps only nominally—that were far more interesting than the *Lewis* case. For example, the *Forsyth*[28] case is historically interesting. Robert Forsyth's father was expelled from Peoria, Illinois, when an American commander burned the town during the War of 1812. Congress later permitted the expelled inhabitants to reclaim their land. Forsyth filed an ejectment to do so. One argument was that Forsyth had made a similar claim under the same federal statute for land in Detroit and was not entitled to "double-dip." Lincoln's name got associated with the case on a printed argument for Forsyth that Lincoln likely did not prepare. Salmon P. Chase argued the case against Forsyth and lost. Lincoln planned to argue more cases before the Supreme Court, but the presidential nomination and election in 1860 drew his focus instead.

James A. Garfield: Starting at the Top

Of all the subjects of this article, James A. Garfield is the greatest surprise. He was an ordained Christian minister and a follower and admirer of Alexander Campbell, the progressive Presbyterian minister who founded the Disciples of Christ in 1810. Campbell helped found Hiram College in Ohio and installed Garfield as its president.[29] At the outset of the Civil War, Garfield was admitted to practice in Ohio before the state supreme court, but there is no evidence of any serious legal practice. He served with distinction in the Union Army, became a breveted major general, and just after the Civil War was elected to the U.S. House of Representatives, where he stayed until he became President in 1881.

In 1866, while a Republican member of the House, Garfield joined David Dudley Field, Joseph E. McDonald, and Jeremiah S. Smith in representing Lambdin P. Milligan before the Supreme Court. A civilian who was tried by a military commission and convicted of conspiracy, Milligan was sentenced to death for his involvement in a plot to release and arm Confederate prisoners so they could participate in the invasion of Indiana. Garfield's co-counsels were all distinguished lawyers. Field, a successful New York lawyer, was the eldest brother of Stephen J. Field, a member of the Supreme Court who remained in the case. McDonald had been attorney general of Indiana and was later to serve in the U.S. Senate. A fellow Disciple of Christ, Smith had served as Attorney General and Secretary of State in the Buchanan administration, and had remained loyal to both the Union and the Democratic Party.

Garfield was admitted to practice before the Supreme Court at the outset of the week-long arguments in *Ex parte Milligan*.[30] He argued after Field, spending most of one day on a historical analysis of the uses of military commissions and martial law since 1322. His conclusion is worth restating:

> Your decision will mark an era in American history. The just and final settlement of this great question will take a high place among the great achievements which have immortalized this decade. It will establish forever this truth, of inestimable value to us and to mankind, that a Republic can wield the vast enginery of war without breaking down the safeguards of liberty: can suppress insurrection and put down rebellion,

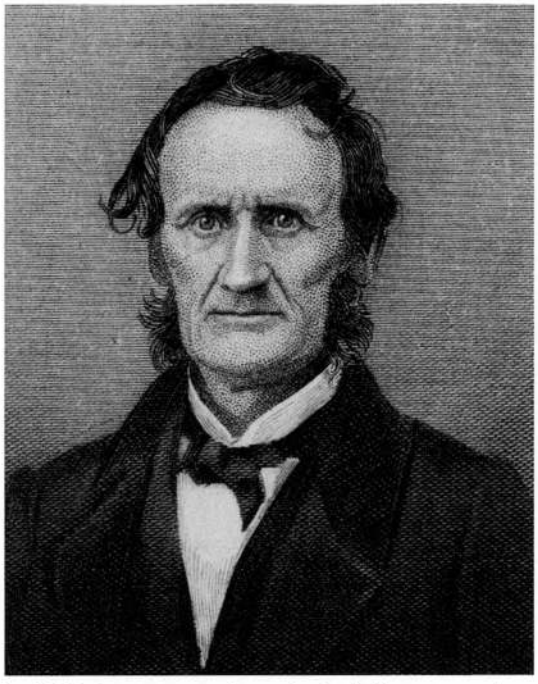
however formidable, without destroying the bulwarks of law, can, by the might of its armed millions, preserve and defend both nationality and liberty. Victories on the field were of priceless value, for they plucked the life of the Republic out of the hands of its enemies; but

Peace hath her victories
No less renowned than war;

and if the protection of law shall, by your decision, be extended over every acre of our peaceful territory, you will have rendered the great decision of the century.[31]

The government was represented by Attorney General James Speed, Henry Stanbery, and the colorful and somewhat infamous Benjamin F. Butler of Massachusetts, an erstwhile general in the Union Army. Garfield enjoyed the good will of Chief Justice Salmon P. Chase, also from Ohio, who described him as a "young, brilliant, and rising public man." Garfield and Chase played chess, which brings to mind Chief Justice Fred Vinson and President Harry S Truman playing poker together a century later.[32]

The Court unanimously agreed that Milligan should be released from the Ohio State Penitentiary, where he had been held since late 1864 under the decision of a 12-member Union Army military commission acting in Indianapolis. However, the Court divided 4 to 4 on the reason. Justice David Davis, Lincoln's long-time friend and campaign manager, wrote the better-known opinion, holding that the use of military commissions involving civilians and certain offenses in places outside of the military battle area where state and federal courts were functioning was a violation of the Due Process Clause of the Fifth Amendment. Davis was joined by Justices Field, Samuel Nelson, and



In 1866 Congressman James A. Garfield was one of several counsel who represented Lambdin P. Milligan (left), a civilian sentenced to death for his involvement in a plot to release and arm Confederate prisoners so they could participate in the invasion of Indiana. Garfield (right) spent most of his argument on a historical analysis of the uses of military commissions and martial law since 1322.

Nathan Clifford. Chief Justice Chase agreed that Milligan should be released, on the ground that Congress could subject citizens to military trials during wartime but had not given proper authorization in this case. Chase was joined by Justices James Moore Wayne, Noah Swayne, and Samuel F. Miller. Lincoln's Court appointees—Davis, Field, Swayne, Miller, and Chase—were thus divided on the issue.

Although Garfield's arguments prevailed, the case had a negative political downside. Milligan, now freed, was branded by the Radical Republicans as a Copperhead and a traitor. He was later portrayed as such in a civil trial for damages that he brought against his accusers. Milligan was represented by Thomas A. Hendricks, the future Vice President, while his accusers were represented by Indianapolis lawyer and future President Benjamin Harrison. In his final argument in that civil trial in May 1871, Harrison labeled Milligan an unqualified traitor.[33]

These facts presented a real political dilemma for Garfield, and he had to make peace with the Radical Republicans in his congressional district in Ohio. On this, his biographer states:

> Garfield might be charged with betraying his party, but no one could accuse him of selling out. He never made a cent out of the Milligan case, even though his clients included some of the wealthiest men in Indiana. From time to time, whenever he was strapped for cash, he would dun Milligan and his friends for payment, but his appeals were ignored. The experience, however, was more valuable than any fee. Garfield had won an overnight reputation as a constitutional lawyer which, if properly managed, could nourish a lucrative career.[34]

The analysis of Garfield's biographer is borne out in the 13 cases (two of which were printed arguments) that he handled from 1866 to 1880 in the Supreme Court after *Milligan.* Representative Garfield regularly appeared with or against some of the best Supreme Court advocates of the time, including: the aforementioned David Dudley Field; Ebenezer Rockwood Hoar, then Attorney General of the United States; Benjamin H. Bristow, the first Solicitor General; Michael C. Kerr, a United States Representative from Indiana and one-time Speaker of the House; and Solicitor General Samuel F. Phillips.[35]

Some of the cases Garfield appealed were insignificant, while others touched on important legal and historic events. In 1869, he represented a landowner in *Bennett v. Hunter,*[36] contesting a post–Civil War property tax that Congress had imposed. The Congressional act provided that if the tax was not paid, the property was subject to forfeiture and sale by the United States. The Supreme Court found for Garfield's client, determining that the tender of the full amount of taxes, penalty, and interest prior to the tax sale must be accepted by the United States—which rendered forfeiture in any later sale of the property by the United States null and void.

In *Henderson's Distillery Spirits,*[37] the United States prosecuted a forfeiture action and seized spirits purchased by Henderson's from a bonded warehouse because the taxes imposed on the production of spirits had not been paid by the distillery. The United States maintained this forfeiture action and seizure of spirits despite Henderson's having made a lawful purchase of the spirits from a bonded warehouse. The Court rejected Garfield's argument, which was based on old and obscure common-law concepts. The *Henderson's* case drew a dissent from Chief Justice Waite and Justices Field and Miller.

Notwithstanding Garfield's deep religious and church ties, on at least two occasions he represented the Baltimore and Potomac Railroad Company against the Trustees of the Sixth Presbyterian Church. In 1873, the case involved a jury verdict of $11,500 by the church against the railroad for damages resulting from

the company's use of a road in front of the church property.[38] The highest court in the District of Columbia upheld, and the issue came before the Supreme Court, where the church argued that it was without jurisdiction to entertain the appeal. Garfield argued for the railroad that the Court did have jurisdiction pursuant to an act of Congress. The Court denied the church's motion to dismiss on that basis. Garfield was next hired by the railroad in a case where the church sought compensation for injuries resulting from the railroad's use of a depot building near a church and the running of trains to and from it.[39] The railroad argued that the assessment of damages was not authorized by law, and the Court, on a procedural technicality, declined to examine the question of the assessment of damages.

In a case from the Indiana circuit court, Garfield represented the appellant in *Putnam v. Day*, this time *against* the railroad.[40] Putnam had obtained a judgment against a railroad company in Floyd County, Indiana. Garfield was able to preserve that judgment before the Supreme Court. In a case from Michigan, Garfield was hired by a township that wanted to issue bonds for the construction of a railroad. The federal court in Michigan disallowed it, and the Supreme Court upheld. Justices Miller and Davis dissented in favor of Garfield's position. Although it was argued under the Michigan state constitution, this case, *Pine Grove v. Talcott*,[41] may have been an early glimpse of substantive due process.

In 1876, Garfield was involved in two insurance cases. In *Hoffman v. John Hancock Mutual Life Ins. Co.*,[42] he represented Frederick Hoffman's widow in an attempt to enforce a premium collected by an agent for a life-insurance policy. The facts in this case surely made a man as serious as Garfield smile. Here, the agent, instead of collecting cash for the premium, received a horse worth $400. The Supreme Court was not amused, however, and ruled that life insurance is primarily a cash business and that the acceptance of the horse in lieu of cash amounted to an *ultra vires* act and a fraud by the agent on the company. The other insurance case involved both New York Life Insurance Company and Manhattan Life Insurance Company[43] for policies issued before the Civil War. Garfield represented the insurance companies in an appeal from the federal circuit court in Mississippi. The Supreme Court, in an important decision for the insurance industry of the time, determined that an action could not be maintained for the amount assured on a life-insurance policy forfeited for nonpayment of the premium, even though the war prevented the insured from making the payment. However, the Court did find that the purchaser of the policy had a right to the equitable value of the policy with interest from the close of the war.

Less successfully, Garfield represented an employee of the Government Printing Office seeking additional compensation under a resolution of Congress that went into effect in 1867. The Court of Claims had granted additional compensation to the employee, named Allison, but the Supreme Court reversed,[44] determining that Allison and other employees were not covered under the resolution and would therefore have to forfeit the additional compensation.

Another of Garfield's cases pertained to the location of the county seat of Mahoning County in Ohio, which had been changed from the small town of Canfield to Youngstown. In spite of Garfield's best efforts, arguing under the Contract Clause, the Supreme Court would not wade into this local fight.[45] Similarly, in *Potts v. Chumasero*,[46] Garfield represented the Governor, secretary and marshal of the Montana Territory against certain citizens, most of whom lived in or around Helena and were attempting to move the territorial capital from Virginia City to Helena. After a state election on the subject, the Supreme Court of Montana Territory issued a mandate requiring a recount in two of the counties in that territory, because the vote showed a majority against removal of the seat. After the recount, the vote showed a majority in favor of the removal.

Garfield represented the Governor, secretary, and marshal of the Montana Territory against citizens attempting to move the territorial capital from Virginia City to Helena (pictured) in 1876.

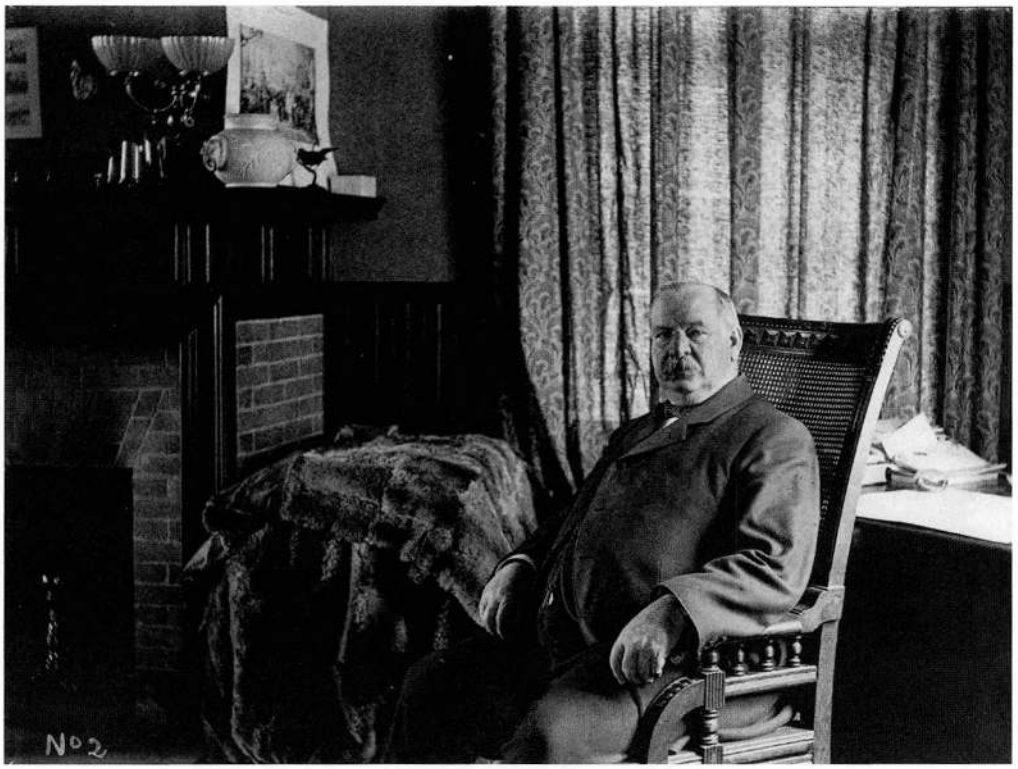
As in the Ohio county seat case, the Supreme Court sidestepped the issue, throwing out the case on the basis of a statute that required the amount in controversy to be more than $1,000. The Supreme Court held that none of the governmental officials were at risk of losing any money, and, therefore, the Court was without jurisdiction to hear the case.

It is interesting to note that for a brief time in 1872, Garfield and Benjamin Harrison were on record as opposing counsel in the same case. Unfortunately for history, Garfield's obligations on the House floor prevented any direct confrontation between these two future Presidents in the Courtroom.[47] A victim of assassination, Garfield would serve only six months as President in 1881.

Grover Cleveland: Between Presidencies

Grover Cleveland commenced his political career in Buffalo, New York as sheriff, became Governor, and then, in 1884, President of the United States. He lost narrowly in 1888 to Benjamin Harrison, but did not return to Buffalo. Rather, he established himself with the Bangs, Stetson, Tracy & MacVeagh law firm in New York City, where he mainly did office work and mediation and became friendly with J. Pierpoint Morgan and other wealthy clients of the firm. He was not a partner, but was "of counsel." Cleveland argued one minor case before the Supreme Court of the United States in 1891. In doing so, he became the first former President to argue before members of the Court—in this case, Chief Justice Melville Fuller and Justice Lucius Q. C. Lamar—whom he had himself appointed.

The case was of no large importance, involving a bond issue in the city of New Orleans.[48] Cleveland appeared for John Crossly & Sons, Ltd., who were holders of

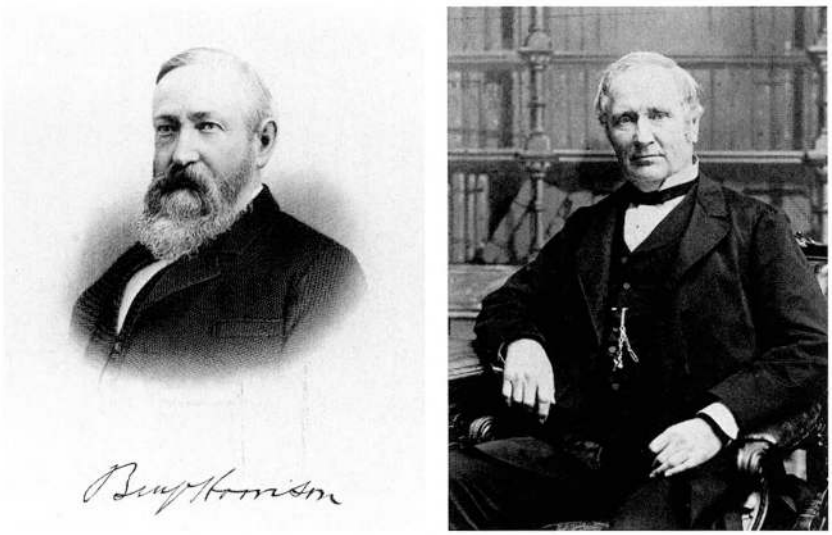


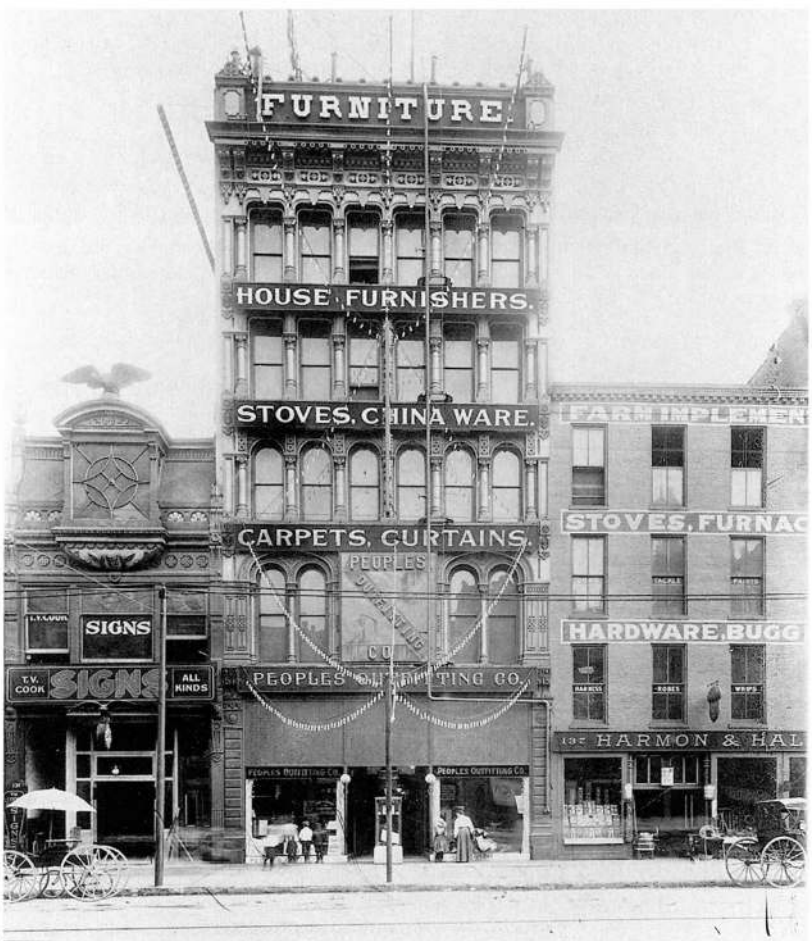
Grover Cleveland argued one minor case before the Supreme Court in 1891, marking the first time a former President argued before Justices he had appointed. Cleveland's two appointees, Chief Justice Melville W. Fuller and Justice Lucius Q. C. Lamar, both voted against his arguments.

certain drainage warrants. Justice David Brewer wrote an extended opinion affirming, but Justice John Marshall Harlan dissented at length, with Chief Justice Fuller and Justice Lamar joining the dissent. Pressure to side with the President who appointed them was thus not an obstacle for the Cleveland appointees. Justice Henry Billings Brown had recused himself, so the vote was 5–3. Interestingly, Cleveland was in regular correspondence with Chief Justice Fuller and gave ex parte comment to Fuller about the case's aftermath.[49] But the press made no particular issue of the fact that for the first time in history, a former President had argued a case as a lawyer before a Supreme Court that included members he had appointed. Perhaps if the case had been of larger import, the notion of a potential conflict of interest would have been raised.

Benjamin Harrison: Lawyer-Senator

In **The Harrisons**, Ross F. Lockridge, Jr. outlines how a remarkable transformation occurred during four generations of the Harrison family. The first Benjamin Harrison, "The Signer," was a part of the aristocratic, slave-owning plantation society of the James and York Rivers in Virginia, a member of the Continental Congress, a signer of the Declaration of Independence, and the Governor of Virginia just as the War of Independence was coming to an end. The Signer's younger son, William Henry Harrison, was governor of the Indiana Territory, a war hero of sorts, and—for 30 days—President of the United States. William Henry's son, John Scott Harrison, was a Whig member of the House of Representatives from Ohio in the mid-19th century. But Representative Harrison's son, the second





Former President Benjamin Harrison (left) represented Lambdin Milligan's accusers—not before the Supreme Court, but in an Indiana common-law damage case. Thomas A. Hendricks (right), a powerful Democratic lawyer who had served in the Indiana legislature and in both Houses of the U.S. Congress, represented Milligan. Harrison and Hendricks were simultaneously opposing each other in a case before the Supreme Court involving an injunction requested by the taxpayers of New Albany, Indiana (above) to enjoin the city from paying interest on bonds issued to construct a railroad.

Benjamin Harrison, was unlike his politically oriented forbears. He was a man of his craft—lawyering.

Harrison studied law in Cincinnati in the office of Bellamy Storer, a former Whig Congressman. He "kept his nose to the grindstone," which greatly pleased Storer, who played a role in forming Harrison's legal talents similar to the one Stephen T. Logan exercised with young Abraham Lincoln. In the 1860 election, running as a Republican, Harrison was elected to the office of Reporter of the Supreme Court of Indiana, then a statewide, elected office. The job provided no compensation except for what money could be made printing and selling the official reports. The Reporter was also permitted to engage in the private practice of law, and Harrison became a first-rate litigator. But he resigned his position and enlisted in the Union Army when war broke out during his first term.

Like Garfield, Harrison was also involved in the case of Milligan, the Indiana lawyer who was tried in 1864 for antiwar activities and sentenced to death by a military commission. After the Supreme Court unanimously ordered Milligan to be set free, he returned to his Indiana home and, appearing *pro se*, filed a state common-pleas damage case primarily based upon common-law principles of false arrest and false imprisonment. The defendants in the case included the 12 military commission members, witnesses against Milligan, and such prominent persons as former Indiana governor Oliver P. Morton, now a U.S. Senator, and former Chief of Staff of the Army Ulysses S. Grant, now the President of the United States. The case was transferred to the U.S. Circuit Court in Indianapolis, where Judge Thomas Drummond of Chicago presided over the trial.

Milligan was represented by a powerful Democratic lawyer, Thomas A. Hendricks, who had served in the Indiana legislature and in both Houses of the United States Congress. President Grant sought out "General" Harrison (as he was referred to by the Court and other counsel) to lead the defense of this case, which really became a civil-rights jury trial, claiming money damages for a violation of the U.S. Constitution. As such, it was a first.[50]

The trial occurred in May 1871, receiving massive media coverage, including verbatim reporting of testimony on the front pages of the leading Indianapolis newspapers. The case went to the jury on the evening before Decoration (Memorial) Day, May 30, 1871. The jury deliberated all night, returning a verdict at 11:00 A.M. After a two-week trial and massive numbers of witnesses and evidence, the verdict for Milligan was $5.00 and costs, although a reading of the transcript indicates that Milligan never collected either.

While Harrison and Hendricks were contesting in a federal courtroom in Indianapolis, they were also doing so in the Supreme Court of the United States. In *New Albany v. Burke*,[51] Hendricks represented the taxpayers in New Albany, Indiana, to enjoin the city from paying interest on bonds issued to construct a railroad. Harrison represented New Albany. The U.S. Circuit Court in Indiana had issued an injunction requested by the taxpayers. The Supreme Court reversed and ruled against them. Thus, Harrison prevailed in his first case before the nation's highest court.

Harrison's next case, *Burke v. Smith*, involved subscribers to stock in a railroad corporation in Indiana and whether the railroad could be held liable for amounts in excess of the face amount of their subscription. The railroad had become insolvent and wanted to require the stock subscribers to pay more. Harrison argued for the railroad; the subscribers were represented by Indiana Congressman Michael Kerr and James A. Garfield. Thus, two future Presidents were opposing counsel in the same case; however, as noted above, Garfield did not actually argue the case.

Harrison had another interesting opponent in *Kennedy v. Indianapolis*.[52] David Turpie, who would later defeat Harrison in his reelection bid for the U.S. Senate in 1887, was opposing counsel and prevailed over Harrison in this case also. In *Kennedy*, Chief Justice Waite ruled that a general internal-improvement

statute did not violate the Takings Clause of the Fifth Amendment.

Harrison was elected by the Indiana General Assembly to the U.S. Senate in early 1881. He received a note from Judge Thomas Drummond saying, "I don't like to see a lawyer like you leave his profession and go into politics." The Supreme Court was housed in the Capitol, and Senator Harrison was present in the Courtroom when the landmark civil rights cases of 1883 were decided. He strongly disagreed with the decision and said so in a later speech to a racially mixed audience in the Second Baptist Church. Notwithstanding his Virginia origins, Harrison took the view of the Radical Republicans at the time on issues of race and reconstruction. He endorsed the Civil Rights Act of 1875, and, as President, would strongly support federal legislation to protect the voting rights of southern blacks under the Fifteenth Amendment.

As Senator, Harrison continued to practice law, and he argued six cases before the Supreme Court. In *Evansville Bank v. Britton*,[53] he was again opposed by Hendricks, who appeared for the bank, with Harrison for Britton. Justice Samuel F. Miller wrote the majority opinion in favor of Harrison's interest, with Chief Justice Waite, Joseph P. Bradley, and Horace Gray dissenting. Miller ruled that under Indiana statute, the taxation of national bank shares without permitting their owner to deduct the amount of bona fide indebtedness from their assessed value was a discrimination forbidden by an act of Congress.

Two years later, Harrison's arguments prevailed again in *Warren v. King*,[54] a case involving the foreclosure of two railroad mortgages, and in *Indiana Southern R. Co. v. Liverpool, London, and Globe Ins. Co.*[55] In that case, Samuel J. Tilden (the Democratic presidential candidate in 1876) was trustee for the issuance of a million and a half dollars in bonds held by the insurance company. The underlying issue had to do with foreclosure, and Chief Justice Waite wrote the opinion for a unanimous Court affirming the decision of the federal circuit court in Indiana.

In 1884, Harrison argued *Dimpfal v. Ohio and Mississippi Railroad Co.*,[56] in which he represented the Farmers Loan and Trust Company as an appellee. The case involved an equitable action by a small minority of stockholders and a question of *ultra vires*. The Supreme Court held that the objecting minority stockholders had to exhaust all means to obtain redress of their grievances within the corporation and that they had not done so.

Near the end of his one term in the Senate, Harrison argued *Smith v. Craft*[57] and *Jewell v. Knight*,[58] two cases that were combined for argument and decision. Here, Harrison was opposed by Joseph E. McDonald, former U.S. Senator from Indiana. Both cases involved minor debtor/creditor issues. Justice Gray wrote an opinion dismissing these appeals, which had been brought by Harrison.

Harrison's biographer Lockridge characterizes Harrison's extraordinary legal ability in the years before his presidency:

> Thus, during the period from 1854 to 1888, despite the interruptions of war, political office and strenuous campaigning, Harrison had remained first and foremost a lawyer. He had steadily grown in ability until he was recognized as one of the ablest lawyers of his time.[59]

Harrison served as President for one term, from 1889 to 1893.

Lawyering Ex-President

The most visible activity in which Harrison engaged as a lawyer after his presidency was to act as chief counsel for the government of Venezuela in a boundary dispute with British Guiana in South America. He took a hard-nosed attitude in fixing the fee with the Venezuelan government, insisting upon and receiving a retainer of $20,000 and quarterly payments of $10,000 until the Arbitration Tribunal in Paris rendered its decision in 1899.

In all, he earned an $80,000 fee. Harrison took an active role in developing the factual record, which then was followed by lengthy oral arguments before the tribunal. That tribunal included two American judges, Chief Justice Fuller and Justice Brewer (the latter appointed to the Supreme Court by Harrison in 1890), and was chaired by a Russian judge. The conclusion to this enormous effort was a final argument lasting 25 hours and spanning five days. Much to the consternation of Harrison and his legal entourage, the tribunal ruled in favor of the British contentions. Harrison may have been correct that the decision was driven by European power politics rather than international law.[60]

An objective view of Harrison's performance as a lawyer on this international stage is offered by Willard L. King, biographer to Chief Justice Fuller. His separate chapter on this international boundary dispute as it finally played out in Paris describes Harrison as "probably the ablest lawyer ever to be President." This conclusion is supported by a statement by Roland Gray, who was Fuller's secretary in Paris:

> I never heard him argue in Washington and he did not appear very well in Paris. But my uncle [Justice Horace Gray] once said to me that in his opinion, the four ablest counsels who argued before him in Washington were Mr. James Carter, Mr. Joseph Choate, Mr. John Johnson of Philadelphia, and President Harrison.[61]

Ex-President Harrison also argued six cases before the Supreme Court between 1896 and 1898. At that time, the Court included Justices Brewer, Brown, and George Shiras, all nominated by Harrison. (A fourth appointee, Howell E. Jackson, had died in 1895.) The pages of *The New York Times* during this period contain numerous references to Harrison's lawyering activities, but, as with former President Cleveland, no question was raised in the press about the propriety of an ex-President appearing before a Supreme Court to which he had appointed members. Perhaps Harrison's talents as a lawyer were so generally recognized as to stave off any negative comment.

Indeed, in 1896 a one-paragraph story appeared on the front page of *The New York Times* confirming Harrison's reputation as a top advocate:

> At the last meeting of the Indiana Tax Commissioners, it was voted to secure, if possible, the services of ex-President Harrison to make an argument in the Supreme Court in behalf of the State of Indiana to enforce payment of taxes assessed against the expressed companies. The Commissioners learned that he would not appear for a fee of less than $5,000. In the California Irrigation cases, he received $10,000. His largest fee was received two years ago from the Indianapolis Street Railway. It was $25,000. In the Morrison will case, at Richmond, Ind., he received $19,000.[62]

The cases Harrison argued so lucratively during this post-Presidential period were: *Fallbrook Irrigation District v. Bradley,*[63] *Tregea v. Modesto Irrigation District,*[64] *Forsyth v. City of Hammond,*[65] *City Ry. Co. v. Citizens State Railroad Co.,*[66] *Magoun v. Illinois Trust & Savings Bank,*[67] and *Sawyer v. Kochersperger.*[68] *Fallbrook* was argued the same day as *Tregea.*[69] Harrison's opponent in these companion California irrigation cases was one of the great lawyers of the time, Joseph H. Choate. The cases involved the taking of private property for public use, as well as a due process issue about how property could be included in a local improvement district. Harrison was well paid and prevailed in these landmark cases, which were crucial in the development and regulation of water resources in the West.

The *City of Hammond* case came from the federal court in Indianapolis and had to do with

In 1897, Harrison argued a case before the Supreme Court on behalf of the Citizens Street Railroad Company, which sought to operate a railroad on the streets of Indianapolis where it had constructed its tracks. Harrison earned $25,000 for his services, a substantial sum in those days.

a reading of Article IV, Section 4 of the Constitution and the guarantee of a Republican form of government. The Supreme Court decided that a state might let a court determine municipal boundaries without running afoul of the Constitution.

The *Citizens* case was argued on March 16 and 17, 1897. Philander C. Knox, later Attorney General, argued with Harrison for the appellee. The case involved the construction, operation, and maintenance of a streetcar system in the city of Indianapolis and concerned the authority of a Citizens Street Railroad Company to operate a railroad on the streets where it had constructed its tracks. There was a question of the validity of an ordinance to that effect. In a somewhat complicated decision, Harrison's arguments prevailed. The economic interests were substantial and, as the *Times* noted, he earned $25,000 for his services.

In *Magoun*, Harrison challenged the constitutionality of an Illinois inheritance tax law under the Equal Protection Clause of the Fourteenth Amendment, earning a $5,000 fee. The Court majority rejected his argument on the ground that the state prescribed different treatment for lineal relations, collateral kindred, and unrelated persons, in increasing proportionate burden of tax as the amount of benefit increases. The *Sawyer* case represented an unsuccessful effort by a Cook County, Illinois tax collector to remove to the Supreme Court of the United States a state court case involving a defendant who refused, on constitutional grounds, to pay taxes. In 1895, Harrison appeared in extended litigation over the will of James L. Morrison, a wealthy banker in Richmond, Indiana, and earned a $25,000 fee.

Writing in 1916, in his three-volume **Courts and Lawyers of Indiana**, Indiana

Supreme Court Justice Leander Monks said of Harrison: "As a lawyer, in its broad and best sense, he was considered second to no one in America."[70] In **My Memories of Eighty Years** (1924), Chauncey M. Depew, a longtime U.S. Senator and political powerhouse, echoed this appraisal: "General Harrison was by far the ablest and profoundest lawyer among our Presidents.... He retired from office, like many of our Presidents, a comparatively poor man. After retirement, he entered at once upon the practice of his profession of the law and almost immediately became recognized as one of the leaders of the American Bar."[71]

William Howard Taft: Fresh from Ohio

William Howard Taft was part of the tightly knit political organization of Ohio Governor Joseph B. Foraker that helped to carry the state to make Benjamin Harrison President in the 1888 election. The organization provided Taft a judgeship on the Ohio Superior Court in Cincinnati. Not yet 30, he was greatly pleased. In January 1890, Orlow W. Chapman, the Solicitor General of the United States, died. Foraker personally lobbied President Harrison for Taft to be Chapman's successor. Taft arrived by train the following month to take up his duties, arguing the government's cases before the Supreme Court and handling a bundle of other administrative and statutory responsibilities.[72]

Taft's many biographies give different numbers of cases he handled while Solicitor General. Henry F. Pringle suggests he argued 18, but Herbert S. Duffy says that there were 27. Thirty-six published opinions of cases Taft argued have been found, and there were several pairs of cases handled together. The exact number of oral arguments is not known, but it is certain that Taft had hands-on involvement in all of them and that at least two are of considerable note.

When William H. Seward negotiated the treaty for the purchase of Alaska in 1867, there was a failure to define the exact boundaries of the Bering Sea. As a result, disputes arose against Canadian and British nationals harvesting the abundant seals of that area. Their sealing ships were being taken into Alaskan federal courts and forfeited. The position of Secretary of State James G. Blaine was that the United States had all of the authority in the Bering Sea that Russia had exercised, even though that had not been spelled out specifically in the treaty. (Historians say that Seward was too anxious to get the treaty signed before the deal fell through to sort out the details.)

The British authorities attempted to do an end run around diplomatic procedures by getting into the Supreme Court in an admiralty case involving the *W. P. Sayward*, a Canadian sailing schooner engaged in the seal trade and owned by a British citizen. It had been seized by a United States revenue cutter, and the federal court in Alaska had forfeited and condemned it. The British and Canadian interests employed Supreme Court advocate Joseph H. Choate to represent them along with the Attorney General of Canada, Sir John Thompson. Taft represented the United States, although Attorney General William Miller's name is also listed. Miller's health was fragile and it is unlikely he played a role in this advocacy.

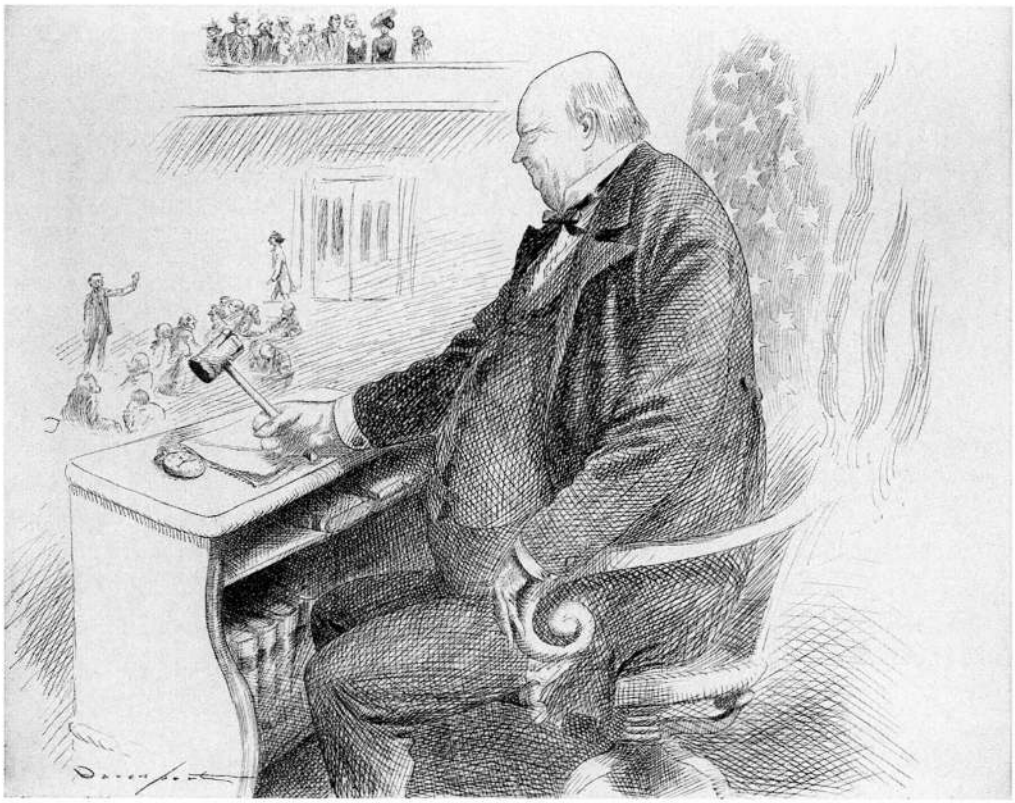
Choate advanced a writ of prohibition to undermine the exercise of admiralty jurisdiction by the U.S. courts in Alaska. Taft countered, reasoning that the application "to a court to review the action of the political department of the government upon a question between it and a foreign power, made while diplomatic negotiations were going on, should be denied." The Supreme Court agreed.[73] Chief Justice Fuller wrote the 1892 opinion; Justice Field alone dissented without opinion. The Taft argument and the Fuller opinion advanced along lines that were further developed by Justice George Sutherland in *Curtiss-Wright* 45 years later.[74]

Taft was a huge man, and he soon became involved with another large-bodied man by the name of Thomas Brackett Reed[75] of Maine. In

1889, Reed had persuaded the majority of the Republican caucus in the U.S. House of Representatives to put him, rather than the very popular William McKinley of Ohio, forward as Speaker. Although Taft and Reed were similar in physical structure, they were vastly different in temperament. Both were brilliant, to be sure. But the comparison largely stopped there. Reed was supremely sophisticated, sarcastic, and at times mean-spirited. He was highly literate and kept a diary in French. He was also the most gifted parliamentarian to serve as Speaker in the 19th century. Taft was always considered affable and lovable. These two big men were thrown together in an interesting Supreme Court case in 1891, while Taft was Solicitor General.

Before the advent of "Czar" Reed's speakership, a tactic used regularly in the House of Representatives was for members to refuse to answer the roll call and thus prevent a quorum for the dispatch of legislative business. Apparently, both parties, when out of power, used some version of this tactic. When Reed became Speaker, he did a frontal assault on this practice by merely having the Clerk note as present those members of the House who were there, even though they refused to answer roll call. That rule, known as House Rule XV, was as follows:

> On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the



House of Representatives Speaker Tom Reed (above) squashed the practice of members refusing to answer roll call to prevent a quorum for the dispatch of legislative business by having the Clerk note them present anyway. As Solicitor General, William Howard Taft argued the government's position when the Supreme Court reviewed this practice in 1891.

> names of the members voting, and be counted and announced in determining the presence of a quorum to do business.

The rule came under review before the Supreme Court under an act adopted on May 9, 1890 classifying worsted cloth as woolens. One of the two issues raised was the way the Speaker had counted a quorum. The importer contested the constitutionality of the act on the ground that it was not passed by a quorum within the meaning of the Constitution. On February 29, 1892, Justice Brewer, speaking for a unanimous Court, ruled that because the *Journal* recorded that a majority was present, and under the Constitution a majority constituted a quorum, then a majority of that quorum had voted in favor of the act.[76] Since the act had been legally passed in the House, Reed's rule and practice were valid. A close reading of Brewer's opinion, however, reveals that Reed's action in counting a quorum in 1890 was not the issue before the Court. Instead, it was the validity of the rule by which the Speaker was authorized to count a quorum that was tested. In any case, the delaying tactic of breaking a quorum was given a decent judicial burial.

It has already been recounted how, when young John Quincy Adams was in the U.S. Senate and observed the Marshall Court in action, he was in awe. Not so with Taft. He wrote to his father:

> I have difficulty in holding the attention of the court. They seem to think when I begin to talk that that is a good chance to read all the letters that have been waiting for them, to eat lunch, and to devote their attention to correcting proof[s], and other matters that have been delayed until my speech. However, I expect to gain a good deal of practice in addressing a lot of mummies and experience in not being overcome by circumstances.[77]

Solicitor General Taft had the opportunity to appear as an adversary against some of the greatest lawyers of the time, including the aforementioned Choate, Elihu Root, Joseph E. McDonald of Indiana, a former U.S. and Attorney General who had been counsel the *Milligan* case, and the colorful Benjamin F. Butler, who at one time or another belonged to all major political parties and some minor ones.

In 1890, the Supreme Court reviewed two cases on the same day regarding age at the time of enlistment in the Army. One of them involved a 17-year-old who lied about his age by claiming he was 21 and thereafter deserted. The Supreme Court held that the contract of enlistment did not relieve him from any obligation to the Army.[78] In the other case, Taft again represented the United States against a man who said he was 28 when he joined the Army but was really 35. Again, the opinion focused on the enlistment contract. In this case, a court-martial decision was held to be final and the civil courts permitted review only to ensure proper jurisdiction. The Court held that the enlistment occurred as soon as the man took the oath, and that that was when his status changed from civilian to soldier.[79]

President Harrison signed the Evarts Act in 1891, which created a permanent set of intermediate federal appeals courts. Among the cases in which Solicitor General Taft was involved were early decisions under the Evarts Act with regard to the constitutional jurisdiction of the intermediate appellate courts, as well as the problems of venue in crimes that can occur in more than one district or state. Taft argued for the President's authority to suspend an Alaskan territorial judge appointed under Article I of the Constitution,[80] raised questions as to who could be tried on an Indian reservation for murder;[81] and tackled the political ramifications of Chinese immigration in the last part of the 19th century.[82]

Taft was appointed to the Sixth Circuit in 1892. Thus, in 1909, he became the only President of the United States to have served as a federal judge before taking office. After his unhappy presidency, Taft taught constitutional law at Yale. To avoid any conflict of interest for the federal judges he had appointed as

After Richard Nixon was defeated for governor in 1962, he was considered washed up as a politician, so he came to New York to practice law. Although Nixon narrowly lost the *Time, Inc.* case before the Supreme Court in 1966, his performance earned him the respect of the Justices, the press, and the legal community.

President, Taft refused to take on any representation in any federal court. He was obviously more sensitive on this subject than either of his predecessors, Harrison and Cleveland, neither of whom had qualms about arguing before judges they had appointed.

Judge Taft badly wanted the Supreme Court nomination that President William McKinley gave to Joseph McKenna in 1898.[83] McKenna stayed on the Court long enough to eventually serve with Chief Justice Taft when he was finally appointed to the Court by President Warren Harding in 1921. Taft had the distinction of being the first Chief Justice to graduate from law school.[84]

Richard M. Nixon on the Way Back

After his disastrous defeat running for governor of California in 1962, Richard M. Nixon switched coasts and became a partner in the New York firm Nixon, Mudge, Rose, Guthrie and Alexander. William Safire sets the stage for Nixon's trip east:

> When he came to New York in late 1963, after Warner-Hudnut chairman Elmer Bobst arranged for his name to be placed at the head of a prestigious but moribund law firm, Nixon was decidedly "through" as a potential political leader.[85]

While working as a lawyer, Nixon took on the case that would become *Time, Inc. v. Hill*[86] and argued it on April 27, 1966, before the Supreme Court. This was his only argument before *any* appellate court. Nixon took three weeks away from campaigning in the 1966 congressional elections and devoted himself to preparing for the oral argument. Harold R. Medina, Jr. of Cravath, Swaine & Moore argued for Time, Inc. Medina, the son of a legendary federal judge and himself a veteran Supreme Court advocate, was a formidable opposing counsel. The case was in many ways a follow-up to *New York Times v. Sullivan*,[87] in which the Court made it increasingly difficult

for political personalities, celebrities, and others similarly situated to bring defamation suits against the press by establishing actual malice.

The facts of the case are as follows. On September 11, 1952, three escaped convicts had taken over a home in a suburb of Philadelphia, holding James and Elizabeth Hill and their five children hostage for 19 hours. No harm was done or later claimed, but the story received sensationalized coverage in the national press. Elizabeth Hill found the publicity hard to bear. The Hill family moved to Connecticut and uniformly denied interviews, conscientiously fading from public view. All was well in this regard until, in February 1955, *Life* magazine published an article about a play entitled *The Desperate Hours* that portrayed a family held hostage by escaped convicts. *Life* described the play as a re-enactment of the Hill family experience and included photographs of their suburban Philadelphia home. But this impression was inconsistent with the realities of the Hill family experience, and indeed, the playwright, Joseph Hayes, denied that he had based it on the Hills' ordeal. In his play, the convicts acted brutally, beating up the father and sexually harassing the daughter. This distortion caused the Hills great distress, and they took legal action by hiring future President Nixon.

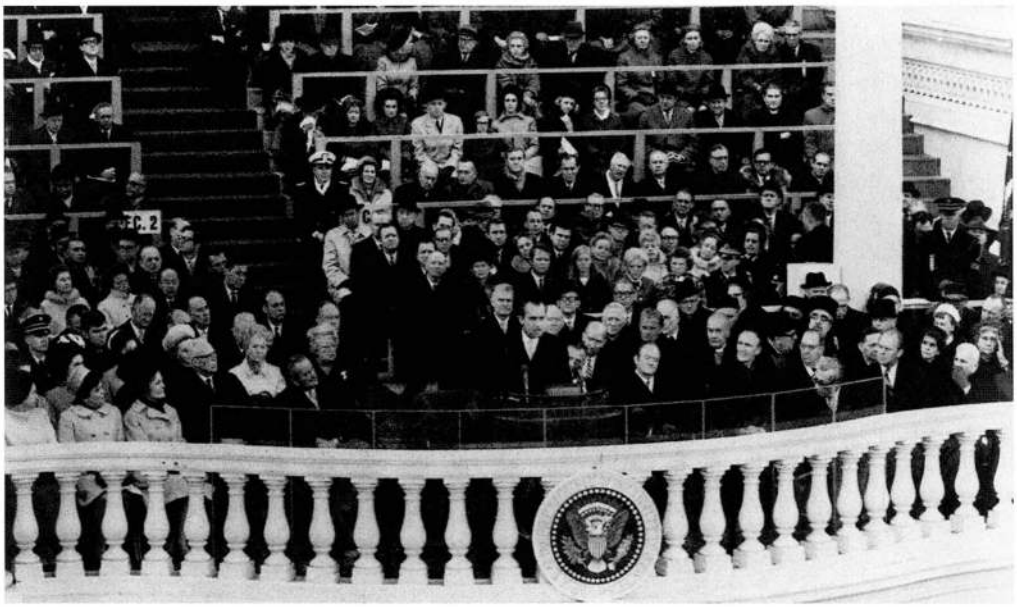
The fact that the Hills were not self-serving celebrities but the victims of notorious criminal activity made their case appealing to Nixon. Safire suggested a further motive for Nixon's taking on the Hills as clients: he could argue a legal position compatible with his private beliefs and, in the process, prove his competence as a real-life lawyer. The case had an issue ready-made for Nixon's predispositions regarding the excesses of the free press, especially when one recalls the late-night "final" news conference after his gubenatorial defeat in 1962. The intersection between the free press and privacy consumed Nixon.

After the oral argument, Nixon wrote a 2,500-word, self-critical memo about his performance. At the ceremony inducting Warren E. Burger as Chief Justice in 1969, he would also speak publicly about the experience:

> I have also had another experience at this Court. In 1966, as a member of the bar, I appeared on two occasions before the Supreme Court of the United States. Looking back on those two occasions, I can say, Mr. Chief Justice, that there is only one ordeal which is more challenging than a Presidential press conference, and that is to appear before the Supreme Court of the United States.[88]

But Nixon's professional performance won praise in surprising places. John MacKenzie wrote in *The Washington Post* that his presentation was "one of the better oral arguments of the year."[89] According to his biographers, Justice Abe Fortas offered high praise and expressed surprise that Nixon had done so well. He termed the Nixon argument "one of the best arguments he had heard since he had been on the Court" and opined that the future President could become "one of the great advocates of our times." Even Anthony Lewis was complimentary of the Nixon style, if not the substance of his argument.[90] In a brief piece tucked away on page 20, *The New York Times* characterized Nixon's professional demeanor before the Supreme Court as "comfortable," an adjective seldom used to describe him in any context and one that is at odds with his own description of the event. At lunch after the argument, the Brethren expressed surprise at how good Nixon was.

When the Court met in conference, there appeared to be a disposition in favor of the Hills, led by Justice Fortas and Chief Justice Earl Warren, supported generally by Justices John Marshall Harlan, Potter Stewart and Tom Clark. Had this majority held, the Hills would have won. But the reasoning required to get a result in favor of the Hills was directly at odds with the absolutist view of the First Amendment long held by Justices Hugo L. Black and



At Nixon's inauguration in 1969, Justices Black, Douglas, and Harlan were seated behind the President at right. Black (whose face is immediately to the right of Nixon) was the moving spirit behind the majority that had voted against the future President's arguments in the *Time, Inc.* case. Douglas joined the majority; Harlan concurred in part and dissented in part.

William O. Douglas. The writings of Bernard Schwartz[91] and Leonard Garment[92] indicate that Justice Black launched a rear-guard action, which eventually turned Justice Stewart and led to a re-argument and finally to the result sought by the two senior members of the Court.

The case was scheduled for re-argument on October 18. The day before the second argument, Black sent around an extended memorandum. Its tone, according to Schwartz, was "unusually sharp" and played a "key role" in changing the Court's decision. Schwartz adds, "[I]t is not clear why the Alabaman [Black] displayed such a distaste for his new colleague [Fortas]." The memo is further described as "an acerbic attack" and "sarcastic."

The second argument came just two weeks before the 1966 congressional elections, in which Nixon was stumping daily for congressional candidates. While Nixon had received generally favorable grades for his performance in the first argument, in his second argument he appeared distracted, won little applause, and, after it was over, did not enter into extended self-critical analysis. Garment, Nixon's co-counsel, said of the second argument, "Justice Black engaged Nixon in a fierce ten-minute colloquy in which neither yielded an inch of ground." But Nixon did not seem to have his mind on the case during the re-argument.

The decision divided the Warren Court in an interesting fashion. Nixon's arguments attracted the admiration and votes of Chief Justice Warren along with Justices Fortas and Clark. Justice Harlan concurred in part and dissented in part. The historical scholarship indicates that the moving spirit in collecting a majority was Justice Black, although Justice William J. Brennan wrote for the majority—no doubt by Black's assignment as senior Justice. Not surprisingly, Brennan was joined by Justice Douglas; somewhat surprisingly, he also picked up the silent vote of Justice Stewart. In a Watergate-tapes conversation with John Dean, Nixon later called the

vote 5 to $3\frac{1}{2}$—an obvious reference to the Harlan dissent.[93]

In 1989, Garment wrote a lengthy article about the case in *The New Yorker*, and Schwartz also dug into the back-channel processes that contributed to the decision. Schwartz included his findings in **The Unpublished Opinions of the Warren Court**, an offshoot of his biography of Earl Warren. *Hill* remained a very sore point with Nixon. Garment's conclusion is revealing:

> The irony of this struggle is that after all the speculation about how the Court would respond to Richard Nixon, the personal animus that determined the course of the Hill case was not antagonism toward Nixon by any member of the Court. The two Justices who had always detested Nixon's politics—Warren and Fortas—were unshakable defenders of his position in the Hill case. The central clash in Hill was actually between Hugo Black and Abe Fortas.[94]

In May 1969, Justice Fortas was severely damaged by a *Life* article disclosing his financial involvement with indicted stock manipulator Louis E. Wolfson. The press scandal eventually forced him to leave the Court. According to Garment, Fortas believed until his death in 1982 that the press scandal was a payback for his actions in *Hill*.[95]

Overall, the *Hill* episode had a positive outcome for Nixon. One biographer states:

> His homework, his logic, his presentation, and his commitment all impressed his law partners, the larger New York legal community, and the reporters covering the Supreme Court. Although he eventually lost the case 5–4, Nixon got from it the respect of his fellow lawyers. He proved what he already knew, that if he had devoted full time to his legal practice, he would have been one of the best.[96]

And Schwartz seems to argue that Supreme Court doctrine is edging back toward the position taken by Nixon in *Hill*.[97]

As for the client, the practical epilogue was that Elizabeth Hill finally received a substantial money settlement after the case was returned to the New York courts. The sad epilogue was her suicide in 1971.

Epilogue

Despite their many character differences and their being separated by nearly two centuries, John Quincy Adams and Richard M. Nixon had one characteristic in common: they were both self-critical worriers. In anticipation of his Supreme Court argument in *Amistad* in 1841, Adams wrote in his diaries about his anxieties over his ability to represent the African mutineers. Immediately after the Supreme Court handed down its decision, Adams worried about getting the Africans home. Similarly, the memo written by Nixon the night after his first argument reveals that he fretted about the quality of his arguments and his ability to help his client.

Adams and Nixon belong to the very narrow category of men who served both as Presidents of the United States and as advocates before the Supreme Court of the United States (see Table 1). This small group includes only six other lawyers who either would later occupy the presidency or had already served that office before arguing before the highest court in the land. Adams and Nixon could further boast that the cases they argued before the Supreme Court were of constitutional significance. James A. Garfield could also make that claim for his participation in *Milligan*. Other past or future Presidents argued cases that were either minor or important only in reference to the political issues of the time. But all the cases described above take on extra significance as occasions when men who were at one time chief executives of the nation served as advocates pleading for the Justices of the highest court to be swayed by their arguments.

TABLE 1 Admissions of Presidents to the Supreme Court Bar

John Quincy Adams	Admitted February 7, 1804, movant unknown.
James Knox Polk	Admitted January 10, 1827, movant unknown.
Abraham Lincoln	Admitted March 7, 1849, on motion by Mr. Lawrence.
James Abram Garfield	Admitted March 5, 1866, on motion by Mr. Jeremiah S. Black.
Benjamin Harrison	Admitted February 28, 1881, on motion by Attorney General Charles Devens.
Stephen Grover Cleveland	Admitted May 1, 1890, on motion by Augustus H. Garland.
William Howard Taft	Admitted March 3, 1890, on motion by Attorney General William Miller.
Richard M. Nixon	Admitted March 14, 1947, on motion by Fred N. Howser. Resigned June 23, 1975.

Grover Cleveland and Benjamin Harrison both argued cases before Justices whom they had appointed while serving as President. It is curious that the press apparently did not object to this practice, nor did the advocates themselves seem troubled by questions of possible conflict of interest. In any case, there is no evidence that the Justices felt compelled to vote in their appointers' favors. Perhaps reflecting a more ethical climate as much as a deep respect for the law, former President Taft refused to represent clients before any federal court, regardless of whether it held one of his own appointees.

ENDNOTES

[1]Paul C. Nagel, **John Quincy Adams** (Alfred A. Knopf, 1997), pp. 132–156. Richard Brookhiser, **America's First Dynasty: The Adamses 1735–1918** (The Free Press, 2002), p. 65–76.

[2]U.S. (2 Cranch) 187 (1804).

[3]U.S. (2 Cranch) (1804).

[4]Charles Francis Adams, ed. **The Memoirs of John Quincy Adams** (J. P. Lippincott & Co., 1874–1877), vol. 1, p. 295, February 17, 1804. *See also* Jean Edward Smith, **John Marshall: Definer of A Nation** (Henry Holt, 1996), p. 342.

[5]Nagel, **Adams**, p. 362.

[6]Allan Nevins, ed. **The Diary of John Quincy Adams** (Charles Scribner's Sons, 1951), p. 57.

[7]U.S. (5 Cranch) 57 (1809).

[8]In 9 Fed Cases 272 in *Fletcher v. Peck* (1807), there is notation "(nowhere reported); (opinion not now accessible)." The records of the Federal Circuit Court are in Massachusetts Circuit Court Records, RT, Federal Records Center, Boston. See also C. Peter Magrath, **Yazoo: Law and Politics in the New Republic** (Brown University Press, 1966), pp. 4–15.

[9]Nagel, **Adams**, p. 183.

[10]Charles Francis Adams, **Memoirs**, 1: 543–544, March 11, 1809. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The opinions of both March 11, 1809 and March 16, 1810 are reported.

[11]Nevins, **Diary**, p. 58.

[12]Nagel, **Adams**, p. 199.

[13]For full details of Madison's efforts to fill the Cushing seat, see Henry Adams, **History of the United States during the First Administration of James Madison** (Charles Scribner's Sons, 1890), Books V and VI, p. 359–360. Madison also made the Story nomination over the strong opposition of Thomas Jefferson.

[14]Nevins records his last moments as the final item in **Diary** at p. 575:

> Adams served in the House till Feb. 21, 1848, when he was fatally stricken there. He was seated at his desk, when a neighboring member saw suddenly that he was in a state of convulsion and, removed to a committee room, he died on Feb. 23. This record may fittingly terminate with his victory in rescinding the gag rule.

[15]There has been heavy reliance on *Amistad*. See Federal Judicial Center, Amistad: *The Federal Courts and the Challenge to Slavery*, http://www.fjc.gov/history/amistad.nsf.

[16]Charles Francis Adams, **Memoirs**, 10: 358, October 27, 1840.

[17]Charles Francis Adams, **Memoirs**, 10: 2429, February 22, 1841.

[18]25 U.S. (12 Wheat) 546 (1827); 23 U.S. (10 Wheat.) 66 (1825); 24 U.S. (11 Wheat.) 743 (1826); John T. Noonan, Jr., **The Antelope** (University of California Press, 1977). Adams' concerns with the Antelope cases and his conferences with Francis Scott Key run throughout his entries of January and February 1841. Adams met with Key on the subject on January 14, 1841. See Charles Francis Adams, **Memoirs**, 10: 396–397.

[19]40 U.S. (15 Pet.) 547, 518 (1841). The statements of Adams in the Supreme Court can be found in Lynn Hudson Parsons, **John Quincy Adams** (Madison House, 1998), p. 239.

[20]President Adams had appointed Robert Trimble, who served only two years and died in 1828.

[21]7 U.S. (Curtis) 117 (1827). Ezekiel Norris appears to have litigated on the same land before the Supreme Court of Errors and Appeals of Tennessee in *Garner & Dickson v. Norris*, 9 Tenn. 62 (1821).

[22]Eugene McCormac, **James K. Polk** (University of Chicago Press, 1922), p. 12.

[23]David Herbert Donald, **Lincoln** (Simon & Schuster, 1995).

[24]Donald, **Lincoln**, pp. 185–193.

[25]48 U.S. (7 How.) 776 (1849).

[26]*Lewis v. Broadwell*, 15 Fed. Cas. 473 (Cir. D. Ill 1847).

[27]Allen I. Spiegel, **A. Lincoln, Esquire: A Shrewd, Sophisticated Lawyer in His Time** (Mercer University Press, 2002) p. 33.

[28]*Robert Forsyth v. John Reynolds et al*, 56 U.S. (15 How.) 358 (1854).

[29]For a somewhat romantic view of Alexander Campbell, see Louis Cochran, **The Fool of God** (College Press Publishing Co., 1985).

[30]71 U.S. (4 Wall.) 2 (1867).

[31]Joseph Harmon, **Garfield, The Lawyer** (Riverview Press, 1929), pp. 4–5.

[32]John Niven, **Salmon P. Chase, A Biography** (Oxford University Press, 1995), pp. 403–404. See also Albert Bushnell Hart, **Salmon Portland Chase** (Houghton Mifflin and Company, 1899), p. 345.

[33]Harry J. Sievers, **Benjamin Harrison: Hoosier Statesman** (University Publishers, 1959), vol. 2, ch. 3, pp. 30–45.

[34]Allan Peskin, **Garfield** (The Kent State University Press, 1978), p. 273.

[35]John M. Taylor, **Garfield of Ohio, The Available Man** (New York, 1970), p. 118. See also Niven, **Chase**, p. 404.

[36]76 U.S. 326 (9 Wall.) (1870).

[37]81 U.S. 44 (14 Wall.) (1872).

[38]*Baltimore and Potomac Railroad Company v. Trustees of Sixth Presbyterian Church*, 86 U.S. (19 Wall.) 62 (1874).

[39]*Baltimore and Potomac Railroad Company v. Trustees of Sixth Presbyterian Church*, 91 U.S. (1 Otto) 127 (1875).

[40]89 U.S. (22 Wall.) 60 (1875).

[41]86 U.S. (19 Wall.) 666 (1874).

[42]92 U.S. 161 (1876). In **Garfield,** Peskin refers to the receipt of legal fees of $5,000. In a memo to the author on 6/25/2002, he states that they were separate sums of $1,500 from one insurance case and $3,500 for the second case.

[43]*New York Life Ins. v. Statham*, 93 U.S. 24 (1876).

[44]*U.S. v. Allison*, 91 U.S. 303 (1876).

[45]*Newton v. Commissioners*, 100 U.S. 548 (1880).

[46]92 U.S. 358 (1876).

[47]See *Burke v. Smith*, 83 U.S. 390 (1872). For a brief overview, see Joseph Harmon, **Garfield, The Lawyer**, (Riverview Press, 1929).

[48]*Peake v. New Orleans*, 139 U.S. 342 (1891).

[49]Willard L. King, **Melville Weston Fuller**, (The Macmillan Company, 1950), p. 161–162. Allan Nevins, **Grover Cleveland: A Study In Courage** (Dodd, Mead & Co., 1934) does not mention Cleveland before the Supreme Court.

[50]Sievers, **Harrison**, 2: ch. 3, pp. 30–45.

[51]78 U.S. 96 (1870).

[52]103 U.S. 599 (1881).

[53]105 U.S. 322 (1882).

[54]108 U.S. 389 (1883).

[55]109 U.S. 168 (1883).

[56]110 U.S. 209 (1884).

[57]123 U.S. 436 (1887).

[58]123 U.S. 426 (1887).

[59]Reports of the Benjamin Harris Memorial Commission (U.S. Government Printing Office, 1941), Exhibit 2, **The Harrisons** by Ross Lockridge Jr., p. 102.

[60]King, **Fuller**, ch. 19, pp. 249–261.

[61]King, **Fuller**, p. 258.

[62]"General Harrison's Big Fees," *The New York Times*, December 12, 1896, p. 1.

[63]164 U.S. 112 (1896).

[64]164 U.S. 179 (1896).

[65]166 U.S. 506 (1897).

[66]166 U.S. 557 (1897).

[67]170 U.S. 283 (1898).

[68]170 U.S. 303 (1898).

[69]These California irrigation cases caught the attention of *The New York Times*, October 13, 1895.

[70]Leander J. Monks, **Courts and Lawyers of Indiana** (Federal Publishing Co., Inc. 1916), Vol. 2, p. 429.

[71]Chauncey M. Depew, **My Memories of Eighty Years** (Charles Scribner's Sons, 1922), p. 140.

[72]Henry F. Pringle, **The Life and Times of William Howard Taft** (Farrar & Rinehart, Inc., 1939), 1: 108–120.

[73]*In re Cooper*, 138 U.S. 404 (1891), 143 U.S. 472 (1892). Taft's arguments here are summarized in Pringle, **Taft**, 1: 117–18.

[74]*U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

[75]Samuel W. McCall, **The Life of Thomas Brackett Reed** (Houghton Mifflin Company, 1914), pp. 162–172; Richard B. Cheney and Lynne V. Cheney, **Kings of the Hill** (Simon & Schuster, 1996), pp. 96–116.

[76]*U.S. v. Ballin*, 144 U.S. 1 (1892).

[77]Pringle, **Taft**, 1: 115.

[78]*Morrissey v. Perry*, 137 U.S. 157 (1890).

[79]*U.S. v. Grimley*, 137 U.S. 147 (1890).

[80]*McAllister v. U.S.*, 140 U.S. 174 (1891).

[81]*Ex parte Wilson*, 141 U.S. 575 (1891).

[82]*Wan Shing v. U.S.*, 140 U.S. 424 (1891).

[83]Pringle, **Taft**, 1:153.

[84]Sometimes this distinction is given to Fuller, who attended Harvard Law School but did not graduate. See Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies**, 2d ed. (Congressional Quarterly Press, 1995), p. 247. Taft did graduate from Cincinnati Law School in 1880. Herbert S. Duffy, **William Howard Taft** (Minton, Balch & Co., 1930), p. 7.

[85]William Safire, **Before the Fall** (Doubleday & Co., 1975), p. 21.

[86]385 U.S. 374 (1967).

[87]376 U.S. 254 (1964).

[88]**Public Papers of Presidents of the United States 1969** (U.S. Government Printing Office, 1971), June 23, 1969, no. 249.

[89]Leonard Garment, "Annals of Law: The *Hill* Case," *The New Yorker*, April 17, 1989, pp. 97.

[90]Anthony Lewis, **Make No Law** (Random House, 1991), p. 188. "[T]he justices thought he did a superior job." The Fortas comment is found in Bruce Allen Murphy, **Fortas** (William Morrow and Company, 1988), p. 230. Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court, a Judicial Biography** (NYU Press, 1983), pp. 643–648. James Fitzpatrick, senior partner at Arnold & Porter in 2003, confirmed the conversations with Fortas in admiration of Nixon's performance in a 12/28/02 telephonic interview with the author.

[91]Bernard Schwartz, **The Unpublished Opinions of the Warren Court** (Oxford University Press, 1985), ch. 8, pp. 240–303.

[92]Leonard Garment, "Annals of Law: The *Hill* Case," *The New Yorker*, April 17, 1989, pp. 90–110.

[93]See Lewis, **Make No Law**, p. 188 for an account of the conversation with Dean.

[94]Garment, "Annals of Law," p. 106.

[95]Garment, "Annals of Law," p. 107.

[96]Stephen E. Ambrose, **Nixon** (Simon and Schuster 1989), vol. 2, p. 82.

[97]Schwartz, **Unpublished Opinions**, p. 302. A 9/23/02 letter to author from Anthony Lewis now puts him as a respector of the position taken by Nixon in *Hill*.

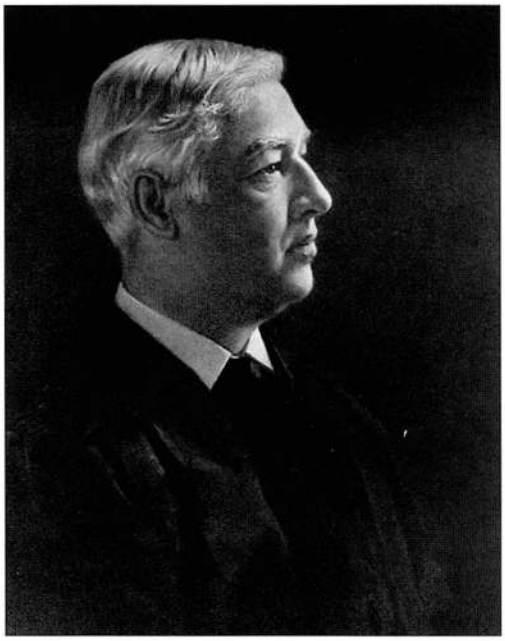
Wilson, Brandeis, and the Supreme Court Nomination

MELVIN I. UROFSKY

In late January 1916, many readers of the *New York World* chuckled as they looked at Rollin Kirby's editorial cartoon entitled, "The Blow that Almost Killed Father." In the drawing, Kirby showed a Wall Street big-shot—one who looked a little like J. P. Morgan—prostrate in his desk chair, the ticker-tape machine broken and leaning against the desk, a picture of the New York Stock Exchange askew on the wall, and a newspaper dropped to the ground, its headline blaring "BRANDEIS FOR THE SUPREME COURT."

The nomination of Louis Dembitz Brandeis of Boston to replace Joseph Rucker Lamar of Georgia triggered a four-month battle waged before the Senate Judiciary Committee and in the newspapers and journals of the country. For historians—and for many reformers of the time—Woodrow Wilson's appointment of Brandeis to the nation's highest court constitutes one of the high points of the Progressive crusade and a major legacy of Wilson's New Freedom. For constitutional scholars, Brandeis has long been considered one of the most important persons to serve on the Court, the Justice who—among other accomplishments in his twenty-three years on the bench—first suggested that the Due Process Clause of the Fourteenth Amendment should incorporate the liberties protected by the Bill of Rights,[1] articulated a theory of free speech tied to citizenship that remains at the core of our First Amendment jurisprudence,[2] put forth the proposition that the Constitution protected an individual right to privacy,[3] and limited the power of the federal courts in an attempt to reinvigorate the federal system.[4]

We are, however, not concerned in this article with Brandeis' enduring achievements on the Supreme Court, nor even with the bruising confirmation battle that took place before he could take the oath of office.[5] Rather, we want to look at the reasons that President Wilson had for making such a controversial appointment, as well as the reasons why Brandeis, who for so many years had been a fierce critic of the courts, decided to accept. I would like to suggest that, as in so many things in public life, we find here a mix of the overtly political and the deeply personal.

The appointment of Louis Dembitz Brandeis (left) to replace Joseph Rucker Lamar (right) on the Supreme Court in 1916 marked a high point of the Progressive crusade but was a controversial move for President Woodrow Wilson.

* * * * *

For Wilson, the Brandeis appointment can be seen as a means not only of shoring up his chances to be re-elected to the White House in 1916, but also of rewarding a loyal political ally and putting a man on the Court who fulfilled ideals that Wilson himself had once held to be unattainable.[6]

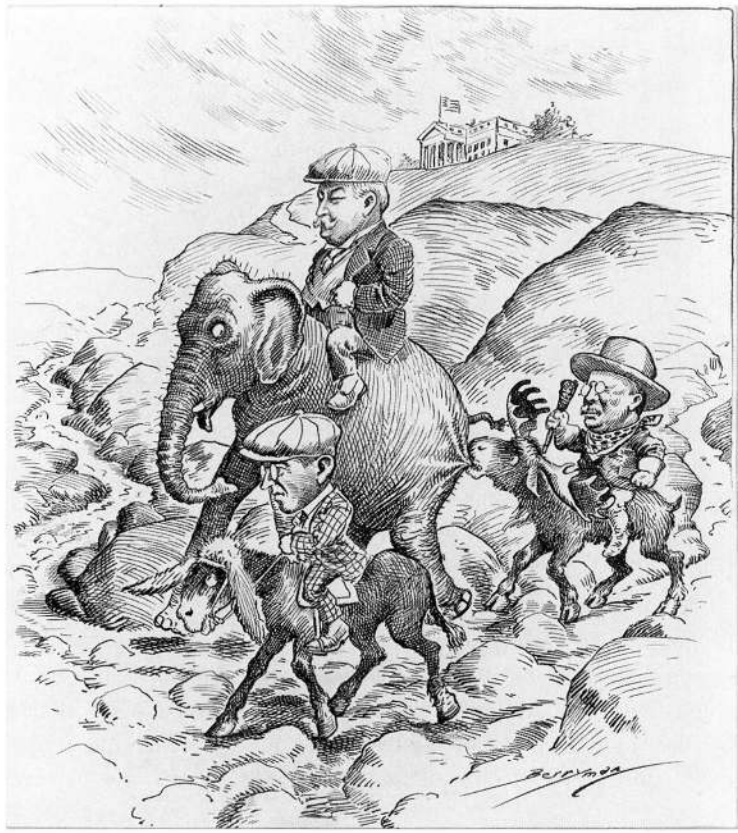
Wilson had been elected by less than a majority of the popular vote in 1912, although he had a comfortable margin in the Electoral College.[7] Had Theodore Roosevelt not bolted from the Republican party in 1912, it is possible—even likely—that Wilson would have lost to William Howard Taft. The country was at peace and prosperous, two conditions that usually favor an incumbent seeking re-election. In 1916, Theodore Roosevelt had seemingly made his peace with the GOP, which united behind the austere Charles Evans Hughes of New York, a successful reform governor of New York who had resigned from the Court to run for the White House. For Wilson to win the election, he had to gain the support of those social-justice progressives who had rallied behind Roosevelt's Bull Moose Party in 1912.

The core of Wilson's original New Freedom had little that appealed to that group, other than the reduction of tariffs embodied in the 1913 Underwood Tariff. The establishment of the federal reserve system constituted an important step in creating a modern banking system needed to avert crises like the "bankers' panic" of 1907, but it did little to speak to the concerns of people such as Jane Addams of Hull House. The reform of the antitrust law in the 1914 Clayton Act may have pleased some labor leaders because of its supposed exemption of unions from antitrust prohibitions, but critics like Robert M. LaFollette believed it did not go far enough in reining in the evils of bigness, while the creation of the Federal Trade Commission struck many as playing into the hands of business interests. With the outbreak of war in Europe in August 1914, Wilson allowed the Rayburn bill, which provided for the regulation of the stock market, to die in the House rather than chance further disruption of the economy. The President announced that the New Freedom had been completed, and

in many ways it was; but that did not bring him any applause from the former Bull Moose supporters.

The war issue—whether the United States should join the Allies or stay neutral—split both parties. But the Democrats were also in disarray on the domestic front, and although the party controlled both houses of Congress, its leaders proved unable to make headway on several seemingly minor proposals the President had suggested to them in conference.[8] Faced with this scenario the President made two crucial decisions in January 1916. First, in spite of the seeming confusion of views, a majority of the American people favored preparedness in case the United States should have to go to war, but preferred that the nation stay neutral. Second, the only hope for victory in the November elections lay in attracting to the Democratic fold the large independent bloc that had supported Roosevelt in 1912. Wilson had only polled 42 percent of the popular vote in 1912; a reversion to normal voting habits would make a Republican victory inevitable.

To do this, Wilson would have to abandon the belief that the federal government had no role to play in protecting underprivileged or disadvantaged groups, the very people whose welfare concerned the independent bloc. Wilson had already started down the road of greater federal involvement in the economy with the Federal Reserve and the Federal Trade Commission Acts. In the spring of 1916, he lost his indecision and helped push through Congress the Hollis-Bulkley Act to provide federal underwriting of a rural farm credits program, the Kern-McGillicuddy bill establishing a model workmen's compensation measure for federal employees, the Keating-Owen child labor bill, a measure giving the Philippines greater autonomy, and the LaFollette Seamen's Act. By the fall of 1916, the Democrats had enacted almost every



This 1912 cartoon shows the race to the White House with Wilson on a donkey and William Howard Taft on an elephant being bitten by Theodore Roosevelt on a bull moose. Wilson was elected without a popular majority, but by a comfortable margin in the Electoral College. If Roosevelt had not bolted from the Republican party, Wilson might have lost the election.

Wilson's New Freedom had little that appealed to the former Bull Moose supporters. The establishment of the Federal Reserve System and the reform of antitrust laws pleased some, but in the eyes of progressives such as Senator Robert M. LaFollette, they did not go far enough in challenging bigness. LaFollette (left) would praise the Brandeis nomination in 1916.

important plank in the Progressive party platform of 1912.

More than any other measure, however, the nomination of Louis D. Brandeis to the Supreme Court won Wilson sustained applause from the independent progressives. As Wilson biographer Arthur Link notes, the nomination "was an open defiance of and a personal affront to the masters of capital as well as to conservative Republicans."[9] "If Mr. Wilson has a sense of humor left," a Washington correspondent told former President Taft, "it must be working overtime today. When Brandeis's nomination came in yesterday, the Senate simply gasped . . . . There wasn't any more excitement at the Capitol

when Congress passed the Spanish War Resolution."[10] Taft had long coveted a position on the Court, and for some reason thought Wilson might appoint him. His comment is worth quoting, because it provides an excellent summary of conservative reaction to the appointment:

> It is one of the deepest wounds that I have had as an American and a lover of the Constitution and a believer in progressive conservatism, that such a man as Brandeis could be put in the Court, as I believe he is likely to be. He is a muckraker, an emotionalist for his own purposes, a socialist, prompted by jealousy, a hypocrite, a man who has certain high ideals in his imagination, but who is utterly unscrupulous, in method in reaching them, a man of infinite cunning, . . . of great tenacity of purpose, and, in my judgment, of much power for evil.[11]

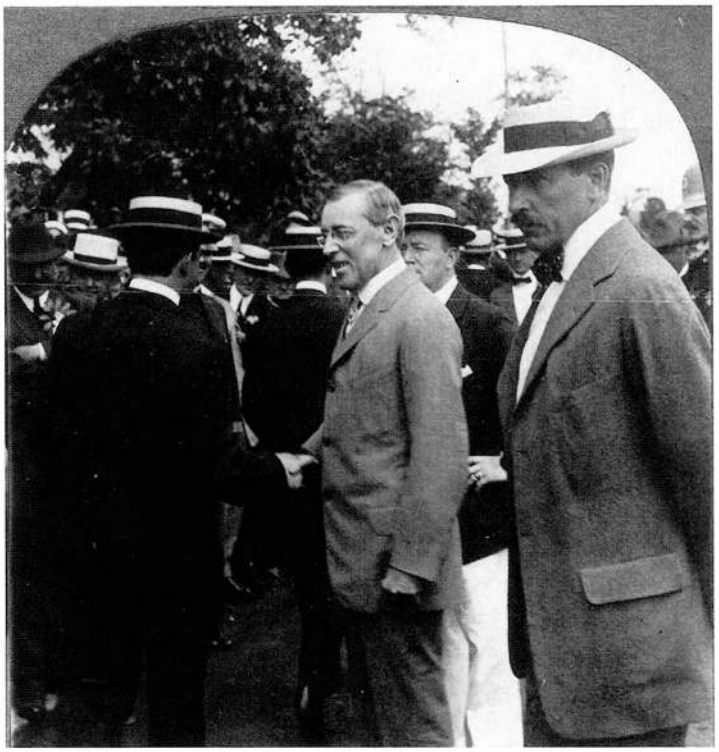
Progressives responded as Wilson had hoped they would. Radical reformer Amos Pinchot wrote to a leading progressive journalist, Norman Hapgood, that it "took courage & sense to make this appointment & I take off my chapeau to the President." Pinchot went on to note that the Brandeis appointment "will pull a strong oar for Wilson in Wis, Minn, S & N Dakota and other Roosevelt strongholds."[12] Senator Robert M. LaFollette, a maverick Republican, hailed the appointment and acknowledged the debt of the American people to Woodrow Wilson for making it. "In appointing Mr. Brandeis to the Supreme Bench President Wilson has rendered a great public service . . . [It] is proof indisputable that when the President sees the light he is not afraid to follow it."[13] Organized labor spoke with one voice in praising the nomination, for Brandeis had been one of their most effective advocates. The White House was inundated with several hundred letters following the announcement, the great majority of them supporting the appointment.[14]

* * * * *

There has been some debate as to who suggested to Wilson that Brandeis fill the vacancy caused by Lamar's death. In the days before the announcement, William Kent,[15] Pinchot,[16] Norman Hapgood,[17] Secretary of the Treasury William Gibbs McAdoo,[18] and Attorney General Thomas W. Gregory all urged Wilson to appoint Brandeis. Shortly after Lamar's death, Gregory went to the White House and asked if Wilson had thought of a successor. Wilson said that he had been waiting to hear from Gregory. "I am going to make a suggestion," the Attorney General replied, "and I am going to ask you not to respond to it for a week. I am going to recommend Louis Brandeis for the Supreme Court. My reason is that he is one of the most progressive men in the United States, and equal to the best in learning and ability."[19]

The fact of the matter is that Wilson needed very little prompting, having known and trusted Brandeis as an advisor ever since the 1912 campaign. The two men had first met at Wilson's summer home in Sea Girt, New Jersey. Wilson had asked Brandeis to meet with him in an effort to clarify his thinking regarding the antitrust problem, and it had been Brandeis who had formulated the New Freedom's philosophy regarding monopoly.[20] Brandeis had campaigned for Wilson throughout the Midwest, and had written a series of articles extolling the New Freedom over Theodore Roosevelt's New Nationalism.[21] When the President had to choose between two competing and quite contrary models for the Federal Reserve System, it had been Brandeis to whom he had turned.[22]

Wilson had wanted to make Brandeis a member of his Cabinet. But when rumors circulated that Wilson intended to name Brandeis—an inveterate foe of bigness and especially of monopoly—as Attorney General, Wilson was inundated with protests from the business community, and he finally yielded to the advice of Colonel Edward M. House that he not put Brandeis into the cabinet.[23] Brandeis, who had not sought any reward for his role in



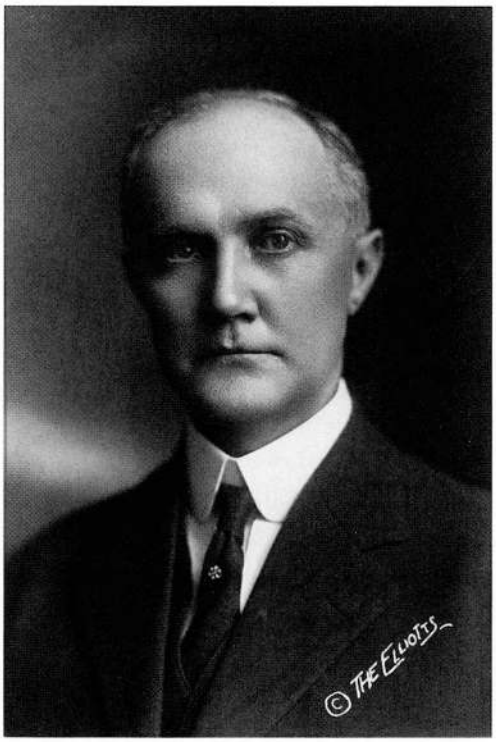
Brandeis first met Wilson at the future President's summer home in Sea Girt, New Jersey, to which he was called to help Wilson tackle the antitrust problem. Brandeis became Wilson's advisor, campaigning for him throughout the Midwest and writing articles extolling the New Freedom over Roosevelt's New Nationalism. Above, Wilson accepts the Democratic presidential nomination at Sea Girt.

the campaign, remained loyal to Wilson, a fact that the President greatly appreciated.

On a personal—and admittedly more speculative—level, let me suggest that Wilson admired Brandeis as the type of lawyer he himself had once wanted to be, and had concluded that it was an impossible dream. Wilson had always wanted to go into politics, and early in his life had believed that law would be the road that would get him there. But he and the law were a mismatched pair from the start, and in a letter to his fiancée, Wilson concluded that without a private income, he would never be able to devote his life to politics. To earn a sufficient living through the law, however, would preclude his going into politics. "The law is more than ever before a jealous mistress," he believed, and if a man "is to make a living at the bar he must be a lawyer *and nothing else* . . . . But he cannot be both a learned lawyer and a profound and public-spirited statesman, if he must plunge into practice and make the law a means of support."[24] One might speculate that perhaps Wilson had found himself drawn to Brandeis thirty years later because Brandeis had done what to Wilson had seemed the impossible—become a learned and successful lawyer as well as an effective political reformer.

Surely he must have had Brandeis in mind in an address he gave to the Gridiron Club in Washington about six months after Brandeis had been sworn in as an Associate Justice:

> The day of cold thinking, of finespun constitutional argument, is gone, thank God. We do not now discuss so much what the Constitution of the United States is as what the constitution of human nature is, what the essential constitution of human society is, and we know in our hearts that if we ever find a place or a time where the Constitution of the United States is contrary to the constitution of human nature and human society, we have got to change the Constitution of the United States. The Constitution, like the Sabbath, was made for man and not man for the Constitution.



Attorney General Thomas Watts Gregory recommended that Wilson appoint Brandeis because of the Massachusetts lawyer's progressivism and because Gregory considered him "equal to the best in learning and ability."

> I have known of some judges who did not perceive that. I have known of some judges who seemed to think that the Constitution was a strait jacket into which the life of the nation must be forced, whether it could be with a true regard to the laws of life or not. But judges of that sort have now gently to be led to a back seat and, with all respect for their years and their lack of information, taken care of until they pass unnoticed from the stage. And men must be put forward whose whole comprehension is that law is subservient to life and not life to law.[25]

In that last sentence, he indeed summed up much of what Brandeis had been arguing for nearly two decades.

* * * * *

Let us turn now to Brandeis, and ask why he not only accepted the offer of a seat on the high court, but then fought so hard to ensure his nomination. His initial comment to his brother—that "my feeling is rather—'Go it husband, Go it bear' with myself as 'interested spectator'"—must surely be taken with a rather large grain of salt.[26]

I would suggest that Brandeis saw the nomination to the Supreme Court as a vindication not only of his progressivism, but of his Zionist activities as well. His activity during the confirmation fight—hidden from the public but now well known to historians—gave him the opportunity to defend his often unorthodox practice of the law. A seat on the nation's highest court would give him a forum not only to preach but to practice the message he had been articulating for more than a decade: that the law had to reflect and take into account the realities of modern life.

Brandeis was far from a radical, and might better be considered a Burkean conservative, a person who believed that in order to keep the best of the past, one had to adapt as circumstances change. There is no question, however, that he stood as one of the pre-eminent Progressive reformers of the era, a fact recognized by friend and foe alike. His opposition to bigness in general and monopoly in particular, his support for protective legislation, his role in the Pinchot-Ballinger affair, and his success in getting the courts to approve reform legislation all made him an anathema in the eyes of the conservatives. Brandeis certainly recognized that in nominating him to the Court, Wilson was reaching out to the reformers, and in commenting on the opposition to him, he wrote that "[T]he fight that has come up shows clearly that my instinct that I could not afford to decline was correct. It would have been, in effect, deserting the progressive forces."[27] During the four-month fight over the nomination, progressive forces from every camp rallied in

his behalf, and in doing so vindicated Wilson's strategy.

The nomination also silenced many of Brandeis' opponents within the Jewish community. In 1913, Jacob Schiff and other Jewish bankers had opposed Brandeis receiving a Cabinet position, mainly because they perceived him as an antibusiness radical, but also because he was not a "representative" Jew, the way Oscar Straus, Secretary of Commerce in Theodore Roosevelt's administration, had been. Then, in 1914, Brandeis had taken over leadership of the American Zionist movement and turned it from a marginal club into a major force in American Jewish life. He had also begun organizing the American Jewish Congress as a direct challenge to the hegemony that the American Jewish Committee had at that time. The Committee, led by Schiff and Louis Marshall, believed Zionism to be inimical to the demands of American citizenship, since one could not be loyal both to the United States and to a movement that aimed at creating a Jewish nation in Palestine.[28] Brandeis had responded by embracing what the philosopher Horace Kallen later termed "cultural pluralism," and also by equating the Zionist goal of building a democratic state in Palestine with traditional American ideals. He argued that "Jews were by reason of their tradition and their character peculiarly fitted for the attainment of American ideals." This led him to make the ultimate link, not only bridging Zionism and Americanism, but welding the two together. "To be good Americans," he declared, "we must be better Jews; and to be better Jews, we must become Zionists."[29] The nomination seemingly confirmed Brandeis' argument. After all, how much better an American could one be if the President of the United States named that person to the Supreme Court!

The second part of Brandeis' reasoning involves the manner in which he conducted his law practice. In those days, judicial nominees did not themselves attend Senate confirmation hearings. Rather, the committee members heard from people supporting the nomination and, in some instances, from those opposing the appointment. Nearly all of the opposition to Brandeis' appointment came from people who charged him with being unethical in his law practice.[30] Since Brandeis could not appear in person to rebut these charges, he placed his defense in the hands of his law partner, Edward Francis McClennan, who would deal with the committee, and those of journalist Norman Hapgood, who would handle the press.

After a year in St. Louis, Brandeis had entered practice in Boston in 1879 with his good friend from Harvard Law School, Samuel D. Warren, and the partnership was successful from the beginning. After Warren left to run the family paper business, it was reorganized as Brandeis, Nutter & McClennan. While the firm never had the patronage of the old-line Boston banking and business establishments, it counted among its clients such newer firms as Filene Department Store and the hotelier Howard Johnson. While the firm did many of the usual things that lawyers do for those who hire them, Brandeis always said he "would rather have clients than be somebody's lawyer."[31] Brandeis often grilled prospective and even long-term clients on their complaints to ascertain whether they were, by his standards, in the right. If so, he would be a powerful advocate for their cause; if not, he would urge them to settle, and to do the right thing. And if he did become an advocate, by all reports he was extremely effective and more than a little ruthless. In multiparty litigation, Brandeis preferred to think of himself as "counsel to the situation," rather than an advocate for one particular side, and by gaining the trust of all involved, was often able to effect a settlement satisfactory to all concerned. When engaged by the Interstate Commerce Commission to assist it in the so-called Advanced Rate Hearings, Brandeis saw himself in this same position—counsel to the situation—and thus angered many shippers who believed he had been retained to look after their interests. While there is no question that Brandeis

attempted to live up to his own ethical standards, at least one scholar has suggested that even at that time, these practices overstepped the bounds of accepted legal behavior.[32]

As a number of those who had either lost to Brandeis or felt they had been betrayed by him in his role as counsel to the situation testified before the Senate Judiciary Committee, Brandeis analyzed their testimony in his Boston office. His secretaries would bring in the files from those cases to refresh his memory, and he would then dictate a specific rebuttal to the charges and send them—sometimes five or six letters a day—to McClennen in Washington.[33] McClennen would then arrange to have this material entered as rebuttal. While Brandeis' unorthodox practices puzzled many people, in the end the committee could find nothing in them that would, by itself, disqualify him from the Court. Perhaps their finding might well be summed up in a comment later made by Mr. Justice Sutherland about Brandeis: "My, how I detest that man's ideas. But he is one of the greatest technical lawyers I have ever known."[34]

Finally, I would suggest that Brandeis saw the Court as a challenge, a place where he could act as a judge in the way that he had been urging judges themselves to act for nearly a decade. Brandeis was part of the movement in American law known as "sociological jurisprudence," of which Roscoe Pound and Oliver Wendell Holmes, Jr., were the best-known theoretical exponents and Brandeis its greatest practitioner. Law, as pronounced by the courts in the late 19th and early 20th centuries, was bound by a set of assumptions that in some cases went back to the 18th century and before. It placed protection of property at the center of its logic, and utilized the notion of a right to contract as a barrier to reform legislation of any sort. This "classical mode," as William Wiecek has termed it,[35] was completely oblivious to the changes that industrialization had wrought in the economy, the polity, and the workplace. The great triumph of the Brandeis brief in *Muller v. Oregon* was that it piled fact upon fact to make the judges see that the workplace had changed and that the law was justified.[36]

In January 1916, just a few weeks before Wilson named him to the Court, Brandeis gave a speech to the Chicago Bar Association in which he spelled out his belief that the law had not kept pace with the times, and castigated the conservatives for their blindness:[37]

> Political as well as economic and social sciences noted these revolutionary changes [in the economy and society]. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently 18th-century conceptions of the liberty of the individual and of the sacredness of private property. Early 19th-century scientific half-truths like "The survival of the fittest," which, translated into practice, meant "The devil take the hindmost," were erected by judicial sanction into a moral law. Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubt as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the acts void .... [T]he law has everywhere a tendency to lag behind the facts of life.

It is very likely that Wilson saw a copy of this talk, since Brandeis' charge that legal justice had not kept pace with social justice would be echoed in the President's remarks given only a few months later and quoted earlier.

Brandeis had attacked the judiciary as blind to social reality. The nomination would give him the chance to explain what the law should be—not as an outside critic, but from

THAT BRANDEIS APPOINTMENT

CHORUS OF GRIEF-STRICKEN CONSERVATIVES: Oh, what an associate for such a pure and innocent girl! And we have tried to bring her up so carefully, too!

Just a few weeks before his nomination, Brandeis gave a speech to the Chicago Bar Association in which he spelled out his belief that the law had not kept pace with the times and castigated the conservatives for their blindness. Predictably, his appointment caused an uproar in the business community, but it was also criticized by pro-business Jews and by those who thought Brandeis had behaved unethically as a lawyer because he put his own beliefs before his client's interest.

within the sanctum itself. It was an opportunity he could not ignore.[38]

* * * * *

Shortly after the nomination was announced, Brandeis' wife Alice wrote to her brother-in-law that she had some misgivings:[39]

> Louis has been such a "free man" all these years but as you suggested—his days of "knight-erranting" must have, in the nature of things, been over before long. It is of course a great opportunity for service and all our friends here feel that he is the one man to bring to the Court what it greatly needs in the way of strengthening.
>
> It will doubtless be called something of a political appointment, and there is some little of that in it, but the President himself told Louis that he wanted him in the Court because of his high respect for and confidence in him.

There were, indeed, all of these aspects in the appointment—politics, service, and

Alice Brandeis had misgivings about her husband's appointment to the Court, but she conceded to her brother-in-law that Brandeis' "'days of knight-erranting' must have, in the nature of things, been over before long."

something Alice Brandeis did not mention: self-justification on both sides. What we had in late January 1916 was a perfect confluence of the political and the personal. While there have been other nominations made for these reasons, in this instance the confluence worked to the benefit not only of Woodrow Wilson, who was indeed re-elected in 1916 with the strong support of the former Bull Moose progressives, and of Louis Brandeis, who saw his life's work as a lawyer, a reformer, and a Zionist vindicated, but of the country as well. For in the end, the nation's constitutional jurisprudence—especially its concern for individual liberties—would be greatly strengthened through Brandeis' 23-year tenure on the nation's highest court.

ENDNOTES

[1]*Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920), Brandeis, J., dissenting.

[2]*Whitney v. California*, 274 U.S. 357, 372 (1927), Brandeis, J., concurring.

[3]*Olmstead v. United States*, 277 U.S. 438, 471 (1928), Brandeis, J., dissenting.

[4]*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[5]The story of the confirmation has been told well in Alpheus Thomas Mason, **Brandeis: A Free Man's Life** (New York: Viking, 1946), chs. 30 and 31, and in A. L. Todd, **Justice on Trial: The Case of Louis D. Brandeis** (New York: McGraw-Hill, 1964).

[6]One might speculate that Wilson was also determined not to repeat the mistake he had made in putting James C. McReynolds on the Court two years earlier. There is, however, no reference to McReynolds in the Wilson Papers for this time period.

[7]The Democratic Wilson polled 6,293,019 popular votes, Theodore Roosevelt running as an independent garnered 4,119,507, Republican William Howard Taft (the incumbent) 3,484,956, and Eugene Debs, the Socialist candidate, received 901,873 votes. In the Electoral College, however, Taft received 8, Roosevelt 88, and Wilson the rest, 435.

[8]Arthur S. Link, **Wilson: Confusion and Crises, 1915–1916** (Princeton, NJ: Princeton University Press, 1964), 321.

[9]Arthur S. Link, **Woodrow Wilson and the Progressive Era, 1910–1917** (New York: Harper & Brothers, 1954), 225.

[10]George J. Karger to William Howard Taft, 29 January 1916, quoted in Link, **Wilson: Confusions and Crises**, 325.

[11]Taft to Karger, 31 January 1916, *id.*

[12]Pinchot to Norman Hapgood, 29 January 1916, enclosed in Hapgood to Joseph Tumulty, 1 February 1916, in Arthur S. Link *et al.*, eds., **The Papers of Woodrow Wilson** (67 vols., Princeton, NJ: Princeton University Press, 1966–1992), 36:86.

[13]Robert M. La Follette, "Brandeis," *La Follette's Magazine* 8 (February 1916): 1–2.

[14]Woodrow Wilson Papers, Library of Congress, Washington, DC, File VI, Box 522. Although much has been made of anti-Semitism among opponents of the nomination, in the letters to Wilson the minority that opposed Brandeis barely mentioned his religion. They did believe that he was a radical, and for that reason should not be on the Court. William F. Fitzgerald, a conservative Boston Democratic leader, did say that "the fact that a slimy fellow of this kind by his smoothness and intrigue, together with his Jewish instinct, can [be appointed to the Court] should teach an object lesson" to true Americans. Fitzgerald to Thomas Walsh, 29 January 1916, quoted in Link, **Wilson: Confusions and Crises**, 325.

[15]William Kent to Woodrow Wilson, 27 January 1916, **Papers of Woodrow Wilson**, 36:19.

[16]Amos Pinchot to Woodrow Wilson, 27 January 1916, *id.*, 23–24.

[17]Norman Hapgood to Joseph Tumulty, 28 January 1916, *id.*, 25–26.

[18]William G. McAdoo, **Crowded Years: The Reminiscences of William G. McAdoo** (Boston: Houghton-Mifflin, 1931), 342–343.

[19]Ray Stannard Baker, interview with Thomas W. Gregory, 14–15 March 1927, Ray Stannard Baker Papers, Library of Congress, Washington, DC.

[20]See Louis D. Brandeis to Alfred Brandeis, 29 August 1912, in Melvin I. Urofsky and David W. Levy, eds., **Letters of Louis D. Brandeis** (5 vols., Albany: State University of New York Press, 1971–1978), 2:660–661; Melvin I. Urofsky, "Wilson, Brandeis, and the Trust Issue, 1912–1914," *Mid-America* 49 (1967): 118–141. Arthur Link called Brandeis "the architect of the New Freedom."

[21]For Brandeis' role in the campaign, see Mason, **Brandeis**, ch. 24.

[22]Brandeis to Wilson, 14 June 1913, **Letters of Louis D. Brandeis**, 3:113–115.

[23]For business opposition, see, for example, the editorial in the *Boston American* of 21 November 1912, warning that naming Brandeis to the Cabinet would bring on widespread depression. For House's role, see **Papers of Woodrow Wilson**, 27:23, 61, 130, 137-138. See also Brandeis to Alfred Brandeis, 2 March 1913, **Letters of Louis D. Brandeis**, 3:37.

[24]Wilson to Ellen Axson, 30 October 1883, **Papers of Woodrow Wilson**, 2:501.

[25]Address to Gridiron Club, 9 December 1916, quoted in Link, **Wilson: Confusions and Crises**, 324.

[26]Brandeis to Alfred Brandeis, 12 February 1916, **Letters of Louis D. Brandeis**, 4:54.

[27]*Id.*

[28]See Melvin I. Urofsky, **American Zionism from Herzl to the Holocaust** (Garden City, NY: Anchor/Doubleday, 1975), chs. 4 and 5.

[29]Baltimore *American*, 16 September 1914; Brandeis, **The Jewish Problem, and How to Solve It** (New York: Zionist Essays Publication Committee, 1915).

[30]See Senate Committee on the Judiciary, **Hearings on the Nomination of Louis D. Brandeis to be Associate Justice of the United States Supreme Court**, 64th Cong., 1st Sess. (Washington, DC: Government Printing Office, 1916), *passim.*

[31]Quoted in Ernest Poole, "Foreword," in Louis D. Brandeis, **Business—A Profession** (Boston: Small, Maynard, 1914), ix, l–ll.

[32]Clyde Spillenger, "Elusive Advocate: Reconsidering Brandeis as People's Lawyer," 105 *Yale Law Journal* 1447 (1996).

[33]These letters to McClennen can be found in **Letters of Louis D. Brandeis**, 4:33–184, *passim.*

[34]Philippa Strum, **Brandeis: Beyond Progressivism** (Lawrence: University Press of Kansas, 1994), 62.

[35]William M. Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937** (New York: Oxford University Press, 1998).

[36]*Muller v. Oregon,* 208 U.S. 412 (1909). The decision, along with the brief that Brandeis compiled with the aid of his sister-in-law, Josephine Goldmark, can be found in **Women in Industry . . .** (New York: Consumers' League, 1908).

[37]Louis D. Brandeis, "The Living Law," 10 *Illinois Law Review* 461, 463–464 (1916).

[38]Nor did he once on the Court. The "Brandeis brief" of the appellant became the Brandeis dissent, packed with facts to explain why the legislature had passed the law and why the majority of his brethren were foolish to ignore these facts. A good example is his dissent in *Jay Burns Baking Co. v. Bryan*, 264 U.S, 504, 517 (1924), in which the dissent endorsing a law regulating the size of bread loaves was justified by, as some people have put it, more than one would ever want to know about the baking business.

[39]Alice Brandeis to Alfred Brandeis, 31 January 1916, in Mason, **Brandeis**, 466.

William Howard Taft and the Importance of Unanimity*

SANDRA DAY O'CONNOR

This Term, the Historical Society has put on a wonderful series about the man who is widely—and rightly—regarded as this Court's greatest Chief Justice. Through his recognition of the right of judicial review, John Marshall secured for this Court a role in shaping the nation's most important principles: racial equality, individual liberty, the meaning of democracy, and so many others.

Learning more about John Marshall this Term has caused me to think about another great Chief Justice, who perhaps deserves almost as much credit as Marshall for the Court's modern-day role, but does not often receive the recognition: William Howard Taft. Taft, of course, was remarkable even before he became Chief Justice—but even the presidency did not hold as much charm for Taft as did his eventual position on the Court. Mrs. Taft noted in her memoirs that "[N]ever did he cease to regard a Supreme Court appointment as vastly more desirable than the Presidency."[1]

Mrs. Taft, however, disagreed. She loved being First Lady, and was a good one, at that. She was responsible for bringing the cherry blossoms to Washington, a feat for which I am particularly grateful. She also made a bit of history on March 4, 1909 by becoming the first First Lady to accompany her husband from the Capitol to the White House on Inauguration Day.[2] She was a difficult woman to refuse.

Taft, on the other hand, was an unpopular President. His bid for re-election was so unsuccessful that he himself described his defeat as "not only a landslide but a tidal wave and holocaust all rolled into one general cataclysm."[3] Despite his failures as President, however, as chief executive of the Court Taft could only be considered a success. When he took over the job, he found a federal system overwhelmed with cases, causing the Supreme Court's docket to be as much as five years behind and placing the other federal courts in similarly dire straits.[4] Taft, with his experience as an executive and his connections on Capitol Hill, succeeded in securing the appointment of twenty-four additional federal judges.[5] He also founded the predecessor to the Judicial Conference of the United States,

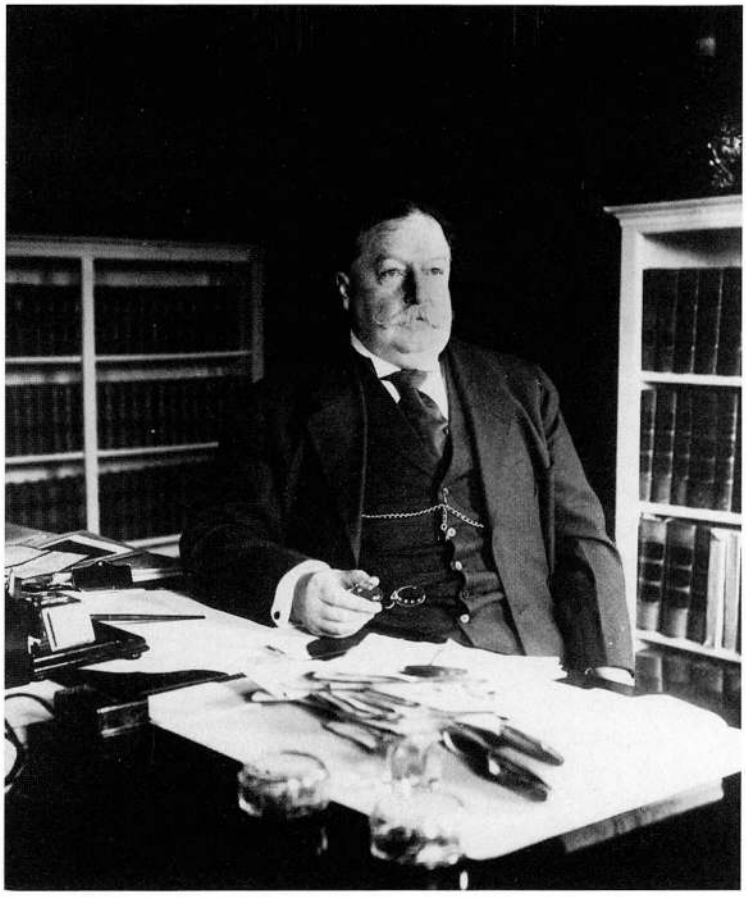
Helen Taft (pictured with her husband and son) became the first First Lady to accompany her husband from the Capitol to the White House on Inauguration Day. She preferred being the wife of a President to being that of a Chief Justice.

the job of which it became to keep statistics on the work of federal courts and to suggest reforms to keep the federal system functioning smoothly.[6]

Taft lessened the load on the Supreme Court by successfully lobbying Congress to pass a statute that would give the Court greater control over its own docket by substituting discretionary certiorari review for much of what had previously been mandatory appellate jurisdiction.[7] But Taft's concern for the Court went beyond simple efficiency: he had a vision of the Court much grander than that of a court of error securing justice for individual litigants. As Taft saw it, individual litigants received all the justice they required through the federal district courts and courts of appeals. The Supreme Court's role was only "to maintain uniformity of decision for the various courts of appeal, [and] to pass on constitutional and other important questions."[8] Control over its own docket allowed the Court to pass over ordinary lawsuits and spend more time on these sorts of questions.

In keeping with his vision of the Court as a player in issues of national importance, Taft also lobbied Congress to appropriate funds to build the present Supreme Court Building, a building whose grandeur matched Taft's sense of the significance of the business conducted therein.[9]

Chief Justices Taft and Marshall also placed great value on keeping the Courts over which they presided unanimous. John Marshall began his Chief Justiceship by putting to an end the English practice of seriatim opinions,



Not only was Chief Justice William Howard Taft an efficient administrator, but he pushed Congress to allow the Court to pass over ordinary lawsuits in order to concentrate on constitutional issues and uniformity of decision in the appellate courts.

where each Justice wrote separately to give his own view of the case.[10] Marshall accomplished this by writing the opinion of the Court himself: in his first four years on the bench, he wrote in all of the cases not decided *per curiam*, save the two in which he did not participate. In these four years, there were no dissents and only one separate concurring opinion.[11]

Marshall explained his Court's ability to achieve unanimity thus: "The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning must be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all."[12] Certainly, Marshall's description of a Court striving for genuine consensus did not present the complete picture. In order to maintain agreement, Justices on the Marshall Court also acquiesced in opinions with which they did not agree. Marshall began one of his rare dissents with a disclaimer: "I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion."[13]

Thomas Jefferson, who was not always pleased at the outcomes reached by the unanimous Court, had another explanation for the Marshall Court's unanimity. Jefferson attributed the Court's level of agreement not to Marshall's willingness to modify opinions to reach consensus, but rather to the Chief's overwhelming influence on the other Justices. When the time came for President Madison to fill a vacancy on the Court, Jefferson lamented:

"It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall."[14]

The Court led by Chief Justice Taft was also remarkably cohesive: 84 percent of the opinions of the Taft Court were unanimous.[15] Taft did not approve of dissents, believing that "[I]t is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way."[16] Taft's concern with the certainty of the law had to do not only with the need for people to plan their lives and business transactions around it; it also had to do with the legitimacy of the institution itself. According to Taft, "Most dissents elaborated, are a form of egotism. They don't do any good, and only weaken the prestige of the Court."[17] Accordingly, he asserted that he "would not think of opposing the views of my brethren if there was a majority against my own."[18] In general, he kept to this view, writing only 20 dissents during his nearly ten years on the Court.[19] On the rare occasion when he did dissent, he was clearly troubled by it. He began his dissent in *Adkins v. Children's Hospital* with a disclaimer: "I regret much to differ from the Court in these cases."[20]

Taft's goal of achieving unanimity on the Court was no doubt helped by norms of the day, which generally disfavored dissent.[21] Canon 19 of the code of judicial ethics in place at the time stated that

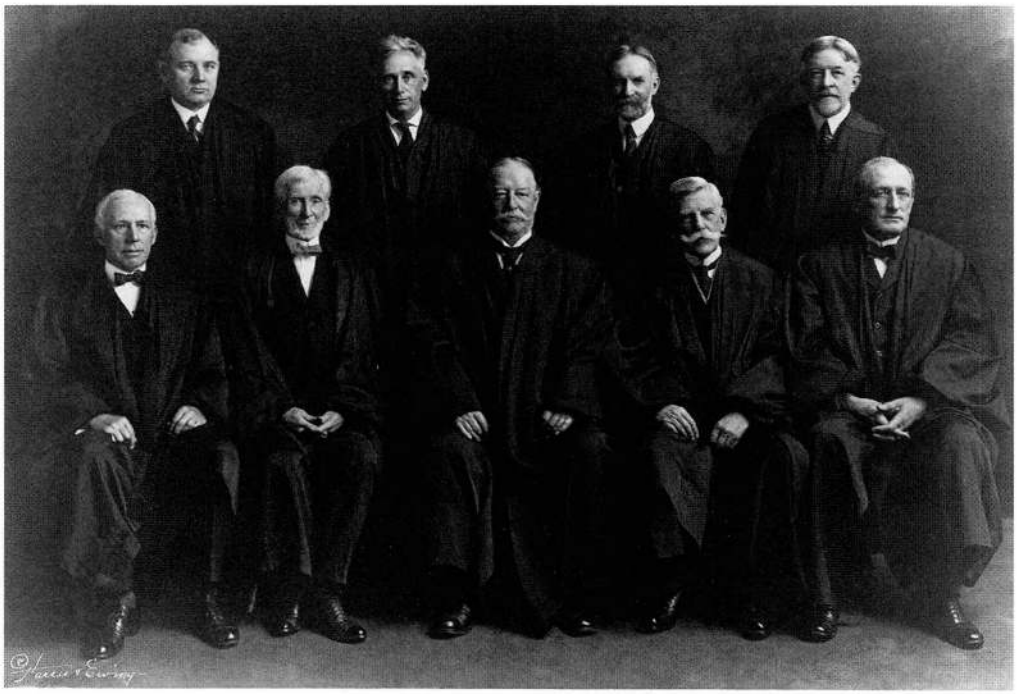
> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.[22]

These norms affected even Justices Holmes and Brandeis, who, along with Justice Stone, vexed Taft with their vigorous dissenting opinions, most famously in cases involving freedom of speech.[23] Taft's frustration with the three was great enough to declare them all "of course hopeless" when they would not join the other six Justices in a case "to steady the Court."[24] But remarkably, even the "Great Dissenter" Holmes thought it was "useless and undesirable, as a rule, to express dissent."[25] Brandeis, too, recognized that he could not "always dissent," and kept his disagreement to himself when he felt he had been out of line with his fellow Justices on too many recent occasions.[26]

At least some of the Taft Court's agreement, however, was due to the Chief Justice's efforts to keep it together. Taft himself played some role in the perpetuation of the general judicial norm against dissent—he was the chair of the committee that drafted Canon 19.[27] But he also made many more efforts directly targeted at his Court. One estimate has it that Taft was directly responsible for suppressing at least 200 dissenting votes.[28]

How did he do it? Taft, who did not have the jurisprudential talent of Marshall, was surely not able to keep the Court together simply by the force of his legal reasoning. Instead, he used his influence over appointments to the Court to block those who he thought would "almost certainly" be dissenters, such as Learned Hand.[29] Taft made every effort to maintain a personal relationship with all of his colleagues, so much so that Justice Holmes in 1925 reported that "[N]ever before . . . have we gotten along with so little jangling and dissension."[30] Taft also used his assignment power to ensure that the opinion writer would garner as many votes as possible for his view.[31]

But achieving unanimity did not end with opinion assignment: it was an ongoing struggle. Professor Robert Post, who is currently

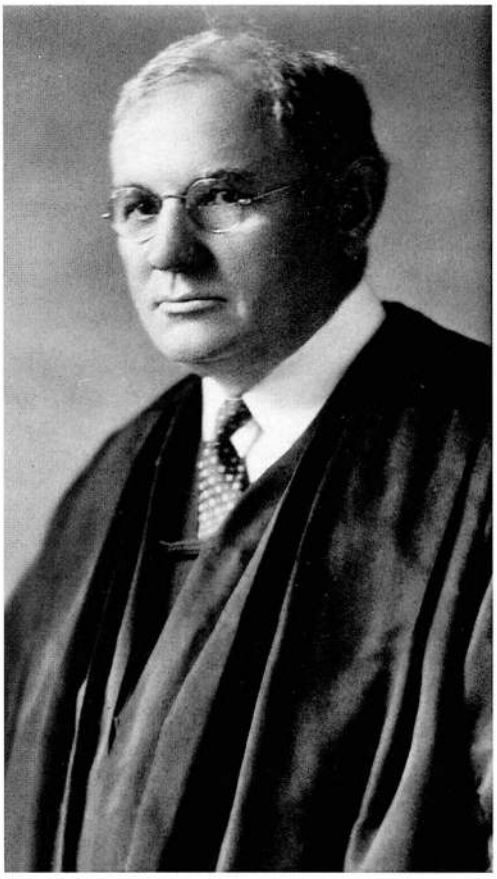


To suppress dissenting votes on the Court, Taft maintained good relations with his brethren and used his assignment power to assure that the opinion writer would garner as many votes as possible. The members of the Taft Court in 1925 are pictured above.

writing the Holmes Devise on the Taft Court, has uncovered the Court's original conference books. He has found that 30 percent of the Taft Court's unanimous opinions required a Justice to change his conference vote in order to achieve unanimity, and a further 12 percent required a Justice to side with the majority after originally passing or registering a tentative vote.[32]

In part, these switches occurred because the Justices of the Taft Court did what Marshall had aspired to do: achieve unanimity by carefully crafting opinions to meet the concerns of all of the Justices.[33] Taft led this practice by example, holding up voting on a complicated utility valuation case to allow Justice Brandeis to work through his concerns and then scheduling an entire day of discussion on the matter.[34] Taft also encouraged the Justices to keep their opinions to bare essentials, avoiding controversial discussions unnecessary to the result. Taft himself omitted a lengthy discussion of Congress's Commerce Clause power from one opinion at the request of Justice Pierce Butler, commenting that although the removal meant a "real sacrifice of personal preference," "[I]t is the duty of us all to control our personal preferences to the main object of the Court, which is to do effective justice."[35]

When methods of accommodation failed, however, the Justices of the Taft Court were willing to sign onto unanimous opinions that contained statements of the law with which they did not agree. Correspondence between the Justices shows that many of their votes were changed only under protest. Justice Butler responded to a Holmes opinion thus: "I voted the other way and remain unconvinced, but dissenting clamor does not often appeal to me as useful. I shall acquiesce." Other Justices were



Like many of the Justices, Pierce Butler acquiesced to signing onto a unanimous opinion to which he did not agree because "dissenting clamor does not often appeal to me as useful."

more blunt. Justice Brandeis concurred in an opinion of Justice Stone, commenting: "I think this is woefully wrong, but do not expect to dissent." Justice Sutherland ultimately joined an opinion to which he had originally responded: "Sorry, I cannot agree."[36]

Times have changed. In the 1991–2000 Terms, only 44 percent of the Court's opinions were unanimous, with 19 percent decided by only one vote. While these numbers do not indicate the sort of political divisions of which we are sometimes accused, the current Court has certainly not achieved anywhere near the level of consensus enjoyed by the Taft Court. In fact, that level of agreement did not last long. In the 1940s, only a decade after Taft left the bench, the statistics looked more modern—only 39 percent of the decisions were unanimous, and 14 percent were decided by a margin of one. The numbers have remained relatively stable since.

Despite the statistical difference, in some ways, the Taft Court sounds a lot like the Court on which I sit. We all strive to write opinions that will satisfy the concerns of as many of our colleagues as possible. We all greatly prefer the Court to be unanimous or almost so whenever possible, and we work to make that happen. I have never heard any of my colleagues express in seriousness the view about which Justice Brennan used to joke: that the most important skill for a Supreme Court Justice to have is the ability to "count to five."[37]

The statistical differences between the Taft Court and the present Court are probably reflective of the lengths we are willing to go to achieve unanimity. The agreement we do achieve is almost exclusively accomplished by the extensive revision of opinions in response to comments by other Justices. Unlike the Justices of the Taft Court, neither my colleagues nor I make a practice of joining opinions with which we do not agree. While unanimity is most certainly a goal of the present-day Court, it does not overwhelm our other goals. When agreement cannot be reached, each one of us takes the opportunity to make our disagreement known, often quite forcefully. Rather than following Taft's Canon 19, we generally, I think, follow the practice recommended by a later Chief Justice, Charles Evans Hughes:

> When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time.[38]

Perhaps ironically, we owe our ability to dissent in such cases in part to Chief Justice

Taft. Taft's focus on unanimity was largely motivated by a concern for the institutional integrity of the Court.[39] It naturally accompanied Taft's attempts to transform the Court from simply a higher appellate body to an expounder of national principle. Taft was as concerned that the Court be a grand presence in the public mind as he was that it be a grand presence on Maryland Avenue. He rightly recognized that too much fragmentation among the Justices would undermine the public's confidence in the institution and its decisions. No doubt the same can be said of John Marshall, who was dedicated to establishing the Court as a body justified in exercising its newly recognized power of judicial review. It is the success of Taft and Marshall in bolstering the Court's integrity that allows us the luxury of expressing our individual views today.

Although I believe that the Court ought to be careful not to squander the nest egg our predecessors have left us, I am thankful that it is there to use when needed. Dissents can play an important role in the future course of the law. One need look no further than Justice Holmes' dissent in *Lochner*,[40] or Justice Harlan's in *Plessy v. Ferguson*,[41] to see the good that can ultimately come from the expression of a minority view. In fact, Harlan's view in *Plessy* was so worth expressing that when the Court finally came around to it in *Brown v. Board of Education*,[42] Chief Justice Warren went to great efforts to do so unanimously. *Plessy* and *Lochner* show us that what was once simply a powerful disagreement by one individual may eventually become the law of the land. This is perhaps the most obvious advantage of dissenting opinions.

There is value to dissent even if it does not eventually carry the day. Dissenting opinions can force the Justices in the majority to respond to criticisms, honing the Court's opinion. Karl Llewellyn has referred to this function of dissent with an idiom that particularly appeals to the cowgirl in me: "rid[ing] herd on the majority."[43] Dissents can also serve to limit the holding of the majority opinion—what Justice Brennan called "damage control"[44]—alerting future litigants and all those who must be governed by the law of the precise scope of the Court's opinion.

Perhaps most importantly, the dissent plays a role in showing those members of the public who disagree with the Court's opinion that their views, though ultimately not successful, were at least understood and taken seriously. The citizens of this nation are educated and aware enough to understand that the questions that come before the Court rarely have easy answers. The existence of dissent demonstrates—indeed, embodies—the struggles we undergo in reaching our decisions. Only a very unsophisticated public could be duped into thinking the law on such controversial issues as abortion rights, immigration, and the rights of criminal defendants could be resolved so simply as to engender no disagreement whatsoever.

This function of dissent demonstrates one thing Chief Justice Taft may have missed: at times, the existence of dissent can bolster, rather than undermine, the Court's legitimacy. Again, a quote from Chief Justice Hughes is useful:

> [W]hat must ultimately sustain the Court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.[45]

We should never lose sight of how regrettable it is when the Court cannot find its way to agreement. The Court must always try, through all available means, to find grounds on which there can be genuine agreement. I feel pride in the Court when we are able to issue unanimous opinions in controversial cases,

as we did this Term in a difficult case or two. But when agreement is not possible, I also feel pride when my colleagues and I are able to disagree honestly and respectfully. I admire Chief Justice Taft for his heroic efforts to keep his Court together—for his flexibility and his willingness to discuss cases repeatedly and at length until the Court could find agreement. These efforts have contributed perhaps more to our Court than the other things Taft gave us: more than this building, however grand, and more than even the greater degree of control over our docket. I appreciate Taft the most for setting an example for future Courts of the importance of reaching agreement when possible, and for helping secure for the Court the respect necessary to enable us to depart from the practice of his own Court and disagree when disagreement is necessary. He truly was a great Chief Justice.

**These remarks were delivered as the Supreme Court Historical Society's Annual Lecture on June 3, 2002.*

ENDNOTES

[1]Donald F. Anderson, "Building National Consensus: The Career of William Howard Taft," 68 *U. Cin. L. Rev.* 323, 328 (2000).

[2]Mrs. William Howard Taft, **Recollections of Full Years** (1914), at 331–332.

[3]Anderson, *supra* note 1, at 336.

[4]Kenneth W. Starr, "William Howard Taft: The Chief Justice as Judicial Architect," 60 *U. Cin. L. Rev.* 963, 964 (1992).

[5]*Id.* at 965.

[6]*Id.*

[7]Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship and Decisionmaking in the Taft Court," 85 *Minn. L. Rev.* 1267, 1277 (2001).

[8]Starr, *supra* note 4, at 968.

[9]*Id.*

[10]Percival E. Jackson, **Dissent in the Supreme Court** 21 (1969).

[11]*Id.*

[12]*Id.* at 22.

[13]*Bank of United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C. J., dissenting).

[14]Jackson, *supra* note 10, at 23.

[15]Post, *supra* note 7, at 1283.

[16]*Id.* at 1311.

[17]*Id.*

[18]Alpheus Thomas Mason, **William Howard Taft: Chief Justice** 223 (1964).

[19]Alpheus Thomas Mason, **The Supreme Court from Taft to Warren** 50 (1958).

[20]261 U.S. 525, 562 (1923) (Taft, C. J., dissenting).

[21]Post, *supra* note 7, at 1284.

[22]Mason, *supra* note 18, at 219.

[23]*See, e.g., Whitney v. California*, 274 U.S. 357 (1927); *United States v. Schwimmer*, 279 U.S. 644 (1929).

[24]Post, *supra* note 7, at 1326.

[25]Jackson, *supra* note 10, at 18.

[26]Mason, *supra* note 18, at 201.

[27]*Id.* at 219.

[28]*Id.* at 223, citing David J. Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," unpublished paper, September 1963, p. 20, n. 122.

[29]*Id.* at 171.

[30]*Id.* at 199.

[31]*Id.* at 212.

[32]Post, *supra* note 7, at 1332–1333.

[33]*Id.* at 1301.

[34]Mason, *supra* note 18, at 202.

[35]*Id.*, *supra* note 18, at 204 (discussing *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 [1925])

[36]Post, *supra* note 7, at 1340–1341.

[37]Anthony Lewis, "In Memoriam: William J. Brennan, Jr.," 111 *Harv. L. Rev.* 29, 32 (1997).

[38]Charles Evans Hughes, **The Supreme Court of the United States** 67–68 (1928).

[39]Post, *supra* note 7, at 1356.

[40]198 U.S. 45, 76 (1905).

[41]163 U.S. 537, 551 (1896).

[42]349 U.S. 294 (1955).

[43]Karl Llewellyn, **The Common Law Tradition: Deciding Appeals** 26 (1960).

[44]William J. Brennan, Jr., "In Defense of Dissents," 37 *Hastings L. J.* 427, 430 (1986).

[45]Hughes, *supra* note 38, at 67–68.

The Buddha and the Bumblebee: The Saga of Stanley Reed and Felix Frankfurter

JOHN D. FASSETT

During the years since the first appointments of Justices to the Supreme Court in 1789, many interesting relationships have occurred between Justices. Some were amicable, but others involved animosity. No such long-Term relationship is more fascinating than the eighteen years Stanley Reed and Felix Frankfurter spent as Brethren. It featured neither consistent amicability nor animosity, but it is intriguing because it ran the gamut from admiration and respect through pettiness and condescension to frustration and serious annoyance. Nevertheless, Reed and Frankfurter probably were closer for a longer period than virtually any other two Associate Justices in the history of the Court. Moreover, the hundreds of letters, notes, and memoranda they exchanged must dwarf the output of any other two Justices.

Stanley Forman Reed, the Solicitor General, was Franklin Delano Roosevelt's second appointee to the Supreme Court, taking the judicial oath on January 31, 1938.[1] Felix Frankfurter, the Harvard Law School professor who had been an advisor to FDR since the President's Term as governor of New York, was his third appointee, taking the oath on January 30, 1939.[2] Between then and February 25, 1957 when Reed retired, Reed and Frankfurter occupied chambers a short stroll apart along the corridor behind the courtroom in the Supreme Court building.

Except for their mutual devotion to the Court as an institution and the fact that they were both workaholics, Reed and Frankfurter had few characteristics in common. Reed was fairly tall and enjoyed an occasional round of golf; Frankfurter was short, somewhat rotund, and not athletic. Reed was born in Kentucky in 1884 and spent his youth as the son of an affluent and influential doctor; Frankfurter was born in Vienna, Austria, in 1882 and emigrated with his parents to America in 1894. Reed attended private schools in Maysville, Kentucky, before spending two years at Kentucky

Wesleyan College; Frankfurter attended a public school in New York City before enrolling at the City College of New York, from which he graduated at the age of 19. Reed subsequently attended Yale University, graduating with its class of 1906, and thereafter spent one year each at the law schools of the University of Virginia, Columbia University, and the University of Paris in France; after a brief career as a civil servant in New York City, Frankfurter spent three years at Harvard Law School, graduating with its class of 1905.

Until he accepted the position of general counsel to the Federal Farm Board in November 1929, during Herbert Hoover's presidency, Reed was a prominent and successful Kentucky lawyer for almost two decades. He was an active Democrat and served two Terms in his state legislature early in his practice, but his legal reputation and particularly his experience as counsel to a tobacco farmers' cooperative led to his invitation to join the federal government. With the election of FDR in 1932, as a result of recommendations by several Democratic friends, Reed remained in the government and moved to the position of general counsel to the Reconstruction Finance Corporation (RFC), a Hoover creation that the New Deal administration decided to retain. Reed's contacts with Attorney General Homer Cummings while at the RFC were of paramount importance in Reed becoming Solicitor General and then being selected by FDR for appointment to the Supreme Court.

In 1911, Frankfurter became assistant to Henry Stimson (pictured) in the United States Attorney's office in New York City. When President William Howard Taft named Stimson Secretary of War, Frankfurter accompanied him to Washington, where his mentor helped him make many important contacts.

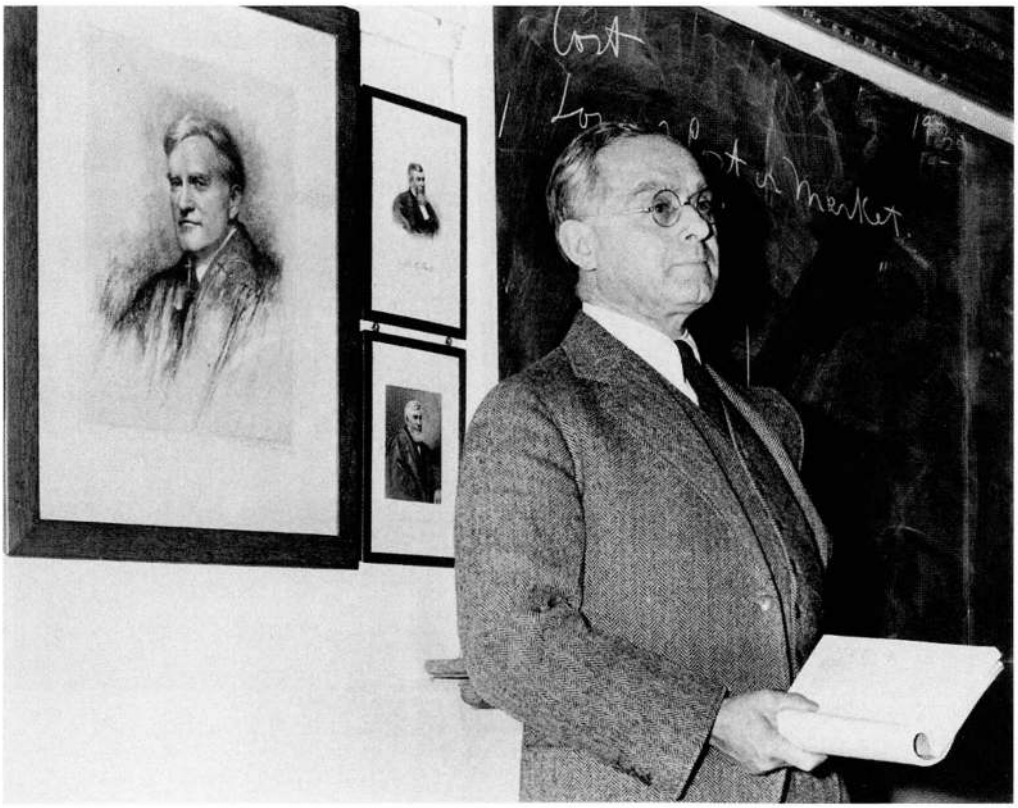
Following Harvard, Frankfurter spent a brief stint working for a Wall Street firm. He abandoned that career path to join Henry Stimson in the United States Attorney's office in New York City. When President William Howard Taft named Stimson Secretary of War, Frankfurter accompanied Stimson to Washington, where he made many important contacts, including the acquaintance of FDR. Frankfurter returned to Harvard Law School in 1914 as a professor, and with several interruptions for further government service as well as other activities, he continued to teach at Harvard until he joined the Court.

The personalities of Reed and Frankfurter were fundamentally different. One of Reed's law clerks accurately described Reed as follows:

> Uniformly gracious, uniformly courteous, uniformly polite. Never disputatious. Always the posture of courteously listening to somebody else's views about whatever, and doing what he wanted to do with a quiet smile, on the basis of the way he saw it.[3]

A Harvard biographer of Frankfurter, Professor H. N. Hirsch, described him:

> Frankfurter was a vibrant personality: witty, charming, warm, energized, sparkling. He had scores of



Frankfurter returned to Harvard Law School in 1914 as a professor, and, with several interruptions for further government service as well as other activities, he continued to teach at Harvard until he joined the Court in 1939.

friends whom he loved and who loved him, including men prominent in politics, the academy, and the legal profession. Few men in the twentieth century have had the devoted loyalty of so many.

But upon closer examination, there is a darker side to his character as well. Other, less flattering adjectives have been used to describe him: intense, nervous, arrogant, domineering. His correspondence with FDR, published in 1967, reveals a sycophantic flattery; his more recently published diaries reveal an obsessive concern with the motives of his judicial opponents mixed with high-pitched anger at their behavior and doctrines.[4]

Relations Prior to Brotherhood

Reed's relationship with Frankfurter antedated Frankfurter's appointment to the Court. While Reed was general counsel at the RFC, a serious dispute occurred between Henry Morgenthau and Dean Acheson in the Treasury Department, resulting in Acheson's departure. As a result, it was necessary to find new slots for Tommy Corcoran and Ben Cohen, two of Frankfurter's protégés who had been working out of Acheson's domain while serving as members of FDR's "brain trust." Chairman Jesse Jones and Reed were requested to create positions for Corcoran and Cohen at the RFC so that they could continue their activities. It has been opined that Corcoran's transfer back to the RFC proved to be a blessing in disguise for Frankfurter and his allies, since Reed

To John D. Fassett with grateful appreciation of his services as my Supreme Court law clerk and my continuing friendship
Stanley Reed
Feby 2-1963

Frankfurter selected Reed's clerks from among his students at Harvard Law School for several Terms, until Reed began ignoring his advice. Pictured is a reunion of Reed clerks in 1963; the author of this article is standing fourth from the right.

"gave ample scope to Corcoran's insatiable political interests and his uncanny ability to find and recruit other good lawyers for the administration."[5] Helen Gaylord, who subsequently became Reed's secretary and served in that capacity throughout his tenure on the Court, served as secretary to Corcoran at the RFC. She saw Frankfurter during his many visits to Corcoran and Cohen and thus was acquainted with the former professor prior to his arrival at the Court.[6]

When Reed became Solicitor General in early 1935, Frankfurter promptly advised him of his availability to assist in staffing the office and with its operation. Among the able former Harvard students selected on Frankfurter's recommendations to join the small staff were Paul Freund, Alger Hiss, and Charles Wyzanski, all former law clerks.

In addition to assuring his influence in the Solicitor General's office by placement there of some of his ablest "happy hot dogs," Frankfurter also proffered—and Reed accepted—Frankfurter's advice with respect to pending arguments and assistance in reviewing briefs to be filed for the government in New Deal cases before the Supreme Court. Reed was well aware of Frankfurter's eminence as a Harvard professor, as well as of his close relationships with both Justice Louis D. Brandeis and FDR. Among Reed's sources of information regarding Frankfurter were Reed's two sons. Both graduated from Harvard Law School, John in the class of 1934 and Stanley, Jr. in the class of 1938.

On January 5, 1938, Justice George Sutherland delivered to FDR a letter announcing his intent to retire from the Court. While

This cartoon appeared on the editorial page of the New Orleans *Item* along with an editorial praising the nomination of Solicitor General Stanley Reed for the seat left vacant by retiring Justice George Sutherland. Some observers feared there would be significant Republican opposition to Reed's nomination, but his appointment was unanimously approved on January 25, 1938.

Attorney General Homer Cummings, Senator M. M. Logan, and Stanley F. Reed smiled after Reed's brief confirmation hearings.

widespread speculation regarding a successor prominently included Frankfurter, FDR ultimately accepted Cummings' strong recommendation and on January 15 named Reed to the vacancy. Ten days later, having received a unanimous favorable report from its Judiciary Committee, the Senate, without debate or formal vote, confirmed the appointment.

To serve as his law clerk during the balance of the 1937 Term,[7] Reed brought with him from the Solicitor General's office Harold Leventhal, a Columbia Law School graduate who had served as Harlan Stone's clerk during the 1936 Term of the Court. But Frankfurter advised Reed that a successful Justice should prefer law clerks from Harvard, with the result that John Sapienza was chosen by Frankfurter to serve Reed during the 1938 Term.[8] Thereafter, for the next five Terms, each of Reed's clerks was also from Harvard and was chosen upon the recommendation of Frankfurter. Reed's third clerk, Philip Graham, who had been president of the *Harvard Law Review* (and later became publisher of the *Washington Post*), had the distinction of serving Reed and thereafter serving Frankfurter during the professor's second full Term on the Court.

The Harvard clerks gave Frankfurter an entrée to Reed beyond the professor's personal communications. As one of them related during an oral history interview:

> Justice Frankfurter, when he came to see Justice Reed, would come through my office, you see. That was a way of saying "hello" because he had been my teacher and I had a pretty good idea that he had been the cause of my getting the job, you see . . . I felt he was my sponsor. So he'd come through me and he would tell me a word or two, a kind of mysterious hint of the errand he was on . . . . It was perfectly clear he was going to try

Frankfurter was photographed arriving at his confirmation hearings before the Senate Judiciary Committee in 1939. FDR had delayed appointing Frankfurter until after Attorney General Cummings retired because, unlike Reed, the Harvard professor was considered too radical and Cummings worried that opposition to Frankfurter's nomination would hurt the President.

> and persuade Justice Reed of a particular point of view. He was lobbying him.[9]

Frankfurter's influence over the selection of Reed clerks continued for many Terms.[10]

In contrast to the widespread support that followed Reed's appointment, Frankfurter's resulted in a tidal wave of objections. FDR delayed his action to fill the vacancy caused by the death of Benjamin Cardozo until after the retirement of Cummings, since the Attorney General had strongly opposed the naming of Frankfurter, predicting that such an appointment would subject the President to criticism for appointing a radical to the Court. Together with Corcoran and Cohen, FDR's advisors Harry Hopkins and Harold Ickes urged FDR to disregard the opposition to Frankfurter; among the professor's other supporters was Justice Reed.[11]

Just prior to his appointment, Frankfurter was engaged in another project involving the Court. FDR's first appointee, Hugo L. Black, had joined the Court at the outset of the 1937 Term amid a furor over disclosure by the press of his past membership in the Ku Klux Klan. Even the "liberal" members of the Court were concerned about the appointment. FDR asked the professor to attempt, through his contacts on the Court, to calm the judicial waters. Additionally, Stone had contacted Frankfurter regarding his concern that Black was not equipped for the judicial position.[12] Probably not coincidentally, the Reeds invited both the Blacks and the Frankfurters to dinner during this period, thus affording the professor an opportunity to pursue his assignment.[13]

Frankfurter made a determined effort to assist Black, but the former Senator had little interest in the professor's lessons or patience with his personality.

Despite his lack of success in "educating" Black, Frankfurter was convinced that when he took his seat on the Court he would be able easily to handle his other judicial colleagues. In *The Enigma of Felix Frankfurter*, Hirsch wrote:

> Frankfurter was also convinced that he could easily handle his judicial colleagues. Throughout his life Frankfurter had excelled at "personalia"—that process of flattering, cajoling, helping, advising, and needling—of which he was so proud. In every previous environment—in the White House, at Harvard, in Washington—Frankfurter's interpersonal skills had won for him what he wanted.[14]

Foremost among those whom Frankfurter clearly expected to accept his leadership as he joined the Court was Stanley Reed.

Courtship during Hughes' Last Terms

Joseph Rauh, Frankfurter's first law clerk (inherited from Cardozo), wrote regarding the professor's arrival:

> When Frankfurter took his seat on the Supreme Court in January 1939, it was widely assumed that he would become the dominant spirit and intellectual leader of the new liberal Court. After all, he had been, in the words of Brandeis, "the most useful lawyer in the United States"; defender of Tom Mooney, of the alien victims of the Palmer Red Raids, of the striking miners of Bisbee, Arizona, of Sacco and Vanzetti and too many others to mention; probably the most influential advisor to President Roosevelt; teacher and sponsor of many of the men and women who made up the New Deal; and quite likely as knowledgeable in the history and significance of the Supreme Court as any living person.[15]

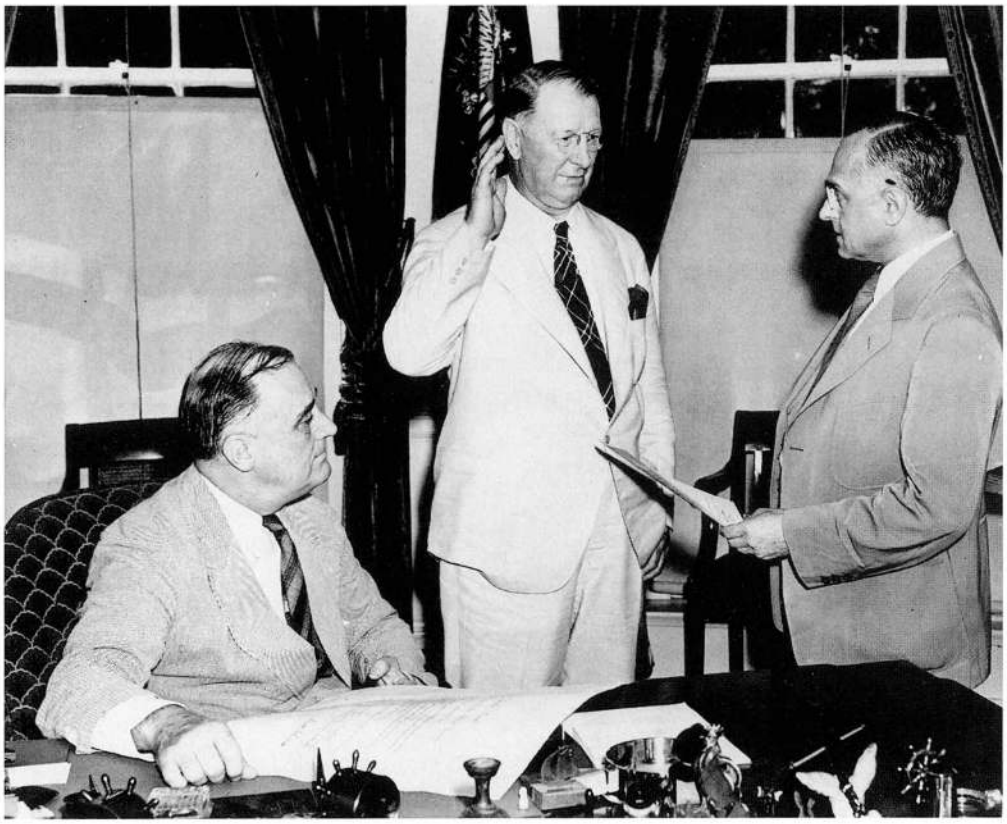
Hirsch emphasized that it was not only the new Justice who anticipated immediate leadership of the Court:

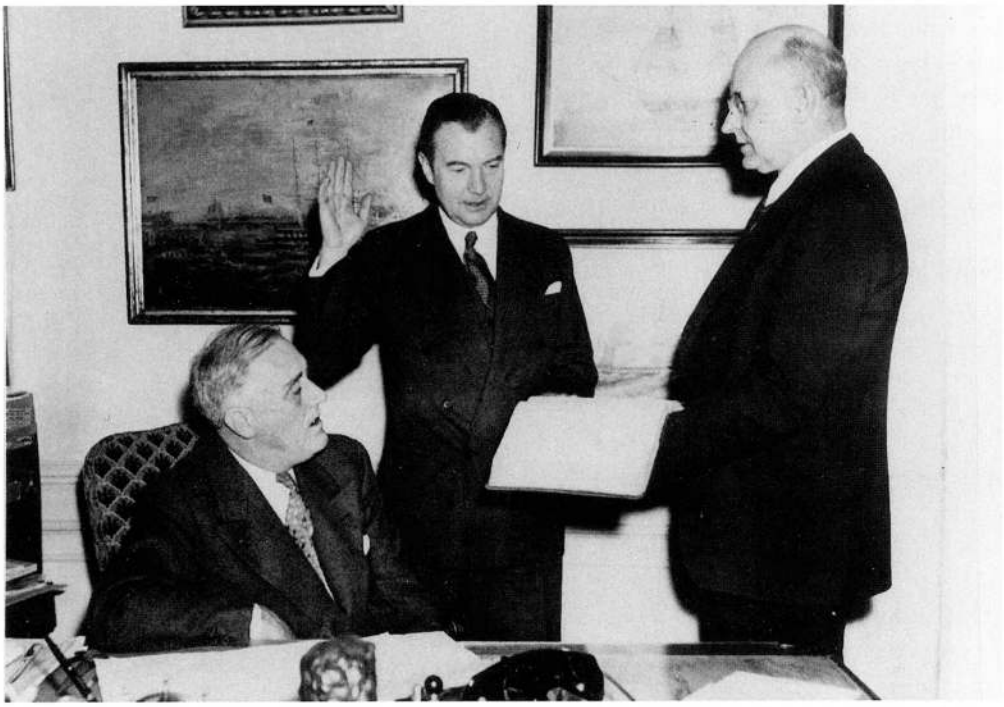
> It was inevitable that Frankfurter in 1939 would think of himself as the intellectual leader of the Roosevelt Court. Members of the White House circle expected him to dominate; that was why he had been appointed.[16]

The former professor was an anathema to Justices Pierce Butler and James C. McReynolds, the two survivors on the Court of the conservative "four horsemen," and his proselytizing efforts had been unsuccessful with Black and were not welcomed by Justice Owen J. Roberts. Thus, his courtships during the remainder of the 1938 Term and the ensuing two Terms were restricted to those with the Chief Justice plus Harlan Fiske Stone, Reed and the two new Justices who joined the Court during that period: William O. Douglas, replacing Brandeis, who retired less than two weeks after Frankfurter arrived; and Frank Murphy, who replaced Butler in February 1940. As to the new appointees, Liva Baker observed:

> Frankfurter earned a reputation for courting every new appointee that came to the Supreme Court. During that period when a new Justice was adjusting to his new position, it was said that Frankfurter spent an inordinate amount of time in the new man's office and wrote an inordinate number of notes and memorandums.[17]

Like Black, Douglas and Murphy, in turn, quickly rebuffed Frankfurter's educational efforts. Douglas later described Frankfurter as "a proselytizer extraordinary [sic]" who, during "every waking hour promoted the ideas





Justice Frankfurter administered the oath of office to Secretary of the Navy Frank Knox in 1940 (above). That same year, Justice Reed swore in Robert H. Jackson (below) as Attorney General.

he espoused."[18] Even more than the other FDR appointees, Douglas resented as well as rejected Frankfurter's efforts. Murphy and Frankfurter had had some serious disagreements even before Murphy was appointed to the Court, and their clashing personalities promptly led to antipathy, which pervaded their relationship. Murphy's biographer reported that Murphy "hated" Frankfurter.[19]

Frankfurter had some success, primarily through flattery, in developing a relationship with Chief Justice Charles Hughes prior to Hughes' retirement at the end of the 1940 Term. A former professor himself, Stone did not encourage Frankfurter's courtship, but their relations were reasonably amicable. Stone's solo dissent at the end of the 1939 Term to Frankfurter's first really major opinion (*Gobitis*,[20] the first flag-salute case) did not cause a significant rift, and Frankfurter, when requested by FDR, recommended that Stone be promoted to Chief Justice upon the retirement of Hughes.

The only significantly successful Frankfurter courtship during the final Hughes Terms was that of Reed. Shortly after Frankfurter occupied his suite of offices down the hall from Reed, the junior Justice commenced peppering Reed's chambers with notes and memoranda. The law clerks Frankfurter had been instrumental in installing in the Reed chambers also made ready conduits for conveying the former professor's words of wisdom. Whereas Reed rarely visited the Frankfurter chambers, the professor frequently journeyed down the hall to converse with Reed or his law clerk.

While flattery was an integral part of the Frankfurter courtship method, from the outset of his service on the Court his approach to Reed was far less deferential than his concurrent efforts with Hughes. That the Harvard professor did not consider the Kentuckian to be his intellectual equal is readily apparent from many of the early communications. An annoyed Cohen, once one of Frankfurter's most devoted followers, perceptively opined after a falling-out with the Justice that "Felix is incapable of having adult relationships"[21]—except with his mentors, Brandeis, Oliver Wendell Holmes, and Stimson. All others were treated as various grades of students!

With the convening of the 1939 Term, Frankfurter accelerated the conveyance of his often-condescending communications to Reed. An early one dated October 23 and addressed to "Dear Stanley" obviously followed up on a prior discussion of a case that had been argued. The three-page dissertation began:

> If I understand your difficulty with No. 38, it relates to opposition against coercive action by a state to achieve a surrender of a federal right. I have thought conscientiously, I believe and certainly extensively, about this difficulty and perhaps you will let me tell you briefly why I think that the problem that confronts us in No. 38 does not involve the difficulty you pose.[22]

The professor added that acceptance by Reed of Frankfurter's interpretation "would be worthy of the great Baron Parke who, you will recall, threw up his judgeship as a protest against" changes in the common law. This early example of a continuous stream of "Dear Stanley" communications appears to have been received not only with appreciation, but with a degree of enjoyment.

Shortly thereafter, Frankfurter prepared a draft of a concurring opinion to a proposed majority opinion Reed had circulated and sent it to Reed with the following covering note:

> I want you to see this before I circulate it not in order to soften the blow, for I have no doubt you will agree there is no blow. I want you to see it because that's the way I feel about you. No job is all beer and skittles—not even this one. Nothing in connection with the job here gives me more enveloping and continuous satisfaction than the disinterestedness of your friendship and fellowship. I have known a few people—very very few—in

> whom the instinct for work was as untarnished by any personal sensitiveness as is yours, but I have never known anyone in whom instinct was more finely or more constantly alive than in you. Therefore you never arouse in me any personal concern that whatever conscientious response I may make to your opinion will be interpreted by you otherwise than as the labors of co-workers in the vineyard.[23]

Amazingly, despite this flattering soliloquy, Reed did not incorporate Frankfurter's points in his opinion and Frankfurter did not file a concurrence!

Soon came a more typical Frankfurter instructional communication, in which he directed Reed to the treatise on the Commerce Clause he had authored. This was followed by a letter explaining:

> When I asked you whether you had read my little book on the Commerce Clause, I meant to imply not a commentary on your opinion in the *Ford* case, but on my views regarding the problems raised by relation of the states to the Commerce Clause. I merely meant to indicate that my conviction as to the necessity for empiricism relates to the disposition of special variants of a particular case within a framework of general ideas and not to a denial of the indispensability for a philosophy regarding state-nation relations under the Commerce Clause.[24]

There is every indication that throughout the 1939 Term, Reed enjoyed his contacts with Frankfurter, and Reed enthusiastically supported Frankfurter's opinion in the flag-salute case. In addition to their contacts regarding work of the Court, throughout the Term Reed and Frankfurter shared an assignment from FDR. By executive order dated January 31, 1939, the President had appointed a committee to study personnel issues involving certain government positions including attorneys, with Reed as chairman and Frankfurter as one of the other seven members. The issues with respect to employment of attorneys proved to be contentious. Frankfurter, who had brought many lawyers into government service, opposed the inclusion of lawyers in the classified civil service, and Reed supported Frankfurter's position, with the result that the committee divided 4–4. The end result was that the report finally submitted to FDR merely presented the conflicting views.[25]

The 1940 Term encompassed the reelection of FDR to his third Term, the announcement of the retirement of Hughes effective July 1, 1941, and the increased involvement of Frankfurter in the administration's war preparations. While Reed generally voted with Frankfurter during the Term, Reed did desert him in one significant case. In the *Meadowmoor Dairy*[26] case, Frankfurter wrote an opinion for a five-Justice majority upholding the right of an Illinois court to issue an injunction in a labor dispute that, the enjoined union claimed, deprived its members of their freedom of speech. Douglas joined a dissenting opinion by Black, but Reed filed his own separate dissent. It was his first exposition as a Justice of his philosophy regarding First Amendment rights, and it obviously did not accord with that of Frankfurter. Only eight Justices participated in the decision, because the Court was temporarily reduced as a result of the retirement of McReynolds, the last of the conservative bloc, on February 1, 1941. As a consequence, a number of cases were continued for the following Term.

Increasing Friction during the Stone Age

When the Court convened to commence hearing arguments on October 13, 1941, Stone occupied the center seat, and Robert H. Jackson and James F. Byrnes, Jr. occupied the two end positions. With the Court again at full

strength, those cases in which the Court had been equally divided during its prior Term were re-argued. Reed and Frankfurter ended up on opposite sides of several of those cases. In a case involving the proper forum for a Federal Employers' Liability Act suit by an injured employee, Reed wrote an expansive opinion for a six-Justice majority and Frankfurter dissented.[27] As to a group of actions involving federal diversity jurisdiction, Frankfurter marshaled a bare majority to hold that such jurisdiction must be narrowly construed, and Reed joined the Chief Justice, Roberts, and Jackson in advocating a more liberal result.[28] Reed also wrote a dissent for himself, the Chief, and Roberts from two decisions supported by Frankfurter restricting the power of federal courts to issue injunctions against competing state court proceedings.[29] It thus became apparent early in the Stone era that, even in the field of federal jurisdiction, in which Frankfurter claimed great expertise, Reed was not prepared to follow silently.

Frankfurter made his strongest effort during the Term to garner Reed's vote in *Bridges v. California*,[30] and he became particularly irked when he was unsuccessful. The case involved a constitutional challenge to a state court's invocation of its contempt power to punish labor leader Harry Bridges for publication of a telegram he had sent to the Secretary of Labor criticizing the actions of a judge in a labor dispute. When Reed advised that he had agreed to support Black's majority opinion reversing Bridges' contempt conviction, rather than Frankfurter's dissent, Frankfurter replied "Apparently that which is fundamental with me is of no moment to you, namely, that striking down state action by declaring it unconstitutional entails a wholly different quality of judgment from that in letting state action prevail." He wrote in a separate communication to "Dear Brother Reed," after making sarcastic references to Black's opinion, that "Perhaps now you will reconsider whether the right to commit contempt of court is really one of Mr. Bridges' privileges and immunities." Frankfurter continued his effort to obtain the vote that would change the outcome of the 5–4 decision up to the day before the opinion was handed down. He then wrote "That you should think of letting Black's opinion in the Contempt cases—the opinion, not the conclusions—go out as your own makes me more sorrowful than I dare put into words."[31] One commentator has opined that, in prevailing, Black, rather than Frankfurter, became the leader of the Roosevelt Justices on matters of constitutional law.[32]

Another flurry of letters followed Reed's declination to support Frankfurter in his challenge of a Douglas opinion. At one point, Frankfurter wrote, "I would like to ask you to read or reread in cold blood the following cases" that the former professor deemed to support his dissent. Shortly after the decision came down, still not having given up, Frankfurter wrote:

> I know you will not think me moved by any I-told-you-so motive in passing on to you the quotation below from Learned Hand . . . "I really think that the *Pearce* decision was unpardonable . . . These bozos don't seem to me to comprehend the very basic characteristic of their job, which is to keep some kind of coherence and simplicity in the body of rules which must be applied by a vastly complicated society."[33]

In addition to citing Hand as supporting his expertise, Frankfurter often cited Holmes or Brandeis as authorities supporting his positions. One handwritten note dated only "Monday Evening" began "As I gaze into a gentle quiet fire and a serene mood steals into me, I reflect on my talk with you late this afternoon . . . " and then added "The one thing you must hear—and I shall not burden you further hereafter is that my views are not my queer views—they are or were the convictions of" a listing of Justices.[34]

Frankfurter often flaunted his academic credentials to Reed, as in a letter in December 1941 in which he stated:

> [T]he fact is that I am an academic and I have no excuse for being on this Court unless I remain so. By which I mean that Harvard paid me a high salary for the opportunity of understanding the problems covered by the phrase "judicial review" and generations of the ablest legal brains in the country deprived me of any excuse for not having availed myself of that opportunity. And not even so powerful and agile a mind as that of Charles Evans Hughes could, under the pressures which produced adjudication and opinion writing, gain the thorough and disinterested grasp of these problems which twenty-five years of academic preoccupation with the problems should have left in one.[35]

The not-so-subtle change in the Frankfurter/Reed relationship that apparently surfaced with their dispute about the *Bridges* decision undoubtedly was exacerbated by Reed's increasing awareness of comments being made by his erstwhile friend to others, including Reed's law clerks. The situation led Douglas to report that "Reed was so polite and gracious as to be a foil to the agile, provocative Felix Frankfurter, who made great fun of him behind his back, though never to his face."[36] One of Reed's law clerks reported that Frankfurter had described Reed to him as "[a] man who crawls from detail to detail."[37]

In any event, during the Term, Reed's annoyance apparently reached a point at which he requested Frankfurter to desist from his contacts. That resulted in the following note to Reed:

> I inferred from our talk last night that I was to await your pleasure and not bother you with any initiation of talk. But I do not want to appear not to talk about what you call a brick. I can only say that if it was a brick, I should expect you to heave a similar one into my window when occasion offers. I deem it an exercise of the duties of friendship.[38]

Despite their judicial relationship, a corresponding social relationship did not develop between the Reeds and the Frankfurters. The Reeds did entertain the Frankfurters together with the Blacks prior to the professor's appointment, but thereafter they saw each other socially only on those occasions which involved all or many members of the Court. Winifred Reed enjoyed and actively participated in Washington's vibrant social life; Marion Frankfurter did not choose that course. Reed's sons both confirmed that there was little intimacy between their father and Frankfurter away from the Court and that a major reason was that Winifred neither liked nor trusted the former professor.[39]

Despite Reed's rebuffs and his time-consuming activities for the war effort, Frankfurter did not entirely give up on his campaign to convert Reed during the war years. For example, again citing his academic background, during the 1942 Term Frankfurter wrote the following in reaction to Reed's joinder of a dissent by Black to a Frankfurter opinion: "Were I still at Cambridge I would be saddened to note that you underwrote an opinion like Black's dissent in the *Chenery* case."[40] On New Year's Eve 1942, Frankfurter sent a handwritten note to Reed regarding *Parker v. Brown*,[41] a pending Commerce Clause decision:

> I cannot rid myself of the conviction that all your difficulties in the *Raisin* case derives from *your* conviction that such state controls of commodities entering into interstate commerce are bad economics and bad for the country . . . You may be right as a statesman—but its none of your damn business as a judge construing the Sherman Law and the commerce clause.[42]

Despite a cordial judicial relationship, Frankfurter and Reed did not socialize off the Court. Winifred Reed (left with the Justice), who actively participated in Washington social life, did not like Frankfurter because she was convinced he had spoken out against Reed being promoted to Chief Justice. Marion Frankfurter (below with her husband) was a recluse.

Reed had been reluctant, because of his conception of the wide range of federal power over commerce, to join the Chief's majority opinion upholding a state regulation. However, in reply to Frankfurter's note, Reed wrote "Happy New Year. But not from a statesman. I am a judge and to prove it in your way, I have signed up with the C.J. on raisins."

Wiley Rutledge, another former professor, joined the Court in February 1943 to fill the vacancy created by Byrnes' departure to the executive branch. Frankfurter's exercise of his wiles with Rutledge quickly proved no more productive than they had with Black, Douglas, and Murphy. A Frankfurter diary entry reads:

> I told Reed that it is a good sign for him to realize all is not for the best in the best of possible worlds but that he ought not to be disappointed in Rutledge, that that was to be expected from him, that he is one of these men who fails to remember what Holmes said it was the first duty of a civilized man not to forget, namely, that he is not God. Rutledge evidently is one of these evangelical lads who confuses his personal desire to do good in the world with the limits within which a wise and humble judge must move.[43]

Further expounding on the proper function of a judge, Frankfurter sent a long memo

entitled "Footnote about objectivity" containing the following:

> Precisely because it is so easy to make our necessarily limited personal experience with affairs the yardstick of the constitutional power of government, a Justice must have humility. That is, humility in not unconsciously arrogating to one's own notions of policy the commands of the Constitution.[44]

Seeking to gain Reed's vote in a case, Frankfurter wrote, "It is the lot of professors to be often not understood by pupils. I suppose that is why one of the boring habits into which professors get is repetitiveness. So let me try again."[45] Another time he told Reed that students at Harvard were taught the importance in construing statutes of reading them not once but thrice. He suggested that Reed do likewise.

Significant events involving the overruling of prior opinions by both Reed and Frankfurter occurred during the final weeks of the 1942 Term. First, a bloc consisting of the Chief, Black, Douglas, Murphy, and Rutledge vacated the Court's judgment in *Jones v. Opelika*,[46] in which Reed, during the prior Term, had written a decision upholding city ordinances requiring members of the Jehovah's Witnesses to obtain licenses prior to solicitations. The bloc then, in a series of cases,[47] held unconstitutional under the First Amendment other municipal ordinances forbidding the ringing of doorbells to deliver religious literature. Frankfurter supported Reed's vigorous dissent to these developments.

Frankfurter opposed the bloc of Justices supporting the First Amendment rights of Jehovah's Witnesses, and Reed supported Frankfurter's position in a series of cases on the subject. Above, Jehovah's Witnesses line up at mess tents outside a stadium convention in 1950.

Next, the same bloc plus Jackson, on Flag Day 1943, handed down the decision in *West Virginia v. Barnette*[48] in which Frankfurter's 1939 opinion in *Gobitis* was overruled. While Reed did not join Frankfurter's personalized dissent,[49] he did support Frankfurter's position. Rauh's memoir comments on this seminal event in Frankfurter's judicial career as follows:

> The chasm the flag salute cases produced between Frankfurter and the other liberals was far greater than just the overruling of his opinion. Black became the leader of the liberal majority on the Court, evoking Frankfurter references to his phalanx. Frankfurter even began to question the motives of the others, especially Black and Douglas; his 1943 diaries, for example, find him referring to Black as the "cheapest soap box orator," "a politician, although a very bad one," "violent," "vehement," "reckless"... For most of the time, until Frankfurter's last years, the hard feeling continued.[50]

Another incident occurred early in the 1943 Term that, while not as explosive as the flag-salute controversy, obviously caused Frankfurter to seethe. The case of *Smith v. Allwright*[51] involved the claimed unconstitutionality of political party primary elections in Texas. The Court had rejected a similar claim only eight years previously, with Roberts writing the decision. At the conference, all of the Justices except Roberts agreed that the 1935 case had been wrongly decided. Initially, the Chief assigned the writing of a majority opinion to Frankfurter, but Jackson, on behalf of himself and others, communicated to Stone their consensus "that the Court's decision, bound to arouse bitter resentment, would be much less apt to stir ugly reactions if the news that the white primary is dead is broken to it, if possible, by a Southerner who has been a Democrat and is not a member of one of the minorities which stir prejudices kindred to those against the Negro."[52] Stone then withdrew the assignment from Frankfurter and reassigned the opinion to Reed. Reed produced, with input from several of his Brethren, one of the best-written opinions of his judicial career. However, Frankfurter declined to support the opinion—although he concurred in the result.

While frequently entreating Reed to support his positions, Frankfurter felt no compunction to subscribe to Reed's opinions, as demonstrated by *Allwright*. In fact, Frankfurter often wrote or joined dissents to Reed's opinions, and they were frequently on opposite sides when neither was writing. On the final day of the 1944 Term, they had another confrontation regarding litigation involving Harry Bridges. This time the case[53] involved the government's effort to deport Bridges based on his having been a Communist when he entered the country in 1920. Frankfurter vigorously argued that the deportation order should be sustained, but Reed joined Douglas's opinion reversing the order.

Reed and Frankfurter did generally see eye-to-eye during the war in cases involving the administration's conduct of the war—cases involving the German saboteurs, Japanese on the West Coast, and the Espionage Act.[54] However, they were on opposite sides of the very contentious decision in 1943 in *Schneiderman v. United States*.[55] That case involved the government's proceeding to cancel the citizenship of an admitted Communist and arose at a very sensitive time in the nation's wartime relations with Russia. Reed joined the majority reversing the cancellation; Frankfurter both joined the dissent and sent a sarcastic letter accusing Reed of voting with the majority because of concern for the Soviet Union.[56]

There were several bitter feuds on the Court during the final Terms of Stone's Chief Justiceship. As I recounted in *New Deal Justice:*

> Having alienated the chief justice, by the spring of 1945 Roberts was

> on cordial relations with few of the brethren . . . Murphy clearly was unhappy on the Court and he particularly "hated" Felix Frankfurter . . . As for Frankfurter, he "had little regard for any of the members of the Axis, or they for him." Douglas told a biographer that "his break with Frankfurter dated from the Court's reversal of *Gobitis*" and "nastiness" characterized their relationship during the 1944 Term . . . The most notorious antagonists among the brethren prior to May 7, 1945, were Frankfurter and Black . . . Amazingly, the personality conflict at the Court that exploded into public view during the 1944 Term was none of the foregoing, but rather a bitter confrontation between Justices Black and Jackson.[57]

This charged atmosphere may well account for the decrease during the period in confrontations between Reed and Frankfurter, as well as for Roberts' decision, though he was still healthy, to resign on July 31, 1945.

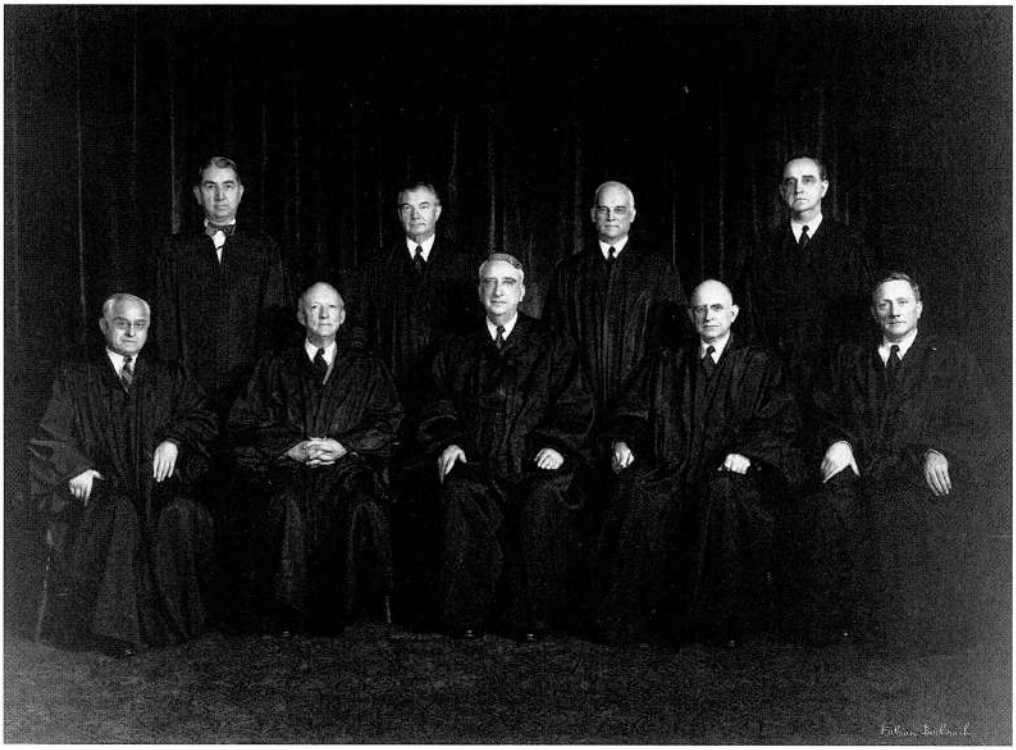
The decision at the core of the Jackson/Black dispute during the 1944 Term was *Jewell Ridge Corp v. Local 1167*,[58] a case involving whether the Fair Labor Standards Act required payment to miners of portal-to-portal pay. As a result of a change of vote by Reed following the conference, the miners, represented by Black's former law partner, were victorious. Jackson, with Frankfurter's support, wrote a biting dissent, but his outrage at what he considered a devious and politically motivated decision merely simmered during the 1945 Term while he was prosecuting war crimes in Nuremburg.

Change of a vote after conference was an unusual occurrence for Reed, but he did it again at the close of the 1944 Term to support a majority opinion by Frankfurter. The notorious "migratory divorce" decision[59] involved convictions by North Carolina of a man and woman for bigamy, despite the fact that, after leaving their spouses, they had obtained divorce decrees in Nevada. The issue was whether the Full Faith and Credit Clause required North Carolina to recognize the Nevada decrees. After much cogitation, Reed concluded that Frankfurter had the better of the debate in holding that North Carolina could refuse to recognize the decrees based on findings that the defendants had never actually been domiciled in Nevada. The case is one of the few in which Frankfurter's efforts with Reed bore fruit, and the switch entailed an avalanche of correspondence between the chambers. Over the course of ten days, each of the Justices wrote four letters arguing about aspects of the opinion. Finally, Frankfurter declined to add certain language and citations suggested by Reed, explaining:

> I am sorry I cannot do what you wish . . . . I really do not mean to resist *any* suggestion by my Brethren and especially by you. And I certainly do not think this opinion is literarily inspired.
>
> But, I have really weighed on the most delicate apothecary's scales what I have said and what I have left unsaid and I know how sensitive all of this is and what risks one runs by greater explicitness than I have been able to muster.[60]

Reed accepted this response and was with the slim majority when the decision finally was announced.

Harold H. Burton took the judicial oath to replace Roberts on October 1, 1945. Jackson was absent throughout the 1945 Term. Thus, there were only eight Justices sitting on April 22, 1946 when Chief Justice Stone became ill while presiding at a Court session and died later in the day. The unexpected vacancy in the center seat became not only the occasion for the most flagrant public display of disharmony on the Court, but also, behind the scenes, the cause of a serious cooling of relations between Reed and Frankfurter.



William O. Douglas (seated at right) believed that "but for Frankfurter's machinations," Reed would have been selected to succeed Harlan Fiske Stone as Chief Justice. Reed (seated second from right) was similarly convinced and thereafter dealt at arm's length with Frankfurter (seated at left). Fred Vinson, whom President Truman ultimately selected, occupies the center chair.

The sweetening of the relationship that had occurred with the *Williams* decision and a friendly exchange of correspondence during the 1945 summer recess was soured by events surrounding the appointment of Stone's successor.

From the day of Stone's death until June 6, 1945, when President Harry S. Truman named Fred Vinson to be Stone's successor, the rumor mills were rife with speculation regarding the appointment. Jackson, still in Europe, had long aspired to the center seat and obviously was sorely disappointed that he was not selected. In his frustration, he released a statement responding to charges that had appeared in the press regarding him and excoriating Black's action in the *Jewell Ridge* case. Even as Vinson was being confirmed, there were many calls for the resignations or impeachments of both Black and Jackson.[61]

Soured Relations during the Vinson Era

Jackson was not the only Justice aspiring to the center seat: Reed was also very interested in the possibility, and Winifred strongly believed he should be appointed. Douglas states in his autobiography that "but for Frankfurter's machinations," Reed "might have been Chief Justice" and would have made a good Chief. Winifred was convinced Frankfurter "pulled wires to keep Stanley from being named Chief Justice."[62] Her conviction cemented her antipathy toward the former professor and was reflected in her husband's apparent determination thereafter to deal at arm's length with Frankfurter. The likelihood that the belief of Douglas, Winifred, and ultimately Reed that Frankfurter had discouraged the President from considering Reed for the vacancy was accurate is supported by evidence of statements

made by Frankfurter regarding Reed. For example, he characterized Reed as "largely [a] vegetable" in one of his letters to his frequent correspondent Learned Hand. He also opined that Reed was "unjudicial minded."[63] An entry in Frankfurter's diary in 1946 also clearly indicates his disdain for Winifred Reed. Along with the other Brethren, having received an invitation to one of her social functions, the former professor recorded:

> Went to a tea at the Reeds given for Maxwell Anderson, the author of *Joan of Lorraine*. It was one of these typically silly and meretricious Washington parties. Winifred Reed characteristically had cabinet members and other people whom she could not possibly have known, but whom she asked because that is the kind of person she is, and they came because people come if asked by a Justice of the Supreme Court.[64]

When the 1946 Term convened, Reed, for the first time, had a law clerk from Yale Law School—a candidate not recommended by Frankfurter, as seven of the candidate's predecessors had been. The significant difference that made with respect to Frankfurter's influence is exemplified by the recollection of that clerk. He reported, "I never saw him ruffled except maybe once," when the clerk overheard Frankfurter in Reed's office:

> It really wasn't a conversation as much as a lecture on the part of Frankfurter to Justice Reed. And Frankfurter literally dressed Justice Reed down for something he had said or written or done on a point of law. It wasn't a personal matter. He was, in effect, saying to the Justice he didn't know what he was talking about and didn't understand this and he was treating Justice Reed almost like a student of Frankfurter's. And I came in afterwards and Justice Reed was flushed and obviously very upset. And I, being young, said "Mr. Justice, how can you let that man talk to you that way." And Justice Reed, looking a bit crestfallen, said "Well you know, you have to understand that Frankfurter is a great man, a brilliant man and a little tempermental."[65]

It is not clear what issue had caused the confrontation overheard by the clerk. It probably concerned the Court's decision in *Ballard v. United States*,[66] the first case argued during the Term. Reed chose to join a majority opinion by Douglas that reversed lower court decisions and ordered dismissal of a federal-court criminal indictment in which women had been systematically excluded from the panel that returned the indictment. Frankfurter, with the support of the new Chief as well as of Jackson and Burton, vehemently contended that the claim sustained by the majority was not properly before the Court. It was normal for the former professor to become as aroused about issues of standing as he became regarding constitutional issues.

Frankfurter's diary during the 1946 Term records several conversations regarding the new Chief, including this entry:

> Reed surprised me by his free talk about Vinson. I say surprised me, because Reed is usually on the bandwagon of authority, he is usually for the new King and is uncritical of those on top. Of course, he knows Vinson of old and when Vinson's appointment was made he was very frank in his expressions of Vinson's inadequacies for the job. When I asked him what Vinson was like, he replied "He is just like me, except that he is less well-educated and has not had as many opportunities." I then said, "Well why didn't the President appoint you?" To which he replied "That's what I asked myself."[67]

If Frankfurter's purpose in initiating these conversations was to drive a judicial wedge

between the new Chief and Reed, it was not successful. Before 1946 ended, the Chief and Reed had a frank discussion about what the Chief had perceived as Reed's antagonism. Vinson inquired whether Reed "was opposing him in some cases because of the fact he had been appointed Chief Justice instead of [Reed.]" Reed responded "that, of course, I'd hoped I might be appointed Chief Justice. Or putting it another way, I would have been very glad if I had been," but thereafter Reed confessed that "if I were not going to be appointed, I would rather have seen you appointed than anyone else."[68] An amicable and cooperative relationship ensued.

Statistics for the 1946 and 1947 Terms confirm that, in fact, Reed agreed with Vinson and also with Burton more often than with Frankfurter. Even when Reed and Frankfurter agreed as to result, they often disagreed as to reasoning. Reed's two most significant opinions during those Terms were typical of that situation. In *Francis v. Resweber*,[69] Reed was assigned to deal with the controversial constitutional questions arising from Louisiana's decision to subject a felon to a second visit to its electric chair after it malfunctioned during the first attempted execution. When Reed circulated his draft opinion (Vinson, Black, Douglas, Frankfurter, and Jackson had voted with Reed to affirm) and Burton his draft dissent, Douglas switched his vote. Frankfurter sent Reed a biting critique of the dissent, which he labelled "a lulu."[70] With only five votes remaining in the majority, the Chief pleaded with Frankfurter not to file a separate opinion, but he insisted on doing so, with the result that there was no majority opinion in the case. Frankfurter chose this occasion to deliver a lecture on the Fourteenth Amendment to challenge the "incorporation theory" of that amendment that Black had been advocating.

The debate on the incorporation theory reached a high with the decision in *Adamson v. California*[71] on the final day of the 1946 Term. Under California law, while a criminal defendant could not be compelled to be a witness against himself, it was permissible for a prosecutor to comment to the jury on the failure of the defendant to testify. Adamson, who chose not to testify in order not to reveal his prior criminal record, contended that the California procedure violated the Fourteenth Amendment, since it incorporated the no-self-incrimination clause of the Fifth Amendment. Reed's five-Justice majority upheld the California procedure, and this time Black expounded on his concept of the Fourteenth Amendment. Even before circulation of either Reed's majority opinion or Black's dissent, Frankfurter delivered to Reed a lengthy communication advising how the majority opinion should be written. He commented:

> There are statesmen, whom Neville Chamberlain best illustrates, who seem to think that the way to conciliate enemies is to lose friends. That odd notion has not been wholly unreflected even in the work of this Court. No matter what you wrote in rejecting the claim that there was a denial of due process in the *Adamson* case, because of disregard of immunity from self-incrimination, you could not win the support of Black & Co. It is important, however, that you should write so as to be able to speak for the Court . . . [I]f there is an opinion which has been accredited by time and by the recognition of the ablest members of the Court, it is the *Twining* opinion. What is called for now is a firm and pithy reaffirmation of that decision.[72]

While Reed squarely met the incorporation argument that Black expounded in the dissent, and while Frankfurter joined the Reed opinion, the former professor could not resist adding a concurrence that asserted that *Twining*[73] was "one of the outstanding opinions in the history of the Court" and refuted incorporation.

Reed's 1948 solo dissent in *McCollum v. Board of Education*[74] was probably the most publicized and widely analyzed of his judicial opinions. The parent of a child in the Champaign, Illinois school system, relying on the Establishment of Religion Clause of the First Amendment, obtained an order, which the majority upheld, requiring the Board of Education to terminate the practice of allowing religious leaders of various faiths to conduct religious instructions in school buildings once each week. Although Reed was alone in his position on the "released-time" program, Frankfurter taunted him for not disapproving such programs. At one point, Frankfurter sent a newspaper clipping containing a letter about the travails of a Jewish boy subjected to Christian activities at his school with a covering note reading:

> Please read this and then re-read it and try to understand what it is trying to say. Unless you *do* understand the deep thought expressed in this letter, believe me you cannot understand the real issues that underlie "released time" problems.[75]

On a subsequent occasion, Frankfurter explained his inclination to critique Reed's writing in such circumstances. "One aspect of the hangover of the habits formed in my Cambridge years is that to some of my brethren I feel free to make suggestions even as to opinions in which I do not join."[76]

Frankfurter did not restrain himself from sending comments even as to Reed's opinions in insignificant cases. In a case[77] involving application with respect to longshoremen of a provision of the Fair Labor Standards Act, Frankfurter chided:

> I should think that the fellow who was able to get away from Brandeis, Hughes & Co. in *Erie Railroad v. Tompkins* ought to be able to get away even from a conclusion of his own, formed before he came to that full grip with the difficulties of a subject and that insight into it, which so often comes only after the thorough study of a case and the brooding reflection upon it, which the responsibility of opinion writing brings.

Frankfurter considered his insight into the issues to be superior, since he "had the adventitious advantage of close knowledge of the New York longshore industry and the union's relation to it acquired during more than thirty years."[78]

One event during 1949 created a common dilemma for Frankfurter and Reed: their participation in the trial of Alger Hiss as character witnesses. Hiss had been a favorite student of Frankfurter's at Harvard and in 1935 had been hired by Reed for a position in the Solicitor General's office. When Hiss was first indicted for perjury, his counsel approached both Frankfurter and Reed to request them to testify during the federal court trial in New York. While Frankfurter agreed to testify voluntarily, Reed insisted that he would testify only if subpoenaed. At the conclusion of the trial, including very brief testimony by Frankfurter and Reed, the original jury deadlocked and a mistrial was declared. Neither Justice was called to testify at the retrial, which resulted in a conviction. The Hiss episode brought substantial criticism of the Justices, which particularly rankled Winifred, who blamed Frankfurter for the problem.

Many of Frankfurter's efforts to "educate" Reed during the final Terms of the 1940s involved procedures in criminal cases, an area in which they frequently disagreed and which was receiving much greater attention by the Court. When a majority including Frankfurter ordered suppression of a confession found to have been voluntary by a jury on the ground that the confessor had not been presented "without unnecessary delay" before a magistrate, Reed wrote a dissent decrying the extension of the "McNabb rule" as unwarranted and inadvisable.[79] In four other decisions announced on the final day of the 1948 Term,

Their participation as character witnesses in the trial of Alger Hiss (pictured leaving a courtroom with his wife in 1950) created a common dilemma for Reed and Frankfurter. Hiss had been a favorite student of Frankfurter's at Harvard; Reed had hired him in 1935 for a position at the Office of the Solicitor General.

Frankfurter joined the bloc of Black, Douglas, Murphy, and Rutledge to reverse criminal convictions in federal and state courts based on determinations that a search had been illegal or a confession improper, with Reed protesting the majority's rejection of the findings of the lower courts.[80]

Even prior to this flurry of cases, Frankfurter and Reed had engaged in a number of debates on the subject of searches and seizures. On one occasion, Frankfurter sent a letter declaring that "A fair reading of our opinions warrants, I believe, the generalization that we do not start with the right of search in order to consider a limitation upon it" and suggesting that Reed "consider the history" of certain precedents. The next day, Reed responded in a lengthy letter providing his analysis of those precedents. Later the same day, Frankfurter replied with a two-page dissertation in which he cited an opinion by Learned Hand for "the proper guiding considerations which I tried to indicate," referred to the "humorless audacity" of the government's position with respect to the challenged search, and concluded that "The application of the Fourth Amendment is not a game."[81]

One of Reed's clerks related that Reed had once asked, "Do you know why Felix and I decide these search and seizure cases differently?" and explained:

> When Felix was a young Jewish boy growing up in Vienna and there would be a knock on the door in the night it could be a policeman. And if it was a policeman that policeman could be coming to take him away. When I

> was young I grew up in Maysville, Kentucky, where my father was one of the leading citizens of the town. And I had a white pony and I used to ride the white pony down the main street. And I had golden curls then and as I passed the main intersection there was a policeman there and he would hold up his hand to stop traffic for me. And as I passed by he would pat me on my golden curls. When Felix thinks of policemen he thinks of the knock on the door in the night, and when I think it is of one stopping traffic and patting my golden curls.[82]

While Reed hardly ever walked down the hall to Frankfurter's chambers and had no contacts with Frankfurter's clerks, the former professor continued to visit the Reed chambers fairly often during the détente of the Vinson era. Visits occurred even when Reed was not present, particularly during those less frequent Terms when one of Reed's clerks was from Harvard.[83] Reed alerted his new clerks to the likelihood of a Frankfurter visit to them early in the Term. As late as the 1953 Term, when I clerked, shortly after I arrived at the Court and while Reed was still on vacation, Frankfurter strolled into my office and introduced himself, an action that was clearly unnecessary.

Frankfurter's visits to the Reed chambers were never social visits—he always had a mission. Many of the resulting discussions became quite loud, because Frankfurter tended to emphasize his propositions by increasing his decibel level. A note from Frankfurter to Vinson dated April 25, 1949, shows his typical persistence:

> I don't know how many times I have told Stanley to his face that while there is about him an aura of sweet reasonableness, he is one of the most obstinate of men .... *York v. Guarantee Trust Company* is a good illustration. I talked with him about that case almost hours on end before he finally concurred in the opinion. But it was like the proverbial pulling of teeth.[84]

One of Reed's clerks the following Term reported:

> He used to drive Felix Frankfurter up the wall... Because Felix would come all hotted up and charge in to talk with Stanley Reed and lobby him and try to persuade him of something or other. Felix would have seventeen arguments and be talking like a machine gun and just brandishing his intellectuality and his citations and his European rhetoric and his epigrams. And it was like talking to a Buddha. And I've watched this happen so often and Felix was tiny, small, whirring around like a hornet or like a bee, whirling around the Buddha-like figure.[85]

During the 1949 summer recess, both Murphy and Rutledge died unexpectedly. Truman wasted little time in appointing Tom Clark and Sherman Minton to the vacancies. These appointments, creating a new bloc of the four Truman appointees plus Reed and often Jackson, significantly altered the complexion of the Court as it began to struggle with a variety of Cold War cases. In virtually all of those cases, Reed was with the group supporting governmental powers. Reed and Frankfurter invariably disagreed in these cases, but their most long-winded disagreement was in the second *Dennis* case,[86] an appeal from the conviction of eleven leaders of the Communist Party for violation of the conspiracy provision of the Smith Act. From the outset, Reed voted with Vinson, Burton, and Minton to affirm (Clark was disqualified, since he had been Attorney General when the proceedings were instituted), and he sent a note to the Chief suggesting a way of dealing with the defendants' contention that the trial judge had improperly limited the issues submitted to the jury. *New Deal Justice* detailed what ensued:

> When Justice Frankfurter was shown a copy of this note, he wrote an analysis of the suggestion which he sent to Reed, thus initiating an exchange of letters regarding the case that greatly exceeded in number and length any other occurring between the two justices during their joint tenure on the Court. Between February 12th and March 15th eleven letters traveled between their offices debating, sometimes acerbically, the interrelationship of subversive activities and the First Amendment. Reed addressed his third response to the former professor's attempted dissection of his rationale of the case to "Dear Plato" and Frankfurter replied with a further critique, which closed "Platonically yours." Finally on March 13th, Reed wrote a letter to the former professor "to complete the correspondence." Frankfurter did not accept Reed's effort to conclude their debate. On March 14th he again responded asking forgiveness for his "candor" in criticizing Reed's "argumentative windings," and arguing that Reed's support for affirmation of the *Dennis* result derived "from the fact that you begin with an answer instead of a problem." This verbal jousting finally ended with a letter from Frankfurter agreeing that no purpose would be served by debating "in bits and pieces"—he proposed to strike "at the jugular" by writing his own opinion in the case.[87]

Frankfurter did write his own opinion, which—amazingly, in view of this background—was a concurrence. Jackson also concurred, thus making the final vote 6–2 for affirmance.

Frankfurter demonstrated again that, even when he agreed with Reed on a result, he had a compulsion to display both his and his clerk's intellectual superiority. In response to a draft majority opinion by Reed in 1951 rejecting due-process claims with respect to a confession,[88] Frankfurter returned a four-page memorandum containing extensive criticisms that he credited to "my legal adviser, my law clerk." Reed made some of the proposed changes and circulated a redraft. He then received a handwritten Frankfurter note, stating, "If I can I want to join you. But the difficulties I've noted, which to you may seem professorial or worse, are important to me." Lengthy notes were scribbled on almost every page of the redraft, and Frankfurter included an additional memo from his law clerk to "show you the kind of law clerks the Harvard Law School sends me."[89] Reed's two law clerks at the time were from Columbia and Yale. Recognizing the futility of further endeavoring to obtain Frankfurter's support of his opinion, Reed terminated the debate, and Frankfurter again filed a concurrence.

Reed's files for this period include a number of short handwritten notes from Frankfurter that do not identify their background. For example, one such note dated only "Saturday" concluded "I'm glad Cardozo is not here for new light on the 'nature of the judicial process.'" A "Monday" note apparently following notice that Reed would support a majority opinion rather than a Frankfurter dissent read, "How often your week-end thoughts do *not* improve on your earlier wisdom. Disrespectfully, FF."[90]

The emergence of what was often dubbed "the Truman bloc" on the Court enabled Reed to prevail in a number of religious freedom cases during the early 1950s, reversing his situation from when *Opelika* was vacated and he was the sole dissenter in *McCollum*. Thus, in 1951, Reed wrote for the majority, which upheld the constitutionality of the so-called Green River ordinances, declaring it a misdemeanor for any solicitor without invitation to enter premises to solicit orders for merchandise.[91] Reed relied on the commercial aspect of solicitations by Jehovah's Witnesses, rather than challenging the 1943 precedents directly. Upon receipt of Reed's first draft,

Frankfurter made a number of comments, including the following:

> On some page you say something to the effect that all but a few people want to protect the family. Now really! We ought not needlessly to lend ourselves to be made fun of. The pages of the *New Yorker* do not need to be supplied by us . . .
>
> On page 19 in the first open paragraph you say: "This Court has been careful to assure every idea, etc. a fair hearing through speech and press." That's a pretty boast! We couldn't possibly do that if we tried.[92]

Reed responded by making changes in his redraft, which led to a note from Frankfurter stating "Considering all I will have to answer for on Judgment Day, I guess I can endure joining you."

Reed's greatest First Amendment triumph of the period came in a case in which he did not write the majority opinion. In 1948, Reed had been the sole dissenter in the decision that outlawed an Illinois released-time program. Sectarian groups, led by the Catholic church, vigorously attacked the *McCollum* decision. During the 1951 Term, the case of *Zorach v. Clauson*[93] presented a similar issue with respect to a New York program, which differed from the one earlier condemned in that the religious instruction occurred away from the educational facilities. With Clark and Minton replacing Murphy and Rutledge and with reconsideration of their positions on released time by Vinson, Burton and Douglas—who wrote the majority opinion that Reed was enthusiastic about joining—only Frankfurter and Jackson were left to join Black's dissent, which stated he saw "no significant difference between the Illinois system and that of New York here sustained."[94] Reed's victory, which brought scorn from Frankfurter, resulted in many accolades, including publication by a Jesuit scholar of a volume entitled *Justice Reed and the First Amendment*.[95]

During the 1952 Term, Reed wrote prevailing opinions in four significant cases, and Frankfurter declined to join any of them. In *Brown v. Allen*,[96] which had been debated at length during the prior Term and studied by both Reed and Frankfurter during the summer recess, the Court proposed to clarify the role of federal courts in employing the writ of habeas corpus to review state-court criminal proceedings. Even prior to the re-argument, Reed circulated a memorandum specifying his analysis, and several communications between the Reed and Frankfurter chambers ensued. On the day of the re-argument, Frankfurter distributed copies of a lengthy study he had had completed by one of his clerks. At the conference, a majority supported Reed. The following day, Frankfurter distributed a five-page letter addressed to "Dear Brethren," commencing:

> All things must come to an end and I should not like to be unmindful of the fact that crying over spilt milk is for children, not for grown men. Still less do I like to appear disloyal to those wise men who taught me that when a case is over it is over. But since a case in this Court is not over until it is decided, I am venturing to put on paper what I did not get around to saying in yesterday's discussion regarding habeas corpus.[97]

For three additional months, memoranda and redrafts were circulated, until Reed's opinion for the Court was finally released on February 9, 1953. Jackson, Clark, and Burton also filed concurring opinions, and Black and Douglas filed dissents. The former professor filed a statement that, he announced was "not a dissenting opinion." To two of Reed's other significant opinions, Frankfurter wrote a clearly denominated dissent[98] and concurrence.[99]

The most personalized confrontation between Reed and Frankfurter on these four Reed opinions occurred with respect to *Poulos v. New Hampshire*,[100] another Jehovah's Witness case. Having been denied a license to conduct religious services in a public park, Poulos

proceeded to hold the services anyway and was convicted of violating the licensing ordinance. The highest state court upheld the conviction, even though the license had unlawfully been denied: it was held that Poulos's proper course had been to seek review of the denial, rather than to proceed without a license. Reed's draft opinion, which received the votes of the four Truman appointees and Jackson, concluded that the ordinance as construed by the state court did not impinge on the free exercise of religion. By a series of memoranda to all of the Brethren, Frankfurter first stated that he regarded most of Reed's opinion to be "wholly gratuitous," since the issue of the requirement for a license had not been raised in the state courts. When Reed pointed out language in the state-court opinion dealing with the validity of the ordinance, Frankfurter circulated an "apology" without significantly changing his position. Annoyed by the entire episode, Reed distributed a brief memorandum to the conference stating, "If anyone makes two mistakes hard-running in reading my draft opinion, may it not be that he has made a third." Finally, in response to two further memos from Frankfurter, Reed responded on the last one, "one more circulation from you and I am bound to win." Reed adhered to his draft and retained his five votes, and Frankfurter filed another concurrence.[101]

Throughout the 1952 Term, the necessity of resolving the pending school segregation cases[102] overshadowed all Court proceedings. Reed was studying and cogitating the challenging issues, and Frankfurter was pressing for the cases to be scheduled for re-argument rather than decisions. There is no specific evidence of any discussions between the two during the Term regarding the cases.

Final Terms with Warren

Reed no longer had any aspiration to the center seat when Vinson suddenly died on September 8, 1953, and Frankfurter's days of even a modicum of influence at the White House had ended when Dwight Eisenhower was elected in 1952. Accordingly, Ike's appointment of Earl Warren, while the subject of much conjecture among the Brethren, did not cause any further friction between Reed and Frankfurter. However, the entire Court's preoccupation with the anticipated re-argument of the segregation cases and Frankfurter's focus on his "education" of Warren did somewhat limit the former professor's proselytizing of Reed during the 1953 Term.

Frankfurter "courted Warren as he courted all new members of the Court," resulting in "a short honeymoon period."[103] The most comprehensive biography of Warren provides details of the Frankfurter campaign:

> Frankfurter, in particular, made a massive effort to cultivate the new Chief Justice. He bombarded Warren with notes, memoranda, articles, and even texts intended to inculcate the Frankfurter view. On October 8, 1953, for example, only three days after Warren was sworn in, Frankfurter sent him an article on the day-to-day work of a Chief Justice. A few days later, Frankfurter, writing that "a remark of yours the other afternoon encourages me to send you some more literature," sent Warren his 1927 volume, *The Business of the Supreme Court*, as well as his later articles surveying the conduct of the Court's business.[104]

During the Term, Frankfurter again declined to support either of Reed's only significant majority opinions. Frankfurter dissented in *Braniff Airways v. Nebraska*,[105] involving the constitutionality of the taxation by a state of the property of an interstate air carrier, and he filed a concurring opinion in the *Radio Officers' Union*[106] case involving interpretation of a provision of the Taft-Hartley Act about which there had been disagreements among the circuit courts. However, in neither case did Frankfurter engage in extended

Frankfurter (second from left) had no influence over President Dwight D. Eisenhower (center), so the appointment of Earl Warren as Chief Justice in 1953 caused no further friction between Frankfurter and Reed (right). Frankfurter courted Warren as he did all new Justices, taking some of the heat off of Reed.

written or oral debate with Reed. Rather, he sought to make his points in both cases by confronting the Reed law clerk who, he obviously surmised, had prepared drafts of the opinions for Reed. When the clerk, convinced that there was some merit in one of the professor's objections to specific language in the latter lengthy opinion, suggested to Reed that the challenged language be modified, the Justice responded that he had six votes and no change would be made "to humor Felix."[107]

While Frankfurter's visits to Reed's chambers were less frequent, he did make a few during the 1953 Term. The author had the exhilarating experience of being an active participant in one of those Frankfurter missions. The incident is recorded in a memoir as follows:

> Justice Reed had returned from the conference one Saturday near to 6 p.m. and was hurriedly going through his notes in his docket book and summarizing for George and me the developments during the session. Casually dressed in a bright orange-colored sweater, Justice Frankfurter walked into the room wishing to debate further the outcome of a procedural case in which Frankfurter had been on the losing side. As soon as the former professor began, Justice Reed responded that he had followed my advice on the vote and he had to leave, since he and Mrs. Reed were due at a reception. Helen stood in one doorway of the Justice's chambers and George in the other having trouble containing their mirth because the louder Frankfurter got, the

louder I responded. The "discussion" went on for some time before Justice Frankfurter apparently concluded I was hopeless.[108]

An article entitled "Mr. Justice Reed and *Brown v. The Board of Education*" in the 1986 *Yearbook* of the Supreme Court Historical Society detailed Reed's labors during the 1953 Term respecting the school segregation cases. Aside from Reed's receiving from Frankfurter and studying the long memorandum written by Alex Bickel, a Frankfurter clerk, with respect to the intent of the drafters and ratifiers of the Fourteenth Amendment, there was no overt interaction between Reed and Frankfurter regarding the cases. Their only written communications occurred subsequent to the announcement by Warren of the decisions on May 17, 1954. Frankfurter's note of May 20th read:

> History does not record dangers averted. I have no doubt that if the *Segregation* cases had reached decision last Term there would have been four dissenters—Vinson, Reed, Jackson and Clark—and certainly several opinions for the majority view. That would have been catastrophic. And if we had not had unanimity now inevitably there would have been more than one opinion—for the majority. That would have been disastrous.
>
> It ought to give you much satisfaction to be able to say, as you have every right to say, "I have done the State some service." I am inclined to think, indeed I believe, in no single act since you have been on this Court have you done the Republic a more lasting service. I am not unaware of the hard struggle this involved in the conscience of your mind and in the mind of your conscience. I am not unaware, because all I have to do is look within.
>
> As a citizen of the Republic, even more than as a colleague, I feel deep gratitude for your share in what I believe to be a great good for our nation.[109]

The following day Reed replied:

> Your note in regard to the *Segregation* cases was appreciated by me. While there were many considerations that pointed to a dissent they did not add up to a balance against the Court's opinion.

During Reed's final two and a half Terms before his retirement on February 25, 1957, the Reed/Frankfurter relationship mellowed, and there were few confrontations. Among the reasons were: Frankfurter's continued efforts at proselytizing, but with decreasing success, of Warren; the appointment of John Marshall Harlan, a more receptive candidate for supporting Frankfurter's philosophy, to replace Jackson, who died on October 9, 1954; the abolition as of the end of the 1954 Term of the weekly Saturday conferences, events that had often inspired Frankfurter campaigns; Frankfurter's knowledge that Reed was seriously contemplating retirement upon reaching age seventy and thus had limited further tenure on the Court; and—despite the good feeling engendered by the *Segregation Cases* note—the continued rebuff by Reed of Frankfurter's lobbying efforts. One of Reed's clerks during his final Terms reported that Reed still "found Frankfurter irritating, condescending."[110] To another, Reed commented that Frankfurter truly believed that any Justice who did not agree with him was either stupid or dishonest.[111]

A final explanation for Frankfurter's less persistent lobbying of Reed during these Terms was that, even though they were frequently on opposite sides in contentious cases, Reed was increasingly more often on the losing side, with Frankfurter on the prevailing side. Such was the situation during the 1954 Term in a series of cases involving resistance by

When Frankfurter convinced Justices Warren, Clark, and Minton to switch sides in *Toth v. Quarles*, Reed's lengthy majority opinion was revised to be a dissent. Frankfurter gloated over his victory and returned the circulated dissent with pointed comments. Air Force Policeman Robert Toth (pictured hugging his mother and sister on his return from Korea) was freed when the Supreme Court held in 1955 that ex-servicemen may not be tried by court-martial for alleged service crimes.

members of the Jehovah's Witnesses to the military draft,[112] a series of cases involving rights of witnesses before the House Un-American Activities Committee,[113] a death-sentence case in which the issue of discrimination against Negroes in the selection of the trial jury was not raised until the appeal,[114] and a case challenging procedures under the Federal Employee Loyalty Program.[115] Frankfurter could not resist sending a memo critiquing Reed's rationale for upholding the Loyalty Board in the latter case. He found the rationale "truly funny" and commented "I should think anybody who knows as much as you do about how regulations are signed by a President would be less confident than you are that because there is a reference in something signed by a President in 1953, that carries with it the legal implication that he authorized something to be done, as it were, by incorporating the past by reference."[116] Frankfurter's communication, which bore "disrespectfully submitted" as its closing, did not cause Reed to revise his opinion.

Events during the 1955 Term largely followed the same disheartening pattern for Reed. In a case involving the Federal Tort Claims Act,[117] Frankfurter, with the support of the Chief, wrote a majority opinion virtually overruling a 1952 Term Reed opinion from which Frankfurter had dissented. In *Toth v. Quarles*,[118] presenting the issue of whether a civilian ex-serviceman could constitutionally be subjected to trial by a military court-martial, what was initially believed to be a majority opinion written by Reed had to be converted into a dissent when Frankfurter convinced the Chief, Clark, and Harlan to switch sides.

When Reed's lengthy opinion, revised to be a dissent, was circulated, Frankfurter promptly returned his copy to Reed bearing many handwritten comments obviously gloating over his victory. The Term ended with Reed joining Clark and Minton protesting an opinion,[119] vigorously supported by Frankfurter, which gutted the Federal Employee Loyalty Program.

Minton retired for health reasons at the outset of the 1956 Term, and Reed chose to specify February 25, 1957 as his date to commence retirement status. Along with the other seven Justices—including William J. Brennan, Jr., who was named by Ike to replace Minton—Frankfurter signed a departure letter to Reed that concluded "We shall miss our official association with you, but our friendship and our best wishes for your happiness will always remain unchanged." Reed's response referred to "the close personal relationship between the members of the Court" and stated that he "would look forward to the continuance of the close friendships that have been nurtured."[120]

An Affair to Remember?

Upon his retirement, Reed was assigned new chambers in the front of the building, outside the brass gates that protect the area containing chambers of active Justices. On occasion, until the Reeds departed their apartment in the Mayflower Hotel, where they had resided since first coming to Washington, and moved to a retirement home on Long Island in 1976, the Justice received visits from a few of his former Brethren or attended sessions of the Court. In 1965, Reed traveled with a group of Justices to Indiana for Minton's funeral. In retirement, Reed outlived all other Justices: he died at ninety-five years of age on April 2, 1980.

Frankfurter remained on the Court for five Terms beyond Reed's retirement, stepping down on August 28, 1962 after suffering his second stroke. He was an invalid, but still mentally active, until not long prior to his death on February 22, 1965. Reed and Frankfurter seldom conversed and were not in regular communication with each other between Reed's retirement and Frankfurter's death. The once prolific communications stopped. No longer did the former professor hustle down the hall of the marble palace to Reed's chambers to do some lobbying.

The question is, in the final analysis, does the Reed/Frankfurter relationship have any real significance? It appears to have had very little effect on the outcome of decisions during its duration of eighteen years. Regardless of which of the protagonists had the better of the substantive arguments during the many debates—a subject I do not address—it is also virtually impossible to demonstrate any significant impact on the development of the law.

Reed and his clerks provided a ready and, during many Terms, welcoming outlet for Frankfurter's apparently boundless energy and professorial inclinations. At least during much of their relationship, even during some of the periods when Reed displayed annoyance, it appears that both Justices were deriving some satisfaction and even some enjoyment from their sparring. Beyond those factors, however, it seems that the only real significance of the fascinating relationship is that it illuminated two very different but very interesting personalities and shed considerable additional light on the operation of the Supreme Court during a tumultuous and most important period.

ENDNOTES

[1]See Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** (1994) (hereafter **NDJ**).

[2]See Baker, **Felix Frankfurter** (1969); Parrish, **Felix Frankfurter and His Times** (1982); Thomas, **Felix Frankfurter: Scholar on the Bench** (1960); Urofsky, **Felix Frankfurter: Judicial Restraint and Individual Liberties** (1991).

[3]Bayless Manning, Stanley Forman Reed Oral History Collection, University of Kentucky, Lexington, KY (hereafter OHC).

[4]Hirsch, **The Enigma of Felix Frankfurter** 4–5 (1981).

[5]**NDJ** 54.

[6]Helen Gaylord, OHC.
[7]Supreme Court Terms commence on the first Monday in October each year.
[8]John Sapienza, OHC.
[9]David Schwartz, OHC.
[10]Bennett Boskey, OHC.
[11]Baker 204.
[12]Lash, **From the Diaries of Felix Frankfurter** 67 (1975).
[13]Hirsch 140.
[14]Hirsch 138.
[15]Rauh, **A Personalized History of the Supreme Court from Roosevelt to Bush** 14 (unpublished manuscript, 1990).
[16]Hirsch 141.
[17]Baker 221.
[18]Douglas, **The Court Years, 1939–1975** 22 (1980).
[19]Fine, **Frank Murphy: The Washington Years** 257 (1984).
[20]*Minersville School District v. Gobitis*, 310 U.S. 586 (1940).
[21]Murphy, **The Brandeis/Frankfurter Connection** 191 (1982).
[22]**NDJ** 275–276. The case in question was *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165 (1939).
[23]Hirsch 143. The case was *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939).
[24]Hirsch 143–144.
[25]Report of the President's Committee on Civil Service Improvement. House Document No. 118, 77th Congress (GPO 1941).
[26]*Driver's Union v. Meadowmoor Dairy*, 312 U.S. 287 (1941).
[27]*Baltimore & Ohio Railroad v. Kepner*, 314 U.S. 44 (1941).
[28]*Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941).
[29]*Toucey v. New York Life*, 314 U.S. 118 (1941).
[30]314 U.S. 252 (1941).
[31]**NDJ** 314–317; Hirsch 157–159.
[32]Simon, **The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America** 126 (1989).
[33]Hirsch 161. The case was *Pearce v. Commissioner*, 315 U.S. 543 (1942).
[34]Reed Collection, Archives, University of Kentucky (hereafter Collection).
[35]Hirsch 159–160. This letter was written during their dispute regarding the *Bridges* case.
[36]Douglas, **Go East, Young Man** 459 (1974).
[37]Edwin Zimmerman, OHC.
[38]**NDJ** 316.
[39]Stanley Reed, Jr. and John Reed, OHC.
[40]Hirsch 165. The case was *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).
[41]317 U.S. 341 (1943).
[42]**NDJ** 348.
[43]Lash 205.
[44]**NDJ** 351.
[45]**NDJ** 359.
[46]316 U.S. 584 (1942).
[47]*Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. Struthers*, 319 U.S. 441 (1943).
[48]319 U.S. 624 (1943).
[49]See Dillard in Garraty, **Quarrels That Have Shaped the Constitution** 303 (1987).
[50]Rauh 19–20.
[51]321 U.S. 649 (1944).
[52]Mason, **Harlan Fiske Stone: Pillar of the Law** 615 (1956).
[53]*Bridges v. Wixon*, 326 U.S. 135 (1945).
[54]**NDJ** 327 *et seq.*
[55]320 U.S. 118 (1943).
[56]Hirsch 170.
[57]**NDJ** 378–380.
[58]325 U.S. 161 (1945).
[59]*Williams v. North Carolina*, 325 US 226 (1945).
[60]**NDJ** 385.
[61]**NDJ** 410.
[62]Douglas 458.
[63]Fine 257, 262.
[64]Lash 295.
[65]Aley Allan, OHC.
[66]329 U.S. 187 (1946).
[67]Lash 270–271.
[68]**NDJ** 418.
[69]329 U.S. 459 (1947).
[70]**NDJ** 721, n. 13. See Wiecek, "Felix Frankfurter, Incorporation, and the Willie Francis Case," 26 *J.S.C. Hist.* 53 (2001) for further details regarding the evolution of this decision.
[71]332 U.S. 46 (1947).
[72]**NDJ** 721, n. 16.
[73]*Twining v. New Jersey*, 211 U.S. 78 (1908).
[74]333 U.S. 203 (1948).
[75]**NDJ** 441.
[76]**NDJ** 734. The case was *Bailey v. Richardson*, 341 U.S. 918 (1951).
[77]*Bay Ridge Co. v. Aaron*, 334 U.S. 446 (1948).
[78]**NDJ** 435, 723, n. 51.
[79]*Upshaw v. United States*, 335 U.S. 410 (1948).
[80]*Lustig v. United States*, 338 U.S. 74 (1949); *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949).
[81]Frankfurter to Reed February 7, 1946, February 8, 1946, and February 19, 1946, Collection; Reed to Frankfurter, February 8 1946 and February 19, 1946, Collection.
[82]Joseph Barbash, OHC; see also Arthur Rosett, OHC.
[83]Beginning with the 1947 Term, Associate Justices were authorized to have two clerks each.

[84]Hirsch 185.
[85]Manning, OHC.
[86]*Dennis v. United States*, 341 U.S. 494 (1951).
[87]**NDJ** 500–501.
[88]*Gallegos v. Nebraska*, 342 U.S. 55 (1951).
[89]**NDJ** 511.
[90]Collection.
[91]*Breard v. Alexandria*, 341 U.S. 622 (1951).
[92]**NDJ** 496.
[93]343 U.S. 306 (1952).
[94]**NDJ** 515–517.
[95]O'Brien, **Justice Reed and the First Amendment: The Religion Clauses** (1958).
[96]344 U.S. 443 (1953).
[97]**NDJ** 530.
[98]*United States v. Kahriger*, 345 U.S. 22 (1953).
[99]*Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1953).
[100]345 U.S. 395 (1953).
[101]**NDJ** 533–535.
[102]*Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharp*, 347 U.S. 497 (1954).
[103]Baker 308.
[104]Schwartz, **Super Chief** 149 (1983).
[105]347 U.S. 590 (1954).
[106]*Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).
[107]Fassett, **The Shaping Years: A Memoir of My Youth and Education** 141–142 (2000).
[108]**Memoir**, 138.
[109]**NDJ** 575.
[110]Roderick Hills, OHC.
[111]**NDJ** 584.
[112]*Sicurella v. United States*, 348 U.S. 385 (1955); *Gonzales v. United States*, 348 U.S. 407 (1955); *Simmons v. United States*, 348 U.S. 397 (1956).
[113]*Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955); *Bart v. United States*, 349 U.S. 219 (1955).
[114]*Williams v. Georgia*, 349 U.S. 375 (1955).
[115]*Peters v. Hobby*, 349 U.S. 331 (1955).
[116]**NDJ** 595.
[117]*Indian River Towing Co. v. United States*, 350 U.S. 61(1955).
[118]350 U.S. 11 (1955).
[119]*Cole v. Young*, 351 U.S. 536 (1956); see **NDJ** 610-1.
[120]352 U.S. XIII–XIV.

The Exception That Defines the Rule: Marshall's *Marbury* Strategy and the Development of Supreme Court Doctrine

SCOTT E. LEMIEUX*

Introduction: *Marbury v. Madison* and the Fragile Development of Judicial Power

Analyzing the development of the European Court of Justice (ECJ), Laurence Helfer and Anne-Marie Slaughter argue that in the early years of the court, ECJ justices "borrowed a leaf from Chief Justice John Marshall's book, edging principles forward while deciding for those most likely to oppose them in practice."[1] The most famous example of this paradox in Marshall's jurisprudence can be found, of course, in his seminal opinion in *Marbury v. Madison.* While asserting the right of the judicial branch to nullify legislation it deemed unconstitutional, Marshall used an implausible construction of the jurisdictional powers given to the Supreme Court in Article III of the Constitution[2] to deny the petitioner the remedy to which Marshall claimed he was otherwise entitled. While *Marbury* is generally portrayed as the fountainhead of judicial review in the United States (and therefore in liberal democracies in general), as Mark Graber points out, the decision was in fact a "strategic judicial retreat . . . in the face of threats by executive . . . power."[3] In order to assert the power of judicial review, in other words, Marshall had to refrain from applying it in the case in question.

This paradoxical combination of power-claiming and self-restraint has been most often explained by emphasizing—following Alexander Hamilton's argument in *Federalist* #78 that the courts were the "least dangerous branch"[4]—the relative institutional weakness of the courts, particularly before the powers of judicial review were well established.[5] The Marshall Court was unwilling to compel the Jefferson government to appoint Marbury

to his commission—despite Marshall's contention that Marbury was legally entitled to the commission—precisely because a writ of mandamus would have almost certainly been flouted, demonstrating the institutional weakness of the judicial branch. Ironically, therefore, in order to enable the Supreme Court to nullify legislation for the first time, Marshall ultimately had to defer to the actions of the executive branch by refusing to grant a judicial remedy.

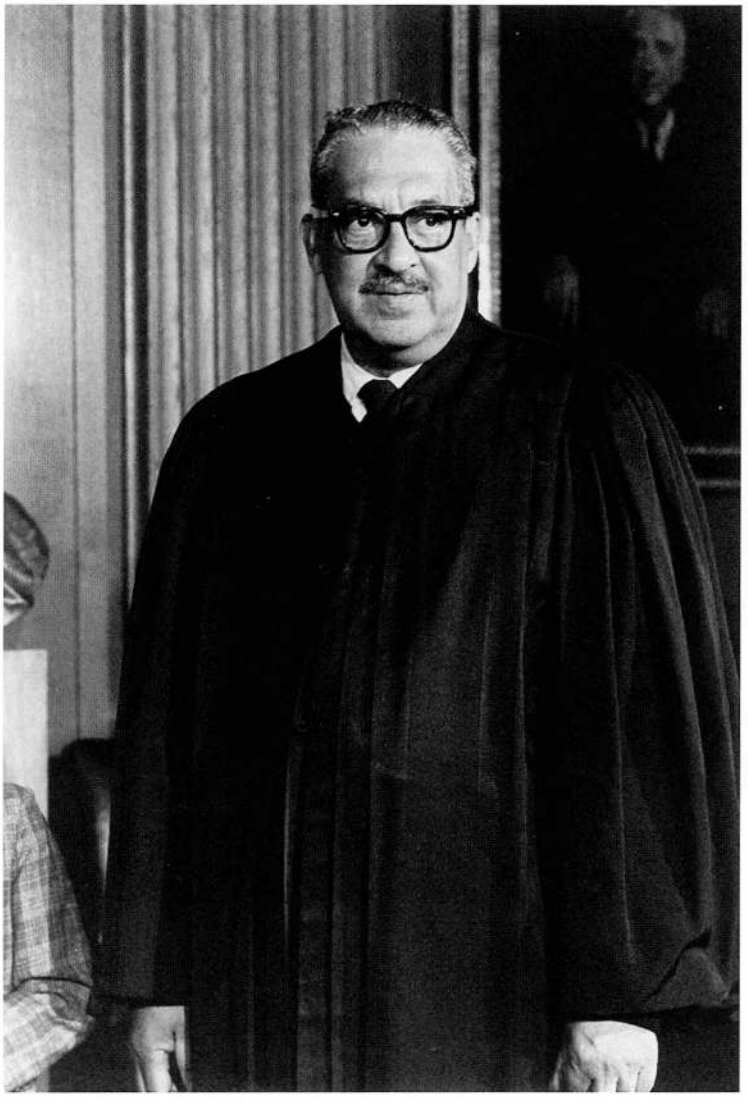
As the example of the ECJ suggests, this paradox in the development of judicial review may be applicable in other contexts in which the judiciary is attempting to assert power in struggles with other political institutions and actors. In addition, this paradox can be identified in the development of other important areas of U.S. Supreme Court doctrine, despite the fact that the Court had become a much more authoritative institution.[6] An analysis of the development of important theories in the areas of free speech, the Establishment Clause, and the Equal Protection Clause of the Fourteenth Amendment demonstrates that Marshall's strategy of asserting the potential power of the Court to nullify legislative acts while refusing to deploy this power despite its logical applicability in the case in question is a surprisingly common one. Even after the concept of judicial review itself is taken for granted, some judges have acted strategically in relation to the other branches, being willing to sacrifice an individual case outcome in order to influence Supreme Court doctrine in the longer term. Moreover, judges in these cases have often modified their opinions in response to negotiations and deliberation with other Justices, another important form of strategic behavior. In addition to its potential applicability in a comparative context, therefore, this pattern of doctrinal development is important because it suggests the importance of strategic elements in judicial behavior, in terms of the relationships both between the judiciary and other branches and among the Justices of the Court as well.

The Strange Development of "Strict Scrutiny" Equal Protection Doctrine

One of the most important doctrinal developments in contemporary Supreme Court doctrine is the application of "strict scrutiny" to state racial classifications in determining whether they are consistent with the Equal Protection Clause of the Fourteenth Amendment. Unlike the doctrinal categories, the application of which to the state tends to be fluid in different contexts, the invocation of strict scrutiny almost always means that the state action will be held to be unconstitutional. As Justice Thurgood Marshall once remarked, "[S]trict in theory, fatal in fact."[7] Because of this, many contemporary battles have been fought over which categories should be "suspect" categories to which strict scrutiny must be applied. Despite the arguments of some Justices that categories such as gender,[8] sexual orientation,[9] and economic disadvantage[10] should be among the suspect categories, only race[11] and national origin[12] have been held to be subject to strict scrutiny.[13] While subject to obvious limitations, this doctrine has not been a trivial accomplishment, serving as the basis of crucial Supreme Court decisions such as *Brown v. Board of Education*[14] and *Loving v. Virginia*.[15]

The historical antecedent of the strict-scrutiny test can be seen in the famous Footnote Four to *U.S. v. Carolene Products*,[16] in which Harlan Fiske Stone articulated what came to be known as the "preferred freedoms" doctrine. While legislation dealing with economic regulation would simply be required to rest on a "rational basis," he argued, other forms of legislation might face a heightened level of scrutiny:

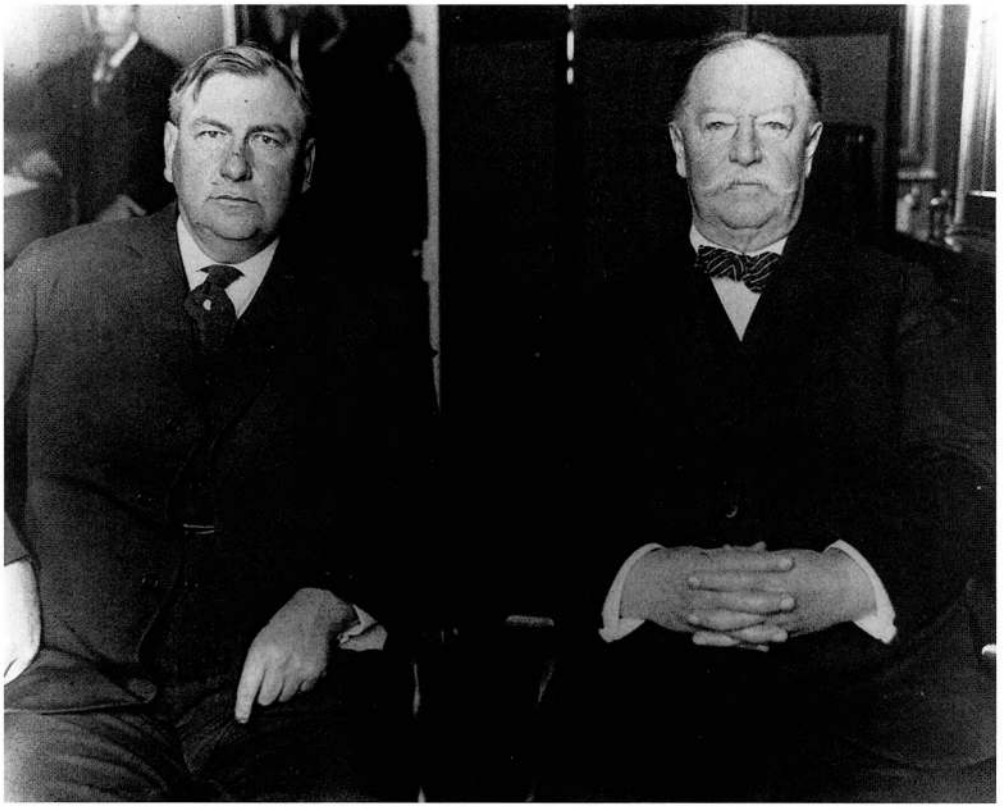
> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . [P]rejudice against



In a concurring opinion in *Regents of University of California v. Bakke*, Justice Thurgood Marshall jokingly defined strict scrutiny as "strict in theory, fatal in fact."

> discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[17]

Stone's *Carolene Products* footnote reflected the attempt by progressive judges to rehabilitate judicial activism in the shadow of the *Lochner* era of judicial activism, in which the Supreme Court frequently (if not as often as is generally assumed) struck down state and federal economic regulation.[18] While some FDR-era progressives—most notably Felix Frankfurter—responded to the previous decades of activism by publicly advocating a more general policy of judicial restraint,[19] a new group of progressive judges followed Justice Stone's lead by attempting to create an interpretive framework that would distinguish economic regulation, which would be presumed to be constitutional, from civil-rights and civil-liberties cases, in which the courts



Harlan Fiske Stone (pictured here with Chief Justice William Howard Taft) articulated what came to be known as the "preferred freedoms" doctrine in the famous Footnote Four to *US v. Carolene Products*. While legislation dealing with economic regulation would simply be required to rest on a "rational basis," he argued, other forms of legislation might face a heightened level of scrutiny.

would have a legitimate role in scrutinizing state activity.[20]

Stone's emphasis on the protection of "discrete and insular" minorities implied that discrimination against religious and racial minorities should face the highest level of state scrutiny. While the protection of religious minorities has tended to fall under the purview of the Establishment and Free Exercise clauses of the First Amendment,[21] the protection of racial minorities has generally been undertaken by the Supreme Court via the Equal Protection Clause of the Fourteenth Amendment. The development of a "strict scrutiny" standard in evaluation of racial classifications that are embedded with legislation, therefore, would seem a logical extension of the logic of *Carolene Products* (although it should be noted that the logic of Footnote Four would make the extension of strict scrutiny to affirmative-action programs highly problematic, as it would not be a minority interest being protected by the Court).[22] Like the assertion of judicial review in *Marbury*, however, the provenance of the strict-scrutiny standard forces us to consider the institutional constraints on the Supreme Court, in addition to its potential for acting as a check on legislatures.

The one major exception to the truism that strict scrutiny is "fatal in fact" happens to be the infamous case in which the standard was introduced: *Korematsu v. U.S.*[23] The case was the culmination of a series of cases that tested the constitutionality of various measures taken against people of Japanese descent—including American citizens—after the United States

joined World War II. The Court, by a 6–3 majority (which included not only the frequently deferential Frankfurter but—dismayingly to many future observers—the great civil libertarians Hugo L. Black and William O. Douglas, the former of whom wrote the majority opinion) upheld the forced uprooting and internment of Japanese-Americans.[24] Seeking to "immunize the military completely from judicial review during wartime,"[25] Black and the rest of the majority capitulated in the face of the military orders, allowing the Court's traditional deference to the executive during wartime to trump systematic civil-rights violations.

Whatever the merits and demerits of the decision, it certainly did not constitute a recognizable application of Footnote Four: faced with pervasive, explicit discrimination against a "discrete and insular" majority, the Court sided with the state. As Justice Robert Jackson noted in his dissent, it seemed to flagrantly contradict the idea that "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable." And yet, it was in Justice Black's majority opinion that Footnote Four's de facto extension into equal-protection doctrine occurred. Prior to establishing the constitutionality of the internment, Black outlined the strict-scrutiny test: "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." Ironically, Black embedded into law the idea that racial classifications are suspect and are

Korematsu v. United States **was the culmination of a series of cases that tested the constitutionality of various measures taken against people of Japanese decent—including American citizens—after the United States joined World War II. The Court upheld the forced uprooting and internment of Japanese Americans, allowing the Court's traditional deference to the executive during wartime to trump systematic civil-rights violations.**

subject to a much stricter scrutiny than economic regulation—while upholding a racialist executive action.

As with John Marshall's assertion of judicial power in *Marbury*, it is difficult to avoid the obvious internal contradiction in the majority opinion. While it is, of course, as Black argues, theoretically possible for a Justice sincerely applying the strict-scrutiny standard to see racial classifications as necessary in particular circumstances, the evidence presented by the state was strikingly weak. Stripped of the racist generalizations, the government's case would essentially evaporate; the federal courts notably failed to push the state to provide evidence that would have been necessary if strict scrutiny were genuinely required.[26] Neither the written opinions nor the remaining records of the deliberations of the Justices in the majority reflect an emphasis on justifying racial classifications. Instead, the contradiction is almost certainly explained by strategic factors.

The presence of strategic considerations in Black's opinion is manifest in at least two crucial respects. First of all, *Korematsu* represents a definitive example of John Marshall's tactic of "edging principles forward while deciding for those most likely to oppose them in practice." Introducing a concept that would have been hotly contested by many political actors involves much less risk in a decision that most of the people who would find the concept in question problematic would enthusiastically support. Since most of the individuals and groups who would be most likely to oppose the application of rigid scrutiny to racial classifications were also the least likely to oppose judicial deference to the executive during a military conflict (and, of course, were likely to be strong defenders of internment itself), this particular strategic context is certainly present in this case. The deference shown by the judiciary to the executive in wartime is hardly unusual, and the Court was almost certainly reluctant (as was Marshall) to force a political showdown it would have almost certainly lost. Accepting the outcome of the case as inevitable, Black was able to introduce the strict-scrutiny standard into constitutional law with a minimum of political risk. We will see a similar form of strategic behavior in the development of Establishment Clause and Free Speech doctrine.

The second strategic consideration involved the relationship between individual Justices, as Black tried to enlarge his majority.[27] Justice Douglas initially circulated a dissent in *Korematsu*. Eager to get his erstwhile ally to join his opinion, Justice Black strengthened the section of his opinion outlining the suspect nature of racial classifications as part of a series of otherwise trivial changes intended to persuade Douglas to join his opinion.[28] This type of strategic behavior represents a subset of Marshall's *Marbury* gambit: including an important doctrinal shift that reflects a Justice's preferred position may persuade them to sign on to an otherwise unpalatable outcome. As we will see in the next section, similar strategic considerations affected Black's seminal Establishment Clause opinion.

Another Brick in the Wall: *Everson* and the Establishment Clause

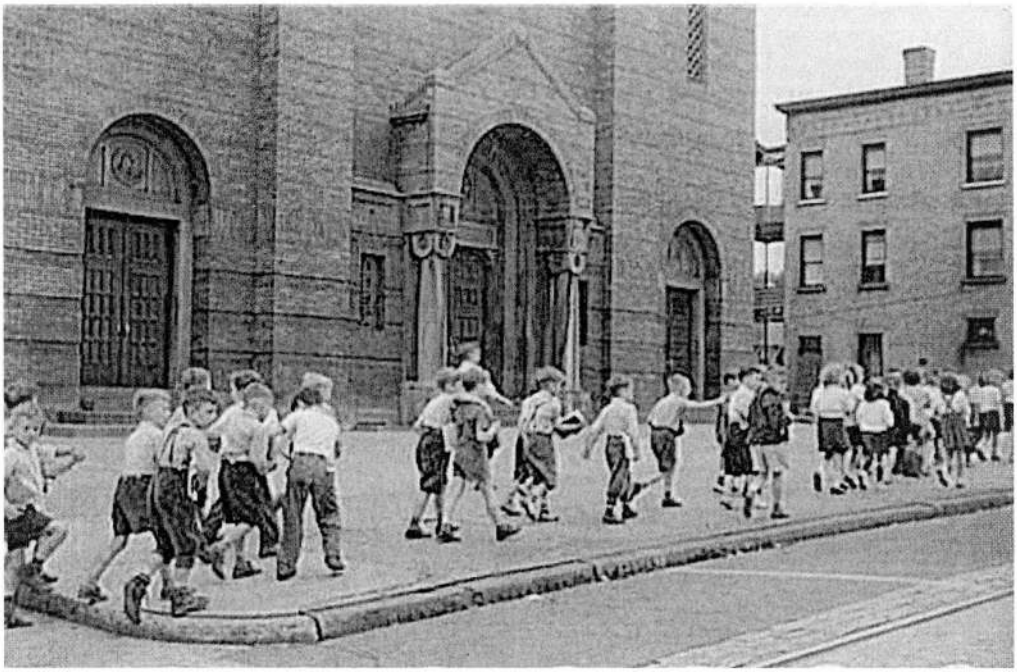
The first clause of the Bill of Rights is an admonition that "Congress shall make no law respecting an establishment of religion." In spite of the importance of this clause—reflected not only in its place in the Constitution but in the importance of the relationship between religion and the state generally—it lay largely dormant before World War II. Between 1833 and 1948, the Supreme Court decided only two Establishment Clause cases.[29] The deference shown by the Court during this time period reflected a narrow interpretation of the Establishment Clause. Rather than the clause being read as requiring that religion and the state remain distinct, autonomous spheres, state entanglements with religion were generally considered constitutional as long as they were not manifested in the creation of a national religion.[30] The protection of religious minorities

Justice Hugo L. Black (shown here taping a segment with Eric Sevareid) strengthened the section of his majority opinion in *Korematsu* outlining the suspect nature of racial classifications as part of a series of otherwise trivial changes intended to persuade Justice William O. Douglas to join his opinion.

foreshadowed in *Carolene Products* did eventually emerge, but slowly.

The decision that marked the new willingness of the Court to apply stricter scrutiny when interpreting the religion clauses of the First Amendment was the landmark case *Everson v. Board of Education of Ewing Township*.[31] As with *Korematsu*, Black wrote the majority opinion in *Everson*, and as with *Korematsu*, the relevant principles articulated in *Everson* represented an application of the logic of Footnote Four. The case concerned the constitutionality of subsidies given by a New Jersey school board that subsidized the transportation costs of parents who sent their children to private (including parochial) schools. Following a detailed history of the disestablishment of religion in the U.S. and the benefits of secular government, Black defended an interpretation of the Establishment Clause that would structure the debate for both adherents and opponents for decades to come:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious



Everson v. Board of Education of Ewing Township **concerned the constitutionality of a school board subsidizing the transportation costs of parents who sent their children to private (including parochial) schools. Following a detailed history of the disestablishment of religion in the United States and the benefits of secular government, Justice Black upheld the subsidies.**

> activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a *wall of separation between Church and State*."[32]

Conceiving of the Establishment Clause as requiring a "wall of separation" represented a major shift in judicial doctrine, as well as sending a clear signal that the Court would scrutinize state entanglements much more carefully than they had in the past. In a final analogy with *Korematsu*, however, the case had a counterintuitive punchline: "The First Amendment has erected a wall between church and state," Black argued, and "That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." Again, having signaled a fundamental shift in doctrine, the outcome of the decision was more consistent (at least on its face) with the *status quo ante* than with the newly minted analysis.

The apparent internal contradiction between Black's arguments and his holding was immediately apparent to most observers of the Court, including the dissenters. Despite its 5-4 decision, the Court agreed unanimously to an unusual degree with Black's underlying constitutional analysis; the only disagreement was with respect to its applicability. To an even greater extent than with *Korematsu*, where the strict-scrutiny analysis was essentially limited to a single concise paragraph, Black's majority, given the outcome, read more like a dissent. As one scholar notes, "The opinion drew criticism from all quarters. Black's rhetoric and *dicta* contrasted too sharply with his conclusion and holding to satisfy anyone."[33] While

New Jersey's busing subsidy was consistent with any number of plausible interpretations of the Establishment Clause, it is difficult to persuasively argue that it was consistent with the theory that an "impregnable wall" exists between religious institutions and the state.

The best explanation for this jarring distinction between *dicta* and holding is, again, a strategic one, like those that best explain Marshall's decision in *Marbury*. First of all, while the Court was not constrained by an immediate external crisis—as it was in otherwise comparable decisions such as *Korematsu, Schenck v. U.S.*,[34] and *Dennis v. U.S.*[35]—it faced some significant external constraints nonetheless. The Court's interventions in church/state issues are often extremely unpopular,[36] and the vast number of contexts in which theoretically unconstitutional entanglements can persist makes the Court's ability to ensure compliance highly limited.[37] The decision represented a change in course in the Court's policy, but by upholding the practice, it limited the potential scope of immediate resistance. In this respect, one can clearly recognize Marshall's *Marbury* strategy recurring in *Everson*.

Perhaps more important, however, were the individual-level strategic choices made in the negotiations between Justices. According to one of Black's biographers, the majority decision went through several iterations, and the expansive development of the separation between church and state was added largely in response to Justice Jackson's circulated dissents: "If he had not written it as he did, he said later, 'Bob Jackson would have. I made it as tight and gave them as little room to maneuver as I could." . . . His goal, he remarked at the time, was to make it a pyrrhic victory."[38] The opinion allowed Black to keep the coalition upholding the state action together, while advancing the development of the doctrine in a more (but not entirely) libertarian direction. As Walter Murphy notes, Black's attentiveness to the strategic context of his decisions—both in terms of the external institutional context and in terms of coalition-building in the Court—manifested itself in other cases as well.[39]

While the application of the "separation of church and state" doctrine has been significantly more complex than the post-*Korematsu* application of strict scrutiny to racial classifications, *Everson* was nonetheless an extremely influential decision that significantly transformed the Court's jurisprudence. First of all, the decision incorporated the Establishment Clause to apply against the states. In addition, it paved the way for crucial future nullifications of state entanglement with religion, such as those in *Engel v. Vitale*[40] and *Epperson v. Arkansas*,[41] and even future decisions (most importantly in *Lemon v. Kurtzman*)[42] that modified Black's rhetoric and grappled and responded to its implications. Like *Marbury*, therefore, *Everson* laid the groundwork for future Court action that was more consistent with its argument than with its outcome, although this development was fragile and not unidirectional.

Free Speech and "Clear and Present Danger"

The most famous phrase in American free-speech jurisprudence made its first appearance in the decisions of the Supreme Court in Oliver Wendell Holmes' opinion in *Schenck v. United States*:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[43]

The "clear and present danger" standard articulated by Justice Oliver Wendell Holmes in *Schenck* proved to be extremely influential, although it was buried in the majority opinion because at the time it was not supported by a majority of the Justices. This 1918 cartoon shows Uncle Sam rounding up enemies of the United States after Congress imposed severe penalties on speech that interfered with the prosecution of World War I.

On its face, Holmes' attempt to define the scope of the state's right to restrict speech represented a quite radical break with existing Supreme Court doctrine. The Court had, before 1920, consistently upheld various acts of federal legislation[44] that placed explicit restrictions on the *content* of speech, giving the state broad powers to criminalize speech that fell under wide categories such as "sedition" or "obscenity."[45] Holmes' standard, by contrast, clearly implied that restrictions on speech based on content alone could not be consistent with the First Amendment.[46] While the state had the right to punish the *effects* of speech (actual or potential), it could not restrict speech based purely on its content. Moreover, the specification of a "clear and present danger" standard was a distinctly more restrictive conception of the state's ability to criminalize speech for its potential effects than was the traditional, common law "bad tendency" test. The necessity to demonstrate a "clear and present" danger would, at least theoretically, force the state to meet a much more specific burden to justify restricting political speech.

The "clear and present danger" test, however, was highly ambiguous in its development (in this sense, it is more comparable to *Everson* than *Korematsu*.) Most importantly, Holmes upheld the state's convictions in *Schenck* (as well as in two more cases dealing with convictions based on the Espionage Act of 1917, *Frohwerk v. U.S.*[47] and *Debs v. U.S.*,[48] in which he did not invoke the "clear and present

danger" standard.) The opinion in *Schenck* was in itself somewhat contradictory, using language that was inconsistent with the "bad tendency" test but without explicitly overruling the existing standard.

Not until Holmes' dissent in *Abrams v. United States*[49] in 1919 did he explicitly substitute the "clear and present danger" standard for the bad-tendency standard and argue that the free-speech rights of the defendant should be upheld against the state. In his free-speech jurisprudence, it was *Schenck*, not *Abrams*, that was ultimately the aberration. In a series of dissents joined by Louis D. Brandeis—including *Schaefer v. U.S.*,[50] *Pierce v. Society of Sisters*,[51] and *Gitlow v. New York*[52]—Holmes took the "clear and present danger" standard first outlined in *Schenck* to its logical conclusion and refused to uphold decisions that upheld convictions that were not based on specific, immediate threats to public order.

While Holmes implied in these seminal dissents that his jurisprudence on the issue was of a piece—that the Court was misapplying his decision in *Schenck*—it is difficult to avoid the conclusion that his arguments in *Schenck* and *Abrams* were fundamentally contradictory.[53] The underlying facts of *Schenck* and *Abrams* are strikingly similar, and it is highly implausible to argue that the defendant in *Schenck* represented an immediate threat to the social order. One way of explaining this difference is in Holmes' ambiguous position on free speech. Holmes was not a staunch absolutist defender of First Amendment rights in the manner of William O. Douglas or Hugo L. Black. While he believed in the necessity of free speech to encourage the pragmatic experimentation that allowed society to develop, he was not particularly sympathetic to libertarian rights claims.[54]

Holmes' ambivalence toward the First Amendment jurisprudence he articulated following *Schenck* reveals only part of the story. As David Bogen points out, Holmes' positions on free speech evolved over time, but there is no evidence that they changed between *Schenck* and *Abrams*.[55] Another part of the puzzle, I suggest, may be found in the possibility that Holmes was making a strategic decision similar to that of Marshall in *Marbury*. Indeed, it is unlikely that Holmes was unaware of the internal contradictions between the different standards articulated within *Schenck*. As subsequent decisions suggest, there was no majority of the Court willing to apply the "clear and present danger" standard. By introducing it within a majority opinion, Holmes created a springboard from which he could attack future jurisprudence from his preferred approach. While the upholding of convictions based on the Espionage Act at the height of wartime was inevitable, Holmes was able to argue in his subsequent dissents that his own precedent was being misapplied.

Eventually, the "clear and present danger" standard articulated in *Schenck* did prove to be extremely influential. Most importantly for our purposes, the test was always used in a way consistent with its application in *Abrams*, not in *Schenck*. As David Rabban notes, from roughly 1930 until the early 1950s, Supreme Court decisions on speech relied on the "clear and present test" when protecting speech, but never invoked clear and present danger in decisions that refused to uphold First Amendment claims.[56] Ultimately, the introduction of the "clear and present danger" standard was transformative, signaling that the Court's position on free speech was going to be significantly more activist and foreshadowing the changing priorities of scrutiny ultimately outlined in *Carolene Products*. *Shenck*, then, like *Korematsu* and *Everson*, represented a true landmark, the text of which was more indicative of future Court practices than was its outcome. As Robert McCloskey points out, "[A]lthough the individual conviction was . . . upheld, Holmes had scotched an old and persistent idea that the protection of the First Amendment was very narrow, and had committed the Court to an essentially libertarian formula for determining when speech may be abridged."[57]

This is not to say, however, that the "clear and present danger" standard was accepted by the Supreme Court in the way that the strict-scrutiny standard has been, or that it has continued to structure the parameters of judicial conflict in the way that *Everson*'s separation of church and state doctrine has. Some Justices, such as Felix Frankfurter and the second Justice John Marshall Harlan, consistently advocated a less restrictive balancing standard more akin to the bad-tendency test.[58] Perhaps more importantly, while the *Everson* and *Korematsu* doctrines were generally embraced—at least by the judges who favored a strong supervisory role for the Court—civil libertarian Justices such as Black and Douglas argued that "the 'clear and present danger' doctrine should have no place in the interpretation of the First Amendment."[59] The Holmes/Brandeis version of clear and present danger was essentially supplanted when the Court overruled *Whitney v. California*[60] in the 1969 decision *Brandenburg v. Ohio*. The standard survives to some degree, however, in the balancing approaches that the Court has adopted since then; *Schenck* portended a standard for assessing restrictions on freedom of speech that was more restrictive than the bad-tendency test but stopped short of a libertarian approach.

A final point should be made about the major exception to post-*Schenck* applications of clear and present danger: *Dennis v. United States*. In this 1951 case, Chief Justice Fred Vinson, arguing that "[W]e are squarely presented with the application of the 'clear and present danger' test," used the test to support the conviction of Communist Party activists under the Smith Act of 1940. Over sharp dissents (reminiscent of the Holmes/Brandeis dissents three decades earlier) by Black and Douglas, the majority argued that the application of the Smith Act was consistent with the "clear and present danger" standard. (Black, for his part, argued for the more conventional post-*Schenck* interpretation: "[T]he only way to affirm these convictions is to repudiate directly or indirectly the 'clear and present danger' rule." The Supreme Court's somewhat disingenuous application of this standard at the height of the Cold War, which is directly analogous to *Schenck*, further demonstrates (along with *Korematsu* and *Everson*) that the Court is often constrained during periods of perceived national crisis or by overwhelming popular opinion. The application and evolution of Supreme Court doctrine, these cases affirm, is strongly affected by the institutional and political context of the Court.

Conclusion: Strategy, Power, and the Supreme Court

While I have, I believe, identified a pattern of significant empirical and theoretical interest, two important qualifications are in order. First of all, I do not mean to suggest that this pattern is by any means universal, or to specify the precise scope of its applicability. Certainly, important new doctrines—such as, for example, the right to privacy in *Griswold v. Connecticut*[61] and, of course, Marshall's interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*[62]—have been developed and applied in a more uniform manner. Secondly, while I have used the secondary literature to identify the most important major elements of the strategic and institutional context in which the doctrines of strict scrutiny, separation of church and state, and clear and present danger developed, it would take in-depth case studies that are beyond the scope of this paper to map out the context in which these doctrines were developed in greater detail.

Nonetheless, the presence of judicial deference in the very inception of three "hard cases"—doctrines commonly cited as examples of judicial activism—suggests that the strategic moves identified by scholars in *Marbury* have remained relevant even as the Court has gained legitimacy and authority. As such, the study of this tendency can be a worthwhile addition to the burgeoning literature on judicial strategy that has developed from

Murphy's seminal work.[63] Moreover, this pattern surely exists in other doctrinal areas as well: the appearance of substantive due process in *Munn v. Illinois*, for example, would be a good candidate for further study within this framework. At any rate, the fact that several important doctrines have been developed before they have been applied provides further evidence that, even in areas in which they appear most powerful, both the decision-making of individual Justices and the powers of the Court as a whole operate within significant institutional constraints.

**Note: Winner of the 2003 Hughes-Gossett Student Essay Award.*

ENDNOTES

[1]Helfer, Laurence R., and Anne-Marie Slaughter. 1997. "Toward a Theory of Effective Supranational Adjudication." *Yale Law Journal* 107: 314–315.

[2]For further elaboration of this point, see McCloskey, Robert G., and Sanford Levinson. 2000. **The American Supreme Court**, 3rd ed., rev. Chicago: University of Chicago Press, 25–28.

[3]Graber, Mark A. 1999. "The Problematic Establishment of Judicial Review" in **The Supreme Court in American Politics**, edited by Howard Gillman and Cornell Clayton. Lawrence: University Press of Kansas, 28.

[4]In Hamilton, Alexander, James Madison, and John Jay. 1987. **The Federalist Papers**. London: Penguin, 437.

[5]See Epstein, Lee, and Jack Knight. 1998. **The Choices Justices Make**. Washington, DC: CQ Press; Graber (1999); McCloskey and Levinson (2000).

[6]Of course, some political scientists have argued that the institutional powers of the Court remain overstated. See, for example, Rosenberg, Gerald N. 1991. **The Hollow Hope: Can Courts Bring about Social Change?** Chicago: University of Chicago. Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6: 279–295.

[7]*Regents of University of California v. Bakke*, 483 U.S., at 362. J. Marshall concurring.

[8]See, for example, *Craig v. Boren*, 429 U.S. 190 (1976), and *U.S. v. Virginia*, 518 U.S. 515 (1996).

[9]See, for example, *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Romer v. Evans*, 517 U.S. 620 (1996).

[10]See *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

[11]The one possible exception from the application of strict scrutiny to racial categories is with respect to affirmative action programs. See Gillman and Clayton (1999). Current doctrine on the subject is fluid and fractured. In general, affirmative action has occupied an "intermediate" scrutiny position along with gender, although several Justices have advocated the application of strict scrutiny and may develop a majority. See Ball, Howard. 2000. **The Bakke Case: Race, Education, and Affirmative Action**. Lawrence: University Press of Kansas.

[12]See *Pyler v. Doe*, 457 U.S. 202 (1982).

[13]For further discussion about the development of the Court's equal protection jurisprudence, as well as a trenchant critique of its limitations, see McCann, Michael. 1989. "Equal Protection for Social Inequality: Race and Class in American Constitutional Ideology" in **Judging the Constitution**, edited by Michael McCann and Gerald Houseman. Glenview, IL: Scott Foresman/Little, Brown.

[14]347 U.S. 483 (1954).

[15]388 U.S. 1 (1967).

[16]304 U.S. 144 (1938).

[17]All quotes from Supreme Court cases are taken from online archives at http://www.findlaw.com.

[18]See Gillman, Howard. 1993. **The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence**. Durham, NC: Duke University Press.

[19]I emphasize the "public" nature of Frankfurter's judicial restraint. Some scholars have argued that Frankfurter's professed judicial restraint was, in fact, merely a mask for increasingly conservative politics. See Spaeth, Harold J., and Michael F. Altfeld. 1986. "Felix Frankfurter, Judicial Activism, and Voting Conflict on the Warren Court" in **Judicial Conflict and Consensus**, edited by Sheldon Goldman and Charles M. Lamb. Lexington: University Press of Kentucky. For comparisons of the different paths taken by Frankfurter and other progressives, see Simon, James F. 1989. **The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America**. New York: Simon and Schuster.

[20]See McCloskey and Levinson (2000), ch.7.

[21]The landmark decision that announced the Court's increased willingness to defend religious minorities can be found in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the Court (over a dissent from Frankfurter, whose own precedent was being overturned) protected the rights of Jehovah's Witnesses by nullifying a statute that called for compulsory flag salutes for public schoolchildren.

[22]For further elaboration of this point, see Helfer and Slaughter (1997), 273–391. Ely, John Hart. 1980. **Democracy and Distrust: A Theory of Judicial Review**. Cambridge, MA: Harvard University Press, 170–172.

[23]323 U.S. 214 (1944).

[24]For a full account, see Irons, Peter. 1993. **Justice at War.** Berkeley: University of California Press. Rehnquist,

William H. 1998. **All the Laws but One: Civil Liberties in Wartime**. New York: Knopf, ch. 15.

[25]Newman, Roger K. 1997. **Hugo Black: A Biography**. New York: Fordham University Press, 316.

[26]See Irons (1993); Irons, Peter H. 1999. **A People's History of the Supreme Court**. New York: Viking, 357–361. As Justice Jackson argued in his dissent, "How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." For a qualified defense of certain aspects of *Korematsu*—which remains nonetheless skeptical that American citizens, at least, could have been legally interned—see Rehnquist (1998), ch. 16.

[27]Again, the analogy with Marshall is strong: Walter Murphy titled the chapter in his seminal **Elements of Judicial Strategy** outlining the importance of judicial leadership and strategic coalition-building "Marshalling the Court" for good reason. See Murphy, Walter. 1964. **Elements of Judicial Strategy**. Chicago: University of Chicago Press, ch. 3.

[28]Newman (1997), 316–318.

[29]Gedicks, Frederick Mark. 1992. "Religion" in **The Oxford Companion to the Supreme Court of the United States**, edited by Kermit Hall. New York: Oxford, 718.

[30]See Kauper, Paul G. 1964. **Religion and the Constitution**. Baton Rouge: Louisiana State University Press. Levy, Leonard. 1994. **The Establishment Clause: Religion and the First Amendment**. Chapel Hill: University of North Carolina Press.

[31]330 U.S. 1 (1947).

[32]330 U.S. 1, 15–16. Emphasis added.

[33]Newman (1997), 363.

[34]249 U.S. 47 (1919).

[35]341 U.S. 494 (1951).

[36]The nearly unanimous vituperation on the part of politicians and editorialists directed against the recent decision of the Ninth Circuit Court to strike the words "under God" from the Pledge of Allegiance represents the most obvious recent example.

[37]Canon, Bradley, and Charles A. Johnson. 1998. *Judicial Politics: Implementation and Impact*. Washington, DC: CQ Press, 64–65.

[38]Newman (1997), 363–364.

[39]Two of Murphy's examples are the "trap pass" Black executed in *U.S. v. Bethlehem Steel*, in which he used narrow statutory construction to defer to Congress without appearing to duck the issue, and the complex negotiations involving opinion assignment and changes in the affirmation of the Sherman Act. Murphy (1964) 45, 129–130.

[40]370 U.S. 421 (1962).

[41]393 U.S. 97 (1968).

[42]403 U.S. 602.

[43]249 U.S. 47, 52. Emphasis added.

[44]Of course, while *Barron v. Baltimore*, 32 U.S. 243 (1833), was seen as being the controlling case on incorporation of the Bill of Rights, the Court also allowed scores of similar state laws to stand. The Free Speech Clause of the First Amendment was not applied against the states until *Fiske v. Kansas*, 274 U.S. 380 (1927) (although, in cases such as *Gitlow v. New York*, 268 U.S. 652 (1925), and *Gilbert v. Minnesota*, 254 U.S. 325 (1920), the Supreme Court had implied that the First Amendment could theoretically be applied against the states).

[45]For a detailed account of First Amendment jurisprudence prior to 1920, see Rabban, David. 1981. "The First Amendment in Its Forgotten Years." *Yale Law Journal* 90: 514–595.

[46]However, of the aforementioned categories, Holmes' standard would apply only to "seditious" speech, as obscenity continued to not be considered "speech" protected by the First Amendment.

[47]249 U.S. 204 (1919).

[48]249 U.S. 211 (1919).

[49]250 U.S. 616 (1919).

[50]251 U.S. 47 (1920).

[51]286 U.S. 510 (1925).

[52]268 U.S. 652 (1925).

[53]See, for example, Ragan, Fred. 1971. "Justice Oliver Wendell Holmes Jr., Zechariah Chafee Jr., and the Clear and Present Danger Test for Free Speech: The First Year," *Journal of American History* 58: 24; Gunther, Gerald. 1975. "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History." *Stanford Law Review* 27: 718; Rabban, David. 1983. "The Emergence of Modern First Amendment Doctrine." *University of Chicago Law Review* 50: 1205–1355; and Tribe, Laurence H. 1985. **Constitutional Choices**. Cambridge, MA: Harvard University Press; but see also Novick, Sheldon. 1992. "The Unrevised Holmes and Freedom of Expression." *Supreme Court Review*: 303.

[54]See Graber, Mark A. 1991. **Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism**. Berkeley: University of California Press, 108; Menand, Louis. 2001. **The Metaphysical Club**. New York: Farrar Straus, and Giroux; and Alschuler, Albert W. 2000. **Law without Values: The Life, Work, and Legacy of Justice Holmes**. Chicago: University of Chicago Press.

[55]Bogen, David. 1982. "The Free Speech Metamorphosis of Mr. Justice Holmes." *Hofstra Law Review* 97.

[56]Rabban (1983), 1205.

[57]McCloskey and Levinson (2000), 115.

[58]See Frankfurter's concurrence in *Dennis v. U.S.*, 341 U.S. 494 (1951), and Harlan's opinion in *Barenblatt v. U.S.*, 360 U.S. 109.

[59]The phrase is from Black's concurrence in *Brandenberg v. Ohio.*, 395 U.S. 444. In his concurrence in the same case, Douglas expanded on this analysis, arguing that "[T]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."

[60]274 U.S. 357 (1927).

[61]381 U.S. 479 (1965).

[62]17 U.S. 316 (1819).

[63]Murphy (1964). See, for example, Epstein and Knight (1998); and Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 1999. "Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making," in **Supreme Court Decision-Making**, edited by Cornell Clayton and Howard Gillman. Chicago: University of Chicago.The importance of strategic behavior, moreover, is certainly not confined to explicitly "strategic" rational-choice analyses; see McCann (1999).

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