

Introduction

Melvin I. Urofsky

This past summer the Supreme Court Historical Society lost a good friend with the death of Chief Justice William H. Rehnquist. The Society is extremely grateful for the support that he, as Honorary Chairman, lent us over the years. He was a noted historian who cared deeply about the past of the glorious institution over which he presided.

Chief Justice Rehnquist once did me the honor of introducing me to the Courtroom audience when I delivered a lecture about the Supreme Court and World War II. He was very gracious to my family, who were invited to his chambers to meet him before the event. On another occasion he gave me a lesson in how one can choose which questions to answer—and which to ignore—in an interview I conducted with him about William O. Douglas.

I hope that the four tributes offered in this issue give you a sense of the person behind the gilded robe. He was a well-liked, even beloved, man for those who were privileged to know him and work with him. He had a great sense of humor, could be exceedingly charming, and was more than generous to his friends. He will be greatly missed.

As always, the other articles in this issue reflect the wide spectrum of scholarship that concerns the Court. They range from correspondence concerning the first Chief Justice's circuit-riding duties, to an examination of a little-known labor case that contributed to the development of First Amendment speech jurisprudence, to the response of the Roosevelt Court to an important piece of New Deal legislation.

J. Harvie Wilkinson III, the highly respected senior judge of the Fourth Circuit Court of Appeals, delivered the annual lecture in 2005 on the dangers of oversimplifying Supreme Court history. He describes several instances where Justices ruled in ways that were unexpected or against stereotype.

Finally, former clerk Alan Kohn reviews a book about one of the least well-known members of the Supreme Court, Charles E. Whittaker, and asks whether Whittaker deserves the opinion that most scholars of the Court have of him.

Although tinged with sadness, this issue, like its predecessors, offers a feast for those interested in the history of our Court.

The “Lone Dissenter”

JOHN M. NANNES

The tenure of Associate Justice—and later Chief Justice—William H. Rehnquist on the Supreme Court spanned more than three decades. Despite his public importance, he was a quite private man. During his time on the Court, relatively few accounts appeared of what life was like inside the Rehnquist chambers, especially during his years as an Associate Justice. In the aftermath of his death last fall, former clerks have begun to reminisce about what it was like to clerk for him.

Those who have sought to describe his early days on the Court inevitably note that he was the sole dissenter in so many cases that he came to be known as the “Lone Dissenter.” The origin of that nickname, at least as applied to him, dates back to June 1975 and actually arose quite accidentally.

It has long been the tradition of many Justices to hold periodic reunion dinners with their former and current law clerks, and Justice Rehnquist held one every year. Back in the mid-1970s, when there were a relatively small number of clerks, these reunion dinners were occasionally held in the Ladies’ Dining Room at the Court (which was renamed after the Chief’s wife, Nan, in 1998). The reunion in June 1975 was held in that room. There were about ten clerks there with their spouses, in addition to Justice Rehnquist and his wife.

The former clerks always made a point of telling the current clerks that the latter were re-

sponsible for arranging suitable entertainment at the reunion dinner. This presented a substantial challenge that year, because my co-clerks and I had little theatrical flair. Thirty years after the fact, I do not recall why or how I got the short straw, but the task of arranging entertainment for the evening fell to me. My greatest worry was that if we didn’t come up with something creative, the Justice would suggest we play charades. The Justice and his wife were “scary-smart” and quite intimidating charades players. If you want to know what it felt playing against them, imagine going up against Ken Jennings in a game of Jeopardy.

After procrastinating for months, I found myself on the afternoon of the dinner with absolutely no idea what we would do for entertainment that evening. I went to Lowen’s, a family-owned toy store in Bethesda, and recall walking down each aisle looking for something



The author, John Nannes, is pictured to the right of Justice Rehnquist. His fellow clerks during the 1974–75 Term were John O'Neill (back to camera) and Bill Jacobs.

(anything, really) that the current clerks could present to the “Boss” (as the Justice was then known to his clerks) at the dinner. Nothing came to mind until, walking down the last aisle, I came across a Lone Ranger doll. And then it seemed so obvious.

During the Term, there had been a number of occasions when the Justice had been

the sole dissenter. Usually, these dissents were written after most—and often all—of the other Justices had already joined the circulated opinion to form a majority. The Justice obviously knew that his dissents could not affect the results of these cases being decided that Term, but that did not discourage him from stating his position.

Certainly the most significant was his sole dissent in *Fry v. United States*,¹ in which the majority held that the Economic Stabilization Act of 1970, authorizing the President temporarily to stabilize wages and salaries, was constitutional as applied to state employees. To the majority, the decision was a relatively straightforward application of *Maryland v. Wirtz*,² but to Justice Rehnquist the case presented important issues regarding the relationship between the federal government and the states. He began his dissent as follows:

Mr. Chief Justice Chase in his opinion for the Court in *Texas v. White*, 7 Wall. 700, 725 (1868), declared that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” A little over a century later, there can be no doubt that we have an indestructible Union, but the Court’s opinion in this case is the latest in a series of decisions which casts some doubt upon whether those States are indeed “indestructible.”³

Barely a year later, he was writing for a majority of the Court in *National League of Cities v. Usery*,⁴ which overruled *Wirtz*. The pendulum has swung back and forth in the years since—*Usery* was itself overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*,⁵—but the debate was ignited by a sole dissent from the junior Justice in the October 1974 Term.⁶

That Term, Justice Rehnquist wrote dissenting opinions in fourteen cases, and in seven of them he was the sole dissenter.⁷ It certainly cannot be said that all of them involved significant and far-reaching issues of law,⁸ but in certain respects that is what makes them notable. The Justice was not a “go along to get along” guy. Rather, he paid serious attention to each case that came before the Court—whether it involved a broad constitutional principle or a narrow application of a statute—and had the intellectual confidence to state his

views, even if this frequently meant standing alone.

And so, in the last aisle of Lowen’s toy store, the Lone Ranger became the “Lone Dissenter.” I bought the doll and brought it to the reunion dinner in the Ladies’ Dining Room. At the appointed time, my wife Carole hummed Rossini’s *William Tell Overture*—the theme song of the Lone Ranger television series—and the clerks read excerpts from the *Fry* dissent and each of the other sole dissents that the Justice had written that Term. Recalling it now, I think the Justice laughed, the readings passed as suitable entertainment for the occasion, and no one suggested we play charades.

Quite unexpectedly, the “Lone Dissenter” had a life beyond the reunion dinner. For many years, it sat on the fireplace mantle in the chambers that Justice Rehnquist occupied as an Associate Justice, and when he became Chief Justice in 1986, he packed it up and moved it over to the Chief’s chambers. The Chief kept the doll until the end. The doll’s outfit was blue originally (except for the white hat and black mask, of course), but it faded over time. And the image it had once captured faded over time, too, as the Chief found himself more often in the majority than in dissent, and views he had espoused as a junior Justice often found their way into the jurisprudence of the Court.⁹

ENDNOTES

¹421 U.S. 542, 549 (1975).

²392 U.S. 183 (1968).

³*Fry*, 421 U.S. at 549.

⁴426 U.S. 833 (1976).

⁵469 U.S. 528 (1985).

⁶For an interesting account of *Fry*, see Tony Mauro, “The Rehnquist Revolution’s Humble Start,” *LEGAL TIMES*, Feb. 3, 2003, at 1.

⁷See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 34 (1974); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 501 (1975); *Stanton v. Stanton*, 421 U.S. 7, 18 (1975); *Van Lare v. Hurley*, 421 U.S. 338, 348 (1975); *Fry v. United States*, 421 U.S. 542, 549 (1975); *Dunlop v. Bachowski*, 421 U.S. 560, 591 (1975). Justice Rehnquist wrote one additional

dissenting opinion that Term in which no other Justice joined, see *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 570 (1975), but there were two other dissenting opinions in the case.

⁸That could probably be said of the entire Term. Justice Douglas suffered a debilitating stroke late in 1974 and, although he remained on the Court for the remainder of the Term, a number of the most important cases that had been on the docket—cases raising issues such as capital punishment, application of the Voting Right Act, and the

right to counsel in summary courts-martial—were set for reargument the following Term.

⁹The number of “lone dissents” issued by Associate Justice and then Chief Justice Rehnquist declined substantially over time. During the 1970s, he averaged four per Term, during the 1980s it was two per Term, and during the 1990s and 2000s, he averaged substantially less than one per Term. Whether this indicates that he “moved to the center” or that the Court “moved to him” is something that historians will no doubt debate over time.

Remembering Rehnquist

SANDRA DAY O'CONNOR

William Hubbs Rehnquist spent the last thirty-three years of his life as a member of the U.S. Supreme Court, fifteen as an Associate Justice and eighteen as Chief Justice. I met Bill when I was a freshman at Stanford in 1946. He was attending Stanford and working part time as a “hasher” at my dormitory during the evening meal. He amazed all of the young women by carrying such heavy loads of dishes on his tray. Perhaps that is how he learned to carry all those heavy loads in all of the years that followed. He was tall and good-looking, and he had a sharp sense of humor.

In 1950—after he had graduated Phi Beta Kappa from Stanford with a B.A. and an M.A., and received another M.A. from Harvard—he and I enrolled at Stanford Law School. He really put the “Bill” into the “G.I. Bill”: he had attained the rank of sergeant and had served in the Army Air Corps as a weather observer in the United States and North Africa. Like many of my classmates who had served in the war, he was serious about his studies and eager to get his LL.B. and practice law. Bill was clearly the brightest in our class, always prepared and willing to express his views when asked, and his conservative views were backed up by brilliant analysis. We also enjoyed bridge games, charades, and occasional movies. Little did either of us expect to serve on the Supreme Court one day.

Our class was very excited when Bill got a Supreme Court clerkship with Justice Robert Jackson. At that time, not many Stanford law

graduates were invited to clerk at the Court. Bill left for Washington in his dilapidated Studebaker for a life in our highest Court.

Bill married another undergraduate classmate of mine, Nan Cornell, who was bright and engaging and also worked in Washington. After he finished his clerkship, Bill and Nan settled in Phoenix. They wanted a city that was both the political and economic center of its state, and Phoenix suited them. They became the parents of Janet, Jim, and Nancy. When my husband John and I moved to Phoenix after John's military service, we enjoyed seeing the Rehnquists on a regular basis. They and two other law-school classmates were our only good friends in Phoenix when we moved there. We had a play-reading group and a bridge group, and we went on family desert outings.

Bill was a successful lawyer in a civil practice, and was active in the Arizona Republican party. He thoroughly enjoyed the practice



Sandra Day O'Connor and William H. Rehnquist served together on the Supreme Court for twenty-four years.

of law in Arizona and in later years would willingly reminisce about particular opposing lawyers, trial judges, and cases. When he was offered the post of Assistant Attorney General for the Office of Legal Counsel in 1969, the Rehnquists moved to northern Virginia and their children entered the public school system. I remember being surprised at the move away from Arizona, but it seems to have worked out well for Bill: only two years later, President Nixon appointed him to the Supreme Court. I traveled to Washington to attend the joint investiture of Justices Rehnquist and Lewis Powell on January 7, 1972. It was a proud and poignant moment.

Warren Burger, who was Chief Justice at the time, grew to admire Justice Rehnquist.

As a member of the Court in the post-Earl Warren years, Justice Rehnquist found himself frequently in dissent. In 1986, when Chief Justice Burger retired and President Reagan nominated Justice Rehnquist for Chief Justice, Bill served ably both as an administrator and as a member of the Court. He had no pretenses at all and was always friendly to Justices and staff alike. He never twisted arms to get a vote on a case. He relied on the power of his arguments, and he was always fair.

Even with the added duties of a Chief Justice, Bill Rehnquist enjoyed his family life as well. He attended his son's basketball games. He and Nan enjoyed bridge parties and dinner parties, although he was a "meat and potatoes" man, disinclined to try more exotic dishes. He



Chief Justice Rehnquist was known for his sense of humor and love of music.

kept up some tennis games with his clerks and others. He had a regular poker night. He saw quite a few movies and read new books with gusto. He swam regularly to alleviate his back problems.

His favorite former president was Abraham Lincoln, and he knew many details of Lincoln's life and presidency. I think Chief Justice Rehnquist admired Lincoln because both of them had been mainstream lawyers ably representing clients in and out of court, and because both made decisions fearlessly and made friends by using their sense of humor. His sense of humor never left him, and he would often break up a tense moment with a funny story, quip, or poem. In his last public session, June 27, the Chief noted the seven separate opinions issued in the contentious Ten Commandments case¹ and joked, "I didn't know we had so many Justices." It drew hearty laughter from the spectators.

Occasionally he surprised us. One day as we gathered in our conference room to shake

hands before going into the courtroom, he appeared with four gold stripes on each sleeve of his robe. We thought it must be a joke. Where did those come from, we asked. "Oh, I had the seamstress sew on one stripe for every five years I have been on the Court," he said. "Just like the Lord Chancellor in Gilbert and Sullivan." And the stripes stayed. He could have added more but never did.

The Rehnquists always liked to have a place to visit on weekends and vacation breaks. In Arizona, they shared a house in a remote area of the Bradshaw Mountains. Later, they acquired a place in Colorado, and the Chief entertained the idea of moving there. When living in Northern Virginia, they acquired a cabin not far from Berkeley Spring in West Virginia. Finally, the Rehnquists bought a summer house in Vermont, a destination the entire family relished.

Despite the workload, the Chief authored four fine books—one on the history of the Supreme Court, one on civil liberties in wartime, one on the 1876 election, and one on historic impeachments—and a number of articles. These works also deserved some gold stripes. He was a first-rate historian and wrote with an engaging style.

My years spent on a ranch taught me that expert horse riders let the horse know immediately who is in control, but then guide the horse with loose reins and very seldom use the spurs. So it was with our Chief. Efficiency was very important to him, but he guided us with loose reins and used the spurs only rarely to get us up to speed with our work. His best weapon was his assignment of opinions: a Justice behind schedule would simply receive few opinions to write.

His annual reports on the state of the judiciary were masterful. His handling of the impeachment proceedings against President Clinton was also expert. He presided over our conferences with dispatch. He did not encourage longwinded debates among us, but he gave each Justice time to say what was needed.

Because he was concise, he thought we should be, too.

Thanks to him, relations among the members of the Court have been remarkably harmonious, considering our different viewpoints. He enabled the Court to serve the role envisioned for it by the Framers. He lived his life fully, enjoying his family, his beloved wife, his three fine children, and his grandchildren. True to his Swedish ancestry, he was a faithful member of the Lutheran Church. He was a beloved friend and colleague, and a public servant in the finest tradition. He was courageous at the end of his life, just as he was throughout his life. And he never lost his sense of humor. As he was being examined in the emergency room of a local hospital in the final week of his life, the examining physician asked who his primary-care doctor was. "My dentist," he struggled to say, with a twinkle in his eye.

The Chief was a betting man. He enjoyed making wagers about most things: the outcome of football or baseball games, elections, even the amount of snow that would fall in the courtyard at the Court. If you valued your money, you would be careful about betting with the Chief. He usually won. I think the Chief bet he could live out another Term despite his illness. He lost that bet, as did all of us, but he won all the prizes for a life well lived. We shall miss the great Chief Justice very much indeed.

ENDNOTE

¹*Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

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The Chief I Knew

NOEL J. AUGUSTYN

Chief Justice William Hubbs Rehnquist died with his boots on. Those boots came each from his native Wisconsin and his adopted Arizona, and he loved them both. He worked until the end, but the enormous importance of his work did not detract from his other interests and talents, and it cannot begin to reflect his personality. This essay does not address his jurisprudence; rather, it is a collection of some personal memories that describe an admirable character whom I, and nearly everyone else, found to be most enjoyable company. Bill Rehnquist was one of the most thoughtful, considerate people I've ever known. He was a humble man with great good humor, and he was, to the very end, a man of surprises.

I had the great honor and good fortune to be selected by him as his administrative assistant not long after he was confirmed as Chief Justice for October Term 1986. My interview for the position the Friday following Thanksgiving that year was unusually memorable. I was escorted to a small waiting room adjoining the historic Supreme Court Conference Room—a large chamber where the Court deliberates the cases brought before it and one of three office areas designated for use by the Chief Justice, and often utilized for ceremonial purposes. On a lamp table in the anteroom was an English language edition of *Pravda*. What was *Pravda*—even Mikhail Gorbachev's *Pravda*, to be sure—doing in William Rehnquist's court? It was the first of many surprises awaiting me in the two-and-a-half years to follow. Soon there appeared a gigantic, Punjab-

like character, albeit with an Afro in place of a turban. He was the Chief Justice's messenger, who wore a shirt with a size 18 collar (which, perforce, was usually unbuttoned). He asked if I wanted tea—the Chief Justice's favorite hot beverage—but fearing I'd spill it, I declined.

At the appointed time—the Chief Justice was nothing if not punctual—I was escorted into the Conference Room where he greeted me with an unfirm handshake and led me into his working office (which, he later disclosed, he rather disliked because it was so small and dark). He asked me to sit on a small leather sofa, which, he explained, was the very bench on which John Quincy Adams had died in the House of Representatives. I thought it imprudent either to inquire how he got hold of that piece of furniture or to observe that it might not be an auspicious place to sit.



Noel J. Augustyn (left) served as Administrative Assistant to Chief Justice Rehnquist from 1987 to 1989.

The interview was memorable primarily because it displayed one trait that made William Rehnquist a great jurist: he was a keen and deliberate listener. I was advised that the interview would be in the nature of a conversation; little did I expect to do almost all the talking. He noted that the position was short-term, because he thought ill of the Washington “hanger-on” phenomenon, those people whose careers—indeed, their very identities—were bound to the famous people for whom they worked. It eventually became clear that his primary concern in this regard was, typically, not his own predisposition or convenience but the longer-term future of the person he chose. Beyond that, he said little, and I anxiously filled the silences that followed my perorations with more talking. I felt a bit of a fool afterward, thinking, “Who wants to hire someone who runs on at the mouth?” The answer was: a man

who liked to listen; a man who had genuine interest in others besides himself.

The following Tuesday he offered me the job, and as a friend told me, “When you get an offer from the Chief Justice, it’s not an offer, it’s a summons.” Shortly thereafter, in his thoughtfulness, the Chief Justice invited me to the Court Christmas party—a mere year or so before that tradition became a source of controversy. Similarly, a day or so after beginning work, he invited me to lunch in his chambers—nothing fancy, because his taste in food was as simple as his tastes in most other things: he liked apples but, I learned later, disliked green olives and pre-buttered toast.

As time went on, William Rehnquist’s thoughtfulness and consideration occasionally became problematic. Hardly a month into the job, I found myself in the awkward position of trying to change his mind concerning his

travel arrangements. We were about to fly to Phoenix for meetings of the board of directors of the Federal Judicial Center and of the special Judicial Conference Review Committee—the latter being the first attempt to examine the workings of the Judicial Conference of the United States in seventeen years, since the time that Warren Burger became Chief Justice and undertook a similar effort. Because of his famous bad back, Chief Justice Rehnquist was legally authorized to fly first-class, but I was not. Not wanting his assistant to fly coach alone, he intended to sacrifice his own comfort and fly coach with someone who was still a relative stranger, until I persuaded him otherwise. At Phoenix we breakfasted together—I ordering my “heart attack special” of eggs, pancakes, bacon, and sausages, and he ordering a bowl of cold cereal. The next morning, as we were again walking to the breakfast room, he was invited by one of the judges to join in the continental breakfast provided by the hotel. “No,” he said, despite his plain-fare preferences; then, continuing on toward the dining area, he explained that the assistant he had known for little more than a month “likes a big breakfast.”

A companion to consideration and thoughtfulness is humility, and it was a virtue Bill had in abundance. While he had great respect for the office of Chief Justice—and there were occasions outside the sphere of deciding cases where he had to assert his authority related thereto—he had a firm identity clearly apart from that office. I was told by one of the Court officers who knew him before he was appointed Chief that he seriously considered not accepting that appointment. He was fully aware of the office’s visibility and the concomitant demands and distractions it would make upon the time he preferred to spend on his many other interests and with his family. Indeed, he told me that if he were ever offered a choice between becoming Chief Justice and being a husband and the father of three children, it would be a very easy decision in favor of the latter.

He rejected out of hand the idea of one admiring federal judge (curiously, a so-called liberal Democrat) to have his portrait hung in courthouses as head of the Judicial Branch of government in the same way that the president’s portrait hangs in post offices. While flattered by the judge’s proposal, he admitted that he was often “turned off” when he walked into a post office and saw the president’s portrait “looming down” upon him—and that this distaste was bipartisan. And as to the power of the Supreme Court itself, he more than once expressed his amazement—and doubts—about a system that would permit him, plus four of his unelected colleagues, to make decisions that could so seriously affect the lives of millions of people.

When I was asked in those years what sort of boss Chief Justice Rehnquist was, my response was that “he writes his own speeches and pumps his own gas.” He also—to the horror of the Court’s Marshal, who was charged with protecting his security—preferred driving his own car. Once, en route to a conference in Charlottesville, he pulled up to the self-service area of a gas station near his home and filled up the tank. His typical response to my question of what the station’s owners thought of the Chief Justice pumping his own gas was, “They don’t know who I am, and if they did, they wouldn’t care.” Then, with customary “everyman” candor, he added that they were a bunch of “surly” characters in any event.

As to writing his own speeches, he usually had the Judicial Fellow assigned to the Court do the research on a topic the Chief had chosen from books he had selected. (He was a prodigious reader.) The Chief Justice would then send his drafts to me for editing. It was, at first, a rather daunting assignment, but yet another surprise awaited me: the traditionalist, conservative Chief Justice liked to split infinitives, and he did not wish to be corrected to the contrary. Subsequent events revealed he was simply years ahead of the *Oxford English Dictionary* in legitimizing that practice.

Bill Rehnquist's humility was mixed with his good sense of humor. He enjoyed not being recognized, even within the environs of the Court. One late afternoon he was inspecting with me the work accomplished on the decorating and painting of the Lower Great Hall—a project he had assigned to the direction of Justice O'Connor. Very few visitors remained in the Court building, which was about to close to the public for the day. While we were gazing at the painting work on the ceiling, he was recognized by a somewhat elderly gentleman visitor who practically ran from the other end of the hall, motioning to his wife to follow him. The Chief extended his hand and said, "Hello, I'm Chief Justice Rehnquist. Welcome to the Court." The visitor's wife caught up with him to hear: "Martha, do you know who this is?" "No," she quizzically replied. The Chief repeated his personal greeting of a few seconds earlier, "Hello, I'm Chief Justice Rehnquist; welcome to the Court." But there was no shock of recognition by "Martha." The visitor left, simultaneously elated that he had met the Chief Justice in person, but mortified that his wife neither recognized him nor appreciated what she had experienced. The Chief himself did everything he could to muffle his laughter.

The completely natural "everyman" aspect of this Chief Justice provided for mirth in its own right. He could do or say things that, because he was Chief Justice of the United States, were funny, when they would be totally un-noteworthy if said or done by others. Once, behind the wheel of his Volkswagen Rabbit, he leaned on the horn, urging the car in front to get going as the red light had turned green. "Come on, buddy, move it!" he shouted. Every driver of even great patience has done likewise at some time, but the thought of the Chief Justice doing it was so incongruous that it was hilarious. Similarly, he once referred to a group of law clerks (not his own) as a "bunch of arrogant jerks"—a phrase that, coming from another's lips, would hardly strike anyone as necessarily funny.

Because of his innate humility, the Chief often failed to appreciate the aura that others placed about him. "Why would someone want to do this?" he would comment about candidates with illustrious credentials who would apply for fairly low-level jobs just to work at the Supreme Court or to work specifically for him, no matter how indirectly. He seemed not to grasp that what they might be doing was far less important to them than for whom they would be doing it. Similarly, when he was hit in the eye with a tennis ball by my partner in a match, he was surprised that I left the game to check on his condition at his hotel room and to render whatever assistance I could. He was bothered as much by the fact that we didn't have the heart to play without him as he was by his injury.

Along with the humility came an open-mindedness that would have surprised his political and jurisprudential detractors. In considering candidates for the Judicial Fellow position at the Court he told me, "I don't see these positions as rewards for people who think the same way I do." In another instance, in evaluating candidates for a certain position that would have constituted a promotion for Court employees who had applied, he noted the large number of African Americans employed in the Court building and said he thought it was important that a black applicant be selected, so that others could see that opportunities for promotion existed. In another context, he was classically hard-minded but soft-hearted. In speaking of certain low-ranked Court employees, he once said to me, "I know these guys sneak off in the afternoon to play cards, but given what they're paid and where they're going in life, I'm not about to crack down on them." As to the higher level Court employees and officers, the Chief Justice's humility and his belief in subsidiarity provided them with great authority and autonomy in their respective areas. We could use all the rope he gave us as a tool to do our jobs as best we could—or to hang ourselves. Chief Justice Rehnquist was not going to micromanage the process either way.

He exhibited a great sensibility in the context of different situations. When receiving the Crown Prince of Denmark—still in his teens and exhibiting adolescent energy—the Chief Justice turned the conversation to sports and ordered more cookies with the morning tea. His courtesy was occasionally joined, though, by his unfailing candor. The ambassador from the then-Soviet Union, Yuri Dubinan, visited the Court to invite the Chief Justice to the USSR, as but one more gesture of Mikhail Gorbachev's *glasnost*. Chief Justice Rehnquist asked if he might arrange it at the same time he was to visit his ancestral home in Sweden. The geographical proximity would permit him to "kill two birds with one stone." The Ambassador, whose English was flawless, understood the idiom but did not take offense.

Bill Rehnquist could very well have been the most cultured member of his Court. His knowledge of history, art, even the names of mountain peaks and varieties of pear trees was encyclopedic. It was not uncommon for him to begin humming or even singing—often an aria from some opera—while waiting for an elevator. Returning to his home from a meeting one Saturday afternoon, we were listening in a Court car to music neither of us could identify with certainty. Too "low" for Mozart, we both agreed, as he stepped out to walk to his house. As the driver and I proceeded on to the Supreme Court building, the music concluded, and the radio announcer named the selection—by Mozart—which brought laughter to us both. The following Monday I called the Chief's chambers and asked his secretary to leave a note for him to read, "It was Mozart." A few minutes later, upon his arrival at work, he called to tell me that, yes, he knew it was Mozart, because as soon as he got inside the door of his house that previous Saturday, he turned on the radio to catch the remainder of the music and to learn the composer's identity. In that great Lutheran tradition which was his heritage, Bill Rehnquist knew music well and took it seriously.

He also took it non-seriously. The sing-alongs he led following various gatherings of the judiciary, in addition to the caroling in the East or West conference rooms near the Court's Great Hall at the annual Christmas party, are fabled. Following one of the "Three-Branch" meetings sponsored by the Brookings Institution one year, the arranged-for piano player was taken ill; thus, the predicate nominative in the classic call "Is there a doctor in the house?" became "piano player." Third Circuit Judge Ed Becker from Philadelphia strode to the fore, and, without notes, accompanied the assembled in the Chief's repertoire; and, as those who knew the Chief's love of singing understood, Judge Becker saved the evening and was transformed in the Chief's eyes from jurist to hero.

The end-of-Term sing-alongs in the Court in June were similarly salvific, and also instructive of the Chief's—and his Associates'—wit. It was 1989, just after the decision in the much-publicized flag burning case of *Texas v. Johnson*¹ was handed down. The ruling was noteworthy in that few of the liberal/conservative stereotypes of the Justices' voting records held. Justice Scalia, for example, sided with the majority, led by Justice Brennan. Chief Justice Rehnquist, in dissent, took the opportunity to quote John Greenleaf Whittier's poem "Barbara Frietchie," as well as to sling a barb at Justice Scalia at the sing-along. Thus, when it came time to sing "It's a Grand Old Flag," the Chief Justice said, "We're going to dedicate this to Justice Scalia." Not missing a beat, Justice Scalia emphasized his view that the flag is not equivalent to the Deity and effectively mocked the Court's Establishment Clause interpretations by shooting back, "Pretty soon we're gonna have to wear Santa Claus outfits before we can sing it." The Chief's ability to so joke with his colleagues publicly displayed his great popularity within the Court. Indeed, were the Chief Justice to be elected by his peers rather than appointed by the President, Bill Rehnquist would have received every vote except his own—and

William Brennan and Thurgood Marshall would have led the campaign.

The Chief Justice was the author of four books, and his love and knowledge of history—especially Court history—was also extraordinary. When I informed him that Vice President-elect Dan Quayle's office had called to say that he was requesting that Justice O'Connor give him the oath of office at the 1988 inauguration, the Chief Justice mused about other occasions when a Vice President had been sworn in by an Associate Justice. He recalled that Justice Stanley Reed delivered the oath to Alben Barkley. "But they were both from Kentucky," he said, wondering what the connection might be between Senator Quayle and the Chief's Stanford Law School classmate and friend, Sandra Day O'Connor.² The Chief's sense of history became publicly visible when, at George H. W. Bush's inauguration, he tried to resurrect from the nineteenth century the wearing at such events of the so-called skullcap—a hat resembling a European jurist's headpiece more than it does a *zuchetta*. It was an example that few of his colleagues followed. Nonetheless, Chief Justice Rehnquist went on, of course, to make history himself in other, more serious ways.

My tenure with the Chief at the beginning of what will be known as the Rehnquist Era on the Court was indeed one of enjoyment and surprise. But the biggest surprise was that his leadership of the Court did in fact turn out to be an "era"—that it extended into the twenty-first century. No one would have been more surprised than Bill Rehnquist to be told in 1986

that he would be Chief Justice for nineteen years. In spring 1989, he told me that he had planned to retire in 1991. But, he said, it would be irresponsible of him to retire during an election year, and, although President George H. W. Bush was then at the peak of his popularity, the Chief Justice had no confidence that he would be re-elected. He and his wife Natalie Cornell Rehnquist ("Nan") had long looked forward to retirement. She had suffered a recurrence of cancer in the late 1980s, but the outlook was positive. The Chief then told me that "What keeps her going is her strong faith in God and her upbeat attitude. If I were in her shoes I'd have been dead long ago." As we all know from Bill Rehnquist's last courageous year as Chief Justice, Nan's influence on him in many ways was far stronger than he realized.

It so happened that, in 1991, Nan at last fell victim to cancer. Her death had the effect of changing her husband's mind on how long he would stay at his work. For a man who could be simultaneously shy and gregarious, it would not be enjoyable entering retirement alone. It was Nan Rehnquist's death, then, that in effect changed Supreme Court—and American—history. And it was a small slice of that history that I—and the five administrative assistants to the Chief Justice who followed me—were privileged to share.

ENDNOTES

¹491 U.S. 397 (1989).

²As it turned out, some years later Dan Quayle moved to Arizona, so the connection was prospective.

Tribute to William H. Rehnquist

JOHN G. ROBERTS, JR.

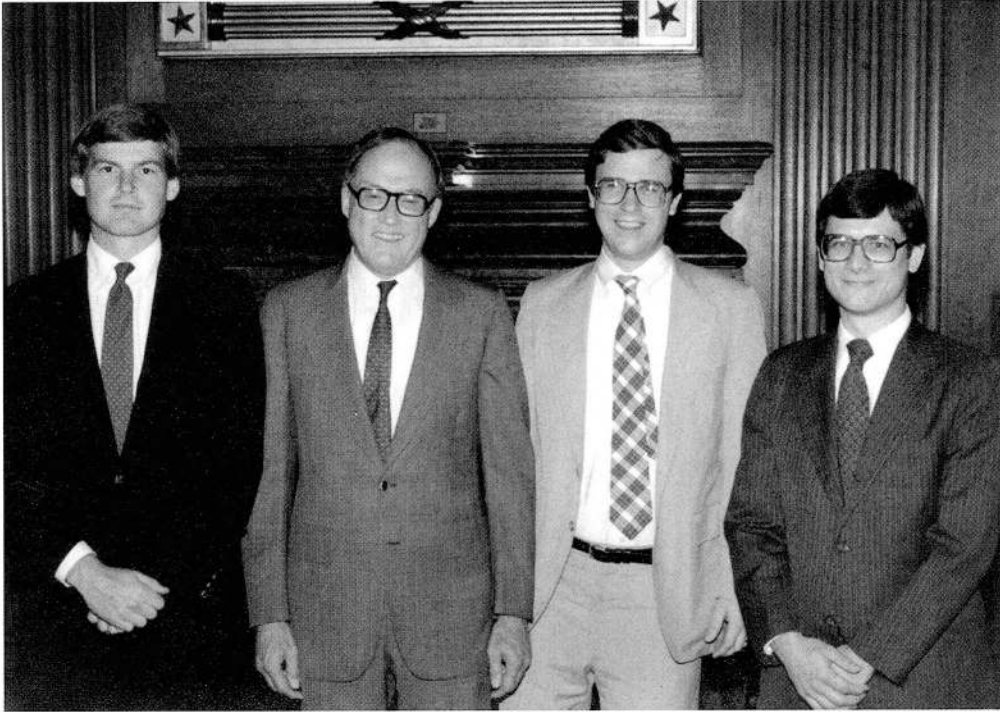
The casket was plain unvarnished pine, and over it was draped the American flag. As my fellow Rehnquist clerks and I carried that casket up the marble steps of the Supreme Court building, to the Great Hall, it occurred to a number of us that this was very fitting. For Chief Justice William H. Rehnquist was direct, straightforward, utterly without pretense—and a patriot who loved and served his country.

Chief Justice Rehnquist is a towering figure in American law, one of a handful of great Chief Justices. He served on the Court for thirty-three years—longer than all but six of the Justices who preceded him—and during that time authored 458 opinions for the Court. Historians and legal scholars will analyze and debate how Chief Justice Rehnquist affected the development of the law and American institutions of government far into the future. But as his casket was carried past the Justices who served with him, past Court staff and other clerks, it was not his impact on the law that was foremost in the minds of those assembled to pay their respects. It was instead the Chief's equally profound personal impact on those whose lives he touched directly.

I first met then-Justice Rehnquist when I came to Washington to interview for a clerkship position. I was fortunate enough to be hired, but soon learned that I should not regard

this as any great accomplishment. The Chief often commented that the top five or so students at the top fifty or so law schools were fairly interchangeable in terms of ability to do the job of a Supreme Court law clerk. The comment never set comfortably with those of us he had hired; having been selected, we were generally inclined to think of ourselves as a bit more select.

It was an early lesson in perspective for clerks that was quickly reinforced when the clerks were introduced to the Chief's famous "ten-day rule." Any writing assignment from the Chief—memorandum, draft opinion, whatever—had to be completed within ten days, no matter how lengthy or difficult, and no matter what other demands were already on the clerk's plate. When a clerk would suggest that he could do a better job with a bit more time, the Chief would explain that the idea was not for the clerk to do the best job, but for the Justice to do so, and whatever refinements the



Associate Justice Rehnquist, second from left, with Dean C. Colson, left, Robert B. Knauss, second from right, and John G. Roberts, right, who were his clerks for the 1980–81 Term.

clerk might make beyond the ten days were unlikely to advance that objective.

Clerks generally did not write “Bench memos” to help the Chief prepare for argument; instead he would discuss the case orally with the clerk shortly before argument. He often liked to do this while taking a stroll outside the Supreme Court building. The Chief grew up in Milwaukee, so weather seldom deterred him; when my co-clerk from Miami balked at a walk because it was “Florida school-closing weather” outside, the phrase quickly became the Chief’s favorite description of the perfect condition for a brisk walk to discuss an upcoming case.

During these strolls, then-Justice Rehnquist would often be stopped by visiting tourists and asked to take their picture as they posed on the courthouse steps. He looked like the sort of approachable fellow who would be happy to oblige, and he always did. Many families around the country have a photograph of

themselves in front of the Supreme Court, not knowing it was taken by one of the most influential Justices to sit on that Court.

Chief Justice Rehnquist was interested in just about everything, which made him very interesting. It was next to impossible to bring up a subject without hearing something new about it from the Chief. He had a prodigious memory, and it was not uncommon for him to relay some obscure fact about whatever subject was at hand, only to say he remembered it from a class he had taken in high school.

He could find something diverting in the most mundane topics. His service as a weather observer with the Army Air Force during World War II instilled a lifelong interest in the weather. He was able to discuss the climate almost anywhere in the United States as if he had spent many years living in just that spot.

The Chief Justice loved to sing: church hymns, Christmas carols, old standards, cowboy songs. He conducted sing-alongs that

became staples at various conferences and meetings. Because he always seemed to know more verses than anyone, he often provided a songbook with the words, so everyone could participate—whether they wanted to or not. But music was not just a diversion. I recall him heartily singing an inspirational hymn at his beloved wife Nan's funeral.

Among his favorite lines of verse were two from Thomas Gray's *Elegy Written in a Country Church Yard*: "Full many a flower is born to blush unseen/And waste its sweetness on the desert air." Quoting those lines, he would regularly discuss at judicial conferences the less celebrated cases of a Court Term, pointing out the interesting aspects of legal craft implicated in those cases that might otherwise be overlooked. In law and life, he overlooked little.

That he was interested in so much, and could derive pleasure and satisfaction from little things, meant that he was not unduly swayed by big things. One year, when the Justices still regularly attended the President's State of the Union Address, Chief Justice Rehnquist did not—because it conflicted with the painting class he was taking at a local school. The Chief Justice simply made the straightforward calculation that he would get more out of the class than out of the speech.

The Chief Justice was an avid student of history, writing three books on historical

topics in addition to his valuable guide to the work of the Supreme Court. The books, like his many speeches on historical subjects, were rich in anecdotes and illuminating asides about the characters involved in whatever topic had drawn his interest. The Chief was a great supporter of the Supreme Court Historical Society. He participated in many of the Society's lecture series and happily lent his backing to various Society projects.

Although occasionally a stern figure on the Bench, the Chief had a whimsical side. He was a great one for games—tennis, croquet, bridge, poker, and board games were favorites. I have never witnessed a more enthusiastic charades player. He excelled at trivia contests, and enjoyed small wagers on anything—athletic contests, presidential elections, the day of the first snowfall and how much snow there would be.

Chief Justice Rehnquist served the Court, and his country, with great distinction. Devotion to duty and a quiet courage characterized his entire career of public service, but especially his last year. There will be time enough to assess and debate his impact on the law. For those of us fortunate enough to have known him, however, he will always be remembered first and foremost as a genuinely kind, thoughtful, and decent man.

Mr. Jay Rides Circuit

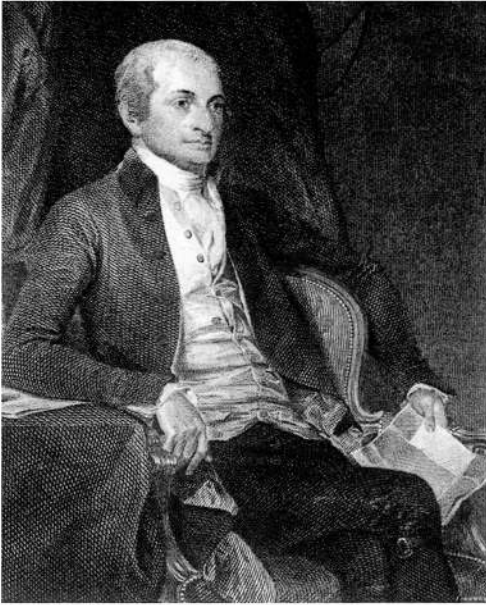
LANDA M. FREEMAN

Several years ago, when two John Jay Homestead¹ colleagues, Louise V. North and Janet M. Wedge, and I contemplated compiling and editing a book of correspondence between John Jay and his wife Sarah Livingston Jay, we agreed that our goal would be to chronicle the personal lives of the Jays in the tumultuous times during and after the American Revolution. In the process of choosing the letters for **The Selected Letters of John Jay and Sarah Livingston Jay**, published in 2005, we came to a true appreciation of the Jays' commitment toward their country.

John Jay devoted his working life to winning independence for the United States and establishing it as a nation. He was the only Founding Father to serve in all three branches of government: executive (Secretary for Foreign Affairs, Governor of New York State), legislative (member of the First and Second Continental Congresses, as well as president of the latter), and judicial (chief justice of the State of New York, and later, Chief Justice of the Supreme Court). He also served in diplomatic roles, as minister plenipotentiary to Spain and as a peace commissioner during the negotiations leading to the Treaty of Paris of 1783, which ended the Revolutionary War. In 1794, he was named envoy extraordinary to Great Britain, charged with negotiating the treaty that bears his name, an agreement that postponed until 1812 another war with Britain.

Sarah Livingston Jay was equally supportive of her country. Completely committed to her husband, she dedicated herself to sustaining and assisting him in his career. Although she was amenable to "giving Mr. Jay to the public," she missed him terribly when they were separated. Theirs was an abiding love that enabled Sarah to be a devoted and affectionate wife, a loving mother to their five children, and a competent manager of their household. In addition, she was an astute observer of life and a superb letter-writer.

In 1789, when John Jay was invited by newly elected President George Washington to become the first Chief Justice of the Supreme Court, he accepted the position with gracious humility. To complete appointments to the Court, President Washington named five other men from five different states as Associate Justices. Together, the Justices began to carry



Once appointed to the Supreme Court in 1789, Chief Justice John Jay and his fellow Justices set out to establish an effective federal court system that would help bind the nation together.

out the Judiciary Act passed by Congress in 1789. Their goal was to establish an effective federal court system that would help bind the nation together. Under the Judiciary Act, Congress created a separate federal circuit court for each state, staffed by two Supreme Court Justices and one local district judge. It also determined the dates and places of court sessions and required the six Justices to cover them—that is, to “ride circuit” twice a year. The country was divided into three judicial circuits—the eastern, the middle, and the southern—and each Justice was assigned to the circuit that included his home state. Given the distances ridden, it was often not possible to return home between court sessions, so that a Justice who left on circuit might return home weeks or even months later. When it became clear that the southern circuit entailed the greatest distances and the worst roads, a rotation of circuits was implemented among the Justices.²

Riding circuit in the eighteenth century was not easy. Letter-writing was the only

means of communication—and it was an uncertain one at best. With regular mail service in its infancy, letters were often entrusted to friends as well as to post riders. The mail sometimes reached its destination and sometimes did not. Frequently, it arrived after the intended recipient (at least in the case of Supreme Court Justices) had departed for another locale. Hence, the first sentence of most letters usually included a listing of correspondence written as well as received, so that both writer and recipient could tell whether letters had “miscarried” or not. While John Jay was away, usually on the eastern circuit, he wrote often to his wife and children. And they in turn wrote to him, to an address where they thought he might be.

In addition to the difficulty of communication, the court schedule required travel during “the two most severe seasons of the year.” As all travel was undertaken on horseback or in carriages (John Jay carried his law library with him), riding circuit was often arduous, taking many more days to go from one place



Sarah Livingston Jay was a devoted wife, loving mother of five children, competent household manager, and astute observer of life. Her talents are divulged in the superb letters she wrote to her husband.



While the Justices were performing their arduous circuit-riding duties, which kept them away for months at a time, they tried to correspond with their families. But mail delivery was erratic, and the Justices had difficulty predicting when they would arrive or depart from a fixed destination. Most letters usually began with a listing of correspondence written as well as received, so that both writer and recipient could tell whether letters had “miscarried” or not.

to another than we can imagine today. Roads were not paved, bridges over rivers did not exist, inns were as often dirty as clean and offered mediocre food at best. Horses needed to be fed, shod, rested, and cared for.

Along with the uncertainties of travel and the post, there were worries about health, not only illness but also epidemics of, for example, smallpox and yellow fever. Medicine was in its infancy, and the need for proper sanitation was not yet appreciated. Even though the Jays had access to the finest doctors in New York, there was always concern when a member of the family fell ill. As the reader will see from Sarah’s letters, the cure for various ailments—bleeding, mercury, and laudanum (opium)—was often worse than the illness itself.

The following excerpts of letters,³ arranged chronologically, afford a glimpse of the Jays’ devotion to their country and family, the demanding worries and apprehensions when children were ill, the difficulties of communication, the uncertainty of travel due to the weather and the state of the roads, and the pleasure of finishing the circuit. The letters

here have been transcribed as written, complete with misspellings and abbreviations. You will notice that the Jays capitalized the words that they considered important.

In John Jay’s letter to George Washington of 6 October 1789, he expresses the honor and humility he feels upon being invited by the President to become the first Chief Justice of the United States.

When distinguished Discernment & Patriotism unite in selecting men for Stations of Trust and Dignity, they derive Honor not only from their offices, but from the Hand which confers them.

With a mind and a Heart impressed with these reflections, and their correspondent Sensations, I assure You that the Sentiments expressed in your Letter of Yesterday, and implied by the Commission it enclosed, will never cease to excite my best Endeavours to fulfill the Duties imposed by the latter, and as far as

may be in my power, to realize the Expectations which your nominations, especially to important Places, must naturally create.

In keeping Mr. Jay abreast of the activities of the family in New York City, Sarah often discussed the "home front," as she called it. In a letter to her husband in Boston, she wrote:

23 April 1790

. . . Our little folks are very well. The distance they suppose you to be at present, the still greater distance you are to travel, the impediments likely to interrupt yr. journey & the pleasing idea of your return are the interesting subjects of our domestic conversation. A week has elapsed since your departure & the servants have not yet given one occasion for the smallest dissatisfaction. Tomorrow or monday I shall pay my father [William Livingston, Governor of New Jersey] the long intended visit.

Last Monday the President went to Long Island to pass a week there. On Wednesday Mrs. Washington call'd upon me to go with her to wait upon Miss Van Berckel & on thursday morning agreeable to invitation myself and the little girls took an early breakfast with her & then went with her & her little grand Children to Breakfast at Genl. Morris's Morissania. We pass'd together a very agreeable day & on our return dined with her as she wd. not take a refusal, after which I came home to dress & she was so polite as to take Coffee with me in the evening . . .

A month later, Sarah wrote again with family news, as well as financial news. John Jay was still in Boston.

15 May 1790

When I wrote you last, William & myself were very poorly, so was likewise Peggy Jay. Thank God! we are

all three much better, . . . Yesterday I recd. 50£ from a Mr. Ball on acct. of Rutherford for your sister Nancy, & I have just been paying it to Peter Munro [John Jay's nephew] for her, which is apropos as he is going to Rye on Monday.

The little girls are gone to drink tea with their Cousin Munro, who dines with me to-morrow. We make out very well, no difficulties have yet occur'd. Ain't you a little fearful of the consequences of leaving me so long sole mistress. Peter Munro paid me 65£ for you which I've been spending at a great rate. . . .

With her husband having ridden on to Providence, Sarah wrote to tell him about the illness of one of the children.

28 November 1790

Our dear little girl [Nancy] being now in a sweet slumber, & the house all quiet, I will endeavor to employ some of my lonely sleepless moments in continuing an account of her situation. You know I wrote you by the last Post, which was on Wednesday evening; on thursday the Doctr. gave her more mercury, & finding her on friday considerably salivated desisted, and, tho' her throat still continues ulcered, he told me the salivation was a favorable circumstance & he flattered me wh. hopes that she wd. recover. I then regretted sincerely having inform'd you of her illness, & wish'd I had suffered alone the anxiety occasioned by it. . . .

7 o'Clock Doctr. Charlton has this inst. left us. He says I may assure you our dear little girl is out of danger. I flatter myself that you will receive this & my last letter at the same time & that therefore your suspense will be lessened. As it will be impossible for me to tell where to direct to you in

future, you must not be uneasy if you do not hear from me, tho' I imagine next thursday's post may find you at Providence & shall accordingly write by that.

Adieu my dear Mr. Jay! May you be preserv'd from every danger & restored to your expecting family & affectionate Wife.

Mr. Jay, in traveling from Providence to Wallingford, Conn. encountered bad weather, freezing and thawing roads, and the continued worry of his ill 7-year-old daughter.

12 December 1790

This is Sunday. On Wednesday last I set out from Providence. The weather very cold, and the Roads rendered bad by Snow and Ice. I was strongly tempted to wait untill Saturday for your Letter, but considering that to be relieved from Suspence respecting Nancy was less interesting to us all than to be at Home speedily, I concluded it would be best to return without Delay, & direct the post master to send the Letter after me. By rising early and travelling late, I reached Hartford on Friday night. Yesterday it rained. I am nevertheless come to this place, with Intention to go on early this morning to New Haven. The distance being only 13 miles. This morning the weather is so bad that it would be very imprudent to turn out. It rained constantly during the night, and the Roads are in a sad Plight. I have had so much to do with cold and wet, that I really wish for a Respite, and shall be very happy to enjoy the comforts of Leisure and my own fire-side with You and the Children. I did flatter myself with the Pleasure of being with you on Wednesday next, but that cannot now be the Case. . . . Adieu my dear Sally. My Love to the children &c.

In the spring of 1791, Sarah and their 15-year-old son, Peter, accompanied John Jay on the circuit tour. The three younger children remained at home. After an enjoyable visit with John's brother Peter and his wife Polly at Rye, the Jays went on to Bedford to inspect their retirement home before heading for New Haven. When Peter became ill at Newport, he and his mother returned home to New York. From New Haven, Sarah wrote to their 9-year-old daughter Maria:

23 April 1791

We arrived here last evening after a very agreeable ride, having had a great deal of pleasant weather. I sent immediately to the Post-office hoping to receive a letter from your Aunt Susan . . .

After passing a week at Rye we went to Bedford where we stayed until last wednesday, when we set out for this place, & as the weather was fine, & we were not hurried, we travel'd leisurely, and have been very fortunate in putting up at good houses, where we found civil people, clean beds, & good-fare. At Norwalk we lodged at a good Inn, situated near a mill dam which is on a pretty stream, & the fall of the water from thence, together with the view renders the place very rural: but what I fancy wd. have delighted you & Nan is a very pretty spring which the Landlord has stoned round & put trout in, whom he keeps tame by feeding & you may at any time see them by throwing some crumbs into the spring which they immediately catch at. The Country in genl. thro' which we have pass'd abounds wh. pretty towns & fine views. The most beautiful View however is at the brow of a Hill about two miles & a half from this place. . . . Believe me my dear daughter to be, your affectionate mother, Sa. Jay

John Jay was a stern but loving parent. He believed that good conduct, good behavior, and the rigorous education of his children reflected upon the honor of his family. From Boston, he wrote to his son Peter at New York, setting out his views on a classical education.

29 November 1791

I returned yesterday in the afternoon from Exeter. This morning I recd. and read with Pleasure your Letter of the 23d. Instant [of this month]. The inaccuracies in it scarcely required an appology. Some errors are observable in the Stile, very few in the matter. I regard the attempt as a mark of attention to my wishes, and shall not forget it. Having many Letters to answer and many Visits to pay, I can devote only a few moments this Evening to you. Early on Thursday morning I expect to set out for Scituate, and from thence proceed with Judge [William] Cushing to Providence on the ensuing Saturday. . . .

Few books, if properly read, afford more useful Lessons than the Lives of great Men, and among Biographers Plutarch is certainly entitled to the first Place. To enjoy the Experience of others without paying the Price which it often cost them, is pleasant as well as profitable. Mankind is the same in all ages, however diversified by colour manners or customs. To regulate our conduct wisely relative to Men, is the most difficult Task we have to perform in the course of our Lives. To know them is necessary but not easy. History will teach us much, but unremitted observation more. Both assist each other. Habituate yourself to trace actions up to their motives. Let me again repeat that we have two worlds to exist in, and that you may be happy in both, is not only the wish but the Prayer of Your affte. Father John Jay

On many occasions, John Jay received invitations to stay with friends while riding circuit. However, in an effort to avoid the appearance of a conflict of interest, he often declined to accept them. In early 1792, John Adams in Philadelphia invited Jay to stay while visiting that city.

4 January 1792

As the week is approaching when you are to be expected at Philadelphia, I take this opportunity to present to you and your Lady the Compliments of the season, and request the honour and pleasure of your Company, at our house during your visit to this City. We live in Arch Street at the Corner of fourth Street where your old bed is ready for you in as good a Chamber and much more conveniently situated for your attendance on your Court and intercourse with your Friends. Mrs. Jay we hope will bear you company and in this request Mrs. Adams joins with me. The winter is very mild; Politicks dull. Speculation brisk. As we have little Interest in these Things we shall have a freer Scope for Friendship. I am, dear sir, with Sincere Esteem, yours John Adams

But Jay declined the offer of hospitality, as graciously as he could. The draft of his reply follows:

10 Jan 1792

I cannot easily tell you how much I am pleased & obliged by your friendly Letter of the 4th Instant. Were I to pursue my Inclinations I shd. without Hesitation accept your kind Invitation but our Inclinations even in things innocent must not always be gratified. . . . The Courts call me regularly & periodically to Philadelphia, and they will continue to call me as long as I remain in office, or the present order of Things continues unchanged. This circumstance

produces considerations which press me on those occasions to be in Lodgings; and the more so, as your living in Town obviates Impediments to our seeing each other frequently, and passing as many pleasant Hours together as our official affairs may permit.

Mrs. Jays situation will not admit of her being from Home next Term. We expect an Increase of our family abt. that Time. . . . She requests the favor of you to present her best compts. & acknowledgements to Mrs. Adams. Be pleased to add mine. . . . With sincere Esteem & Regard I am Dr Sr yr obliged & obt Servt.

John Jay had a great interest in horticulture as well as agriculture. In the following letter from New Haven to his son Peter at New York, he wrote:

25 April 1792

I had flattered myself that a letter from you would have accompanied the one I received from your mama. She will receive two letters from me by the packet which is to carry this; in one of them is enclosed a little white mulberry seed, and I shall also enclose some in this for your Uncle Peter. . . . It always gives me pleasure to see trees which I have reared and planted, and therefore I recommend it to you to do the same. Planting is an innocent and a rational amusement. My Father planted many trees, and I never walk in their shade without deriving additional pleasure from that circumstance; the time will come when you will probably experience similar emotions. . . .

Sarah Jay at New York, always concerned about the health of the children, wrote to her husband about provisions for the house, as well as about the smallpox vaccination of baby Sarah Louisa.

6 May 1792

Since yours of the 30th of April came to hand, I flatter myself you've recd. mine of the 28th & 29th Ult [imo—of last month]. . . .

Yesterday our son went to Rye. A day or two ago I received a letter for you from London, & as I imagined it was from Mr. Johnson I opened it, & found he had ship'd for you 24 Doz. of Porter; I gave the letter to Peter to take to the custom-house, where, after paying the duties he obtained a permit, which he left with the Captn., who promised to send up the porter as soon as he conveniently could.

I believe I wrote you that our little girl had been three time[s] innoculated [for small pox] ineffectually. I was then discouraged but the Doctor advising me to repeat the attempt, I consented to his performing the operation the fourth time on monday last; he thinks she has taken the infection, but I confess I have my doubts. She still enjoys perfect health & is as complacent as an Angel. Will is all vivacity. You are the prevailing subject of his prattle. I believe he dreamt the other night that you had returned, for when he awoke he insisted upon your being at home, nor would he be convinced to the contrary until I carryed him in your room. My little name-sake, contrary to your opinion, is likely to remain unrival'd. . . .

Mr. Jay, in Brookfield, offered advice to his daughter Maria on how to care for her younger brother William, age 3.

7 May 1792

. . . Give little Wm. a kiss for me. I know you love him dearly, but take care not to humour him in any Thing improper. The sooner he learns to bear being denied, what he ought not to have, the better. While he has no

Discretion of his own, the Want of it must be supplied by that of others; and when he shall be of Age to judge for himself, he will not be pleased with any, whose indiscreet Indulgencies may have led him into mistakes, and into a Habit of expecting that all his Caprices and Passions are to be indulged.

I made these Remarks not because I have observed or suspect any Thing amiss; but merely because I think them worthy of Attention. What I mean is, that you should, as I dare say you do, endeavour to improve as well as to please him. May you all love and improve each other. Adieu my dear Maria, I am your very affectionate Father John Jay

Sarah Jay offered her husband more news of the "home front," including how smoothly the household ran with competent servants.

13 May 1792

Your favor of the 5th of May as well as the others you mention came safe to hand. The family still continue well. Our dear little babe remains proof against the smallpox. . . .

Frank, & indeed all the servants behave very well. Our domestic concerns have never been conducted with so much facility as at present. Indeed it is incredible how much our tranquility depends upon our servants. There is a total stagnation of news. The papers no longer contain the price of stock, the publication of it being prohibited by the Legislature to impede the progress of speculation; but that had already recd. such a check that I doubt the Act being necessary. Mr. Duer and McComb still are in confinement [for debt].

It being time to prepare for Church, I must bid you adieu. Many of our friends flatter me with a prob-

ability of your return next month. For more reasons than one I wish their calculations may be justified by the event. Once more my dear Mr. Jay let me repeat that I am with the most tender attachment yours affectionately Sarah Jay

In the gubernatorial election of 1792, John Jay's name was placed on the ballot, although he did not campaign for the office. After the day of the election, each county forwarded its ballots to the office of the secretary of the state. As the pro-Jay ballots from Otsego County were termed invalid and burned, George Clinton was declared the winner of the election. In his letter of 18 June 1792, John Jay explains to Sarah his philosophy about the lost election.

About an hour ago I arrived here from Newport, which place I left on Friday last. The last letters which I have received from you are dated the 2d and 4th of this month. The expectations they intimate have not, it seems been realized. A Hartford paper, which I have just read, mentions the result of the canvass; after hearing how the Otsego votes were circumstanced, I perceived clearly what the event would be. The reflection that the majority of the Electors were for me is a pleasing one; that injustice has taken place does not surprise me, and I hope will not affect you very sensibly. The intelligence found me perfectly prepared for it. Having nothing to reproach myself with in relation to this event, it shall neither discompose my temper, nor postpone my sleep. A few years more will put us all in the dust; and it will then be of more importance to me to have governed *myself* than to have governed the *State*. The weather is very warm; towards evening I shall go to Hartford, where I hope to find a letter from you. In a

letter from Newport I requested you to direct a letter for me there. . . .

Tuesday Morning. I am waiting to have my horses shod, and in expectation that Judge Cushing, who is behind, will be here this morning I have concluded to cross from Bennington to Albany and return from thence by water. . . . My love to all the family.

The Jays dreamed fondly and spoke often about an ideal retirement. While Mr. Jay was in East Hartford, Sarah and two of the children visited the farm in Bedford to which the Jays looked forward to retiring.

13 July 1793

. . . The day after my arrival at New York, I had the pleasure of writing to you & since I've been here have sent for you two letters to the White-plains. Last tuesday your son & daughter, Effy & myself went in the waggon to Bedford. We dined at Holly's & arrived early in the afternoon at the Farm. The Major & his wife made us very welcome & after setting with them a little while we began our rambles. The place looks much prettier than when I was there before. The Cellar for the new house is dug & the bricks are there, but the stone is not yet drawn. The Major says he means to have them on the spot as soon as the harvest is over, which he means to begin in a day or two. Mrs. Lyon seems much pleased with the idea of a change in the situation of her house which she flatters herself will be more convenient still than where she at present is. Ann [Nancy] was as much pleased as I expected she would be & we felt no other wish than that we were peaceably settled there.

The next morning after breakfast we went in the waggon to see the Mill where we found John who performs the part of Miller himself, having dis-

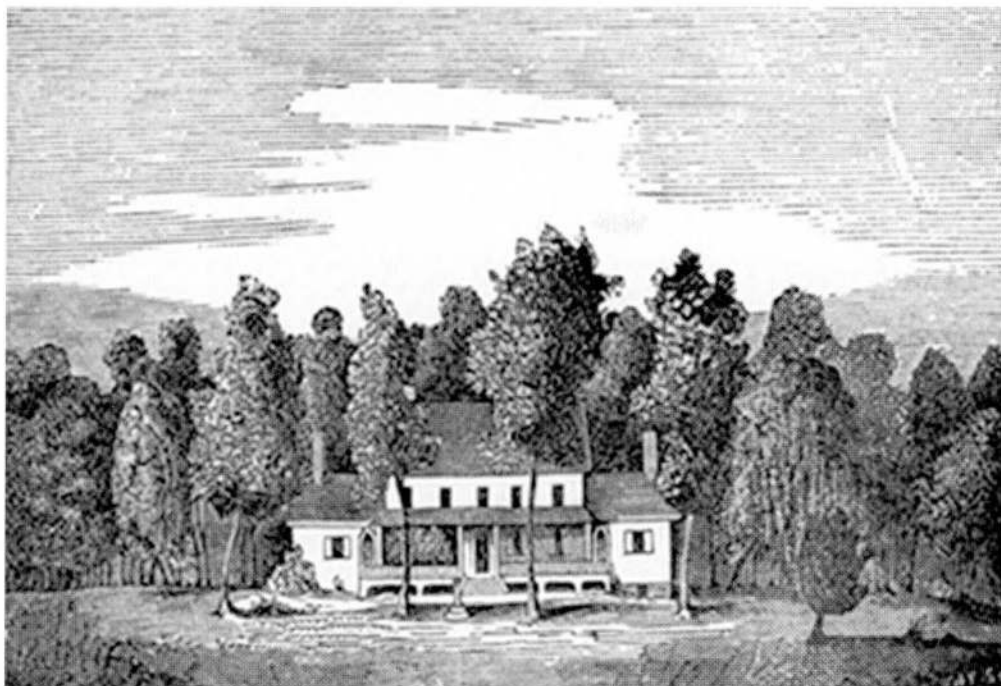
missed the one he used to employ. He was very civil & explained the use of the different parts, & attended us upstairs & down-stairs. Notwithstanding what I had heard of it, the size & apparent strength of it surprised me. . . .

With the greatest desire to see you, I am my dearest, best beloved! most affectionately yours S. Jay

In the late summer of 1792, the Chief Justice and five Associate Justices petitioned the President and Congress to change the system of "riding circuit." They argued that, when the Judiciary Act was passed, the system was considered temporary rather than permanent and that a revision was in order. They explained "[t]hat the task of holding twenty-seven circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the Year, is a task which, considering the extent of the United States, and the small number of Judges, is too burthensome. That to require of the Judges to pass the greater part of their days on the road, and at Inns, and at a distance from their families, is a requisition which, in their opinion, should not be made unless in cases of necessity."⁴

John Jay served as Chief Justice until 1795, although he spent the final year of his term in London negotiating a new treaty with Great Britain. With the Jay Treaty finalized, he returned to New York to discover that he had been elected governor of New York State, resigned from the Supreme Court, and took the oath of office as governor in July 1795, serving in that position for two three-year terms.

His devotion to his country never waning, John Jay served his country until 1801, when he retired to his farm in Bedford (now Katonah) New York. His beloved wife Sarah, who had been in increasingly ill health, suddenly took a turn for the worse, and she died in



Born to a prosperous family of French Huguenot origin, John Jay grew up on a farm in Rye, New York, and retired to this farm in Bedford (now Katonah). He and Sarah wrote often of their plans for an ideal retirement. When Jay finally resigned from public life in 1801, he was able to pursue his agricultural interests. Sadly, Sarah died the following year; John lived until 1829.

the spring of 1802. John Jay continued to live at the farm until his own death at the age of 83 in 1829. Surrounded by family and friends, he occupied himself with his interests in agriculture and husbandry, in legislation for the abolition of slavery, and in the American Bible Society.

ENDNOTES

¹The home and farm in Bedford (now Katonah) New York, which John Jay built for his retirement. The property remained in the Jay family for five generations, until 1953. It is now a New York state historic site and is open to the public.

²Walter Stahr, *John Jay, Founding Father* (London: Hambledon and London, 2005), 274.

³The letters in this article are taken from *The Selected Letters of John Jay and Sarah Livingston Jay* (McFarland & Co., Inc., 2005), compiled and edited by Landa M. Freeman, Louise V. North, and Janet M. Wedge. The originals of all but one of these letters belong to the John Jay Papers, Rare Book and Manuscript Library, Columbia University, and are reprinted here with permission. The exception is John Jay's letter to Sarah Jay of 12 December 1790. This letter is from the collection of Kenneth W. Rendell, Inc. and is reprinted with permission.

⁴A petition, dated Aug. 9, 1792, from John Jay, William Cushing, James Wilson, John Blair, James Iredell, and Thomas Johnson to George Washington and the Congress of the United States, Philadelphia. From Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800*, vol. II, *The Justices On Circuit, 1790–1794* (New York: Columbia University Press, 1988), 289–90.

The *Gompers v. Buck's Stove* Saga: A Constitutional Case Study in Dialogue, Resistance, and the Freedom of Speech

KEN I. KERSCH*

In case of a dispute with employers a Judge can now permanently rivet your jaws and lips. You must not utter the very thoughts that GOD has put into your mind.

Samuel Gompers¹

Although little known beyond a small circle of experts, the U.S. Supreme Court's decision in *Gompers v. Buck's Stove and Range Company* can lay a plausible claim to being that Court's first great decision regarding the freedom of speech.² If one reads the Court's printed opinion, separate from its swirling context, the obscurity of *Buck's Stove* is understandable. In the famed Red Scare cases just a few years later—opinions taken to have launched the Court's modern jurisprudence of the freedom of speech—Justice Oliver Wendell Holmes, Jr. and the Court's other Justices initiated a debate about the fundamental principles and requirements of that freedom, laying the groundwork for future developments in the doctrine.³ In

contrast, *Buck's Stove*, which overturned the jail sentence for contempt of court of Samuel Gompers, the charismatic founding president of the American Federation of Labor (AFL), was a highly technical ruling issued on procedural grounds that said little about the freedom of speech. That case's consignment to obscurity was further sealed by the fact that it did not involve an exercise of judicial review—the power to void a law passed by a democratically elected legislature as invalid on the basis of its conflict with the U.S. Constitution. Because *Buck's Stove* involved the Court's assessment of the propriety of a sentence of civil contempt for violation of a court order concerning a secondary boycott, it says nothing

The American Federation of Labor chose to boycott the Buck's Stove and Range Company to force a test case before the Supreme Court in 1911 that would establish labor's right to assert its powers of collective action in the interest of the unionization of the U.S. economy. Pictured is the company's façade in downtown St. Louis, Missouri.



about the “countermajoritarian difficulty,” the central problem at the heart of contemporary constitutional theory.

In recent years, however, scholars have become increasingly interested in diverse dynamics of constitutional development that fall less neatly under the rubric of Court-issued decrees involving the assertion of the power of judicial review. Some have focused on the complex, dialogic relationship between the Court and the government’s legislative and executive branches. Others have focused on the relationship between movement politics and the Court. Still others have drawn our attention to “popular constitutionalism,” or the ro-

bust tradition of constitutional debate in the broader polity outside the courts.⁴ While the 1911 *Buck's Stove* opinion itself may not be a plausible candidate for immortality in the pantheon of the constitutionalism of the freedom of speech, the *Buck's Stove* episode by all rights should be. Viewed from the perspective of the burgeoning interests of American constitutional scholars, the episode offers an embarrassment of riches.

While the Supreme Court opinion itself is highly technical, the seven-year drama involving the AFL boycott of the Buck's Stove and Range Company of St. Louis, Missouri, was anything but. The *Buck's Stove* episode



Charismatic labor leader Samuel Gompers, president of the American Federation of Labor, was sent to jail for contempt of court during the boycott. *Gompers v. Buck's Stove* overturned the jail sentence on a highly technical ruling issued on procedural grounds.

unfolded at the peak of the longest sustained popular campaign against judicial power in the nation's history.⁵ The case was one of the most—if not *the* most—famous of its time, outdistancing in its day the now more widely known Danbury Hatters case, *Loewe v. Lawler*,⁶ which similarly dealt with a secondary labor boycott.

Buck's Stove pitted charismatic labor leader Gompers, one of the era's towering political figures, against James Wallace Van Cleave, who was president simultaneously of the Buck's Stove and Range Company and of one of the most important and politically active industry trade groups, the National Association of Manufacturers (NAM). Unlike most cases that make their way to the Supreme Court, every step in the Buck's Stove saga over

the course of years was chronicled as high political drama by the nation's major newspapers, including the *New York Times*, which published over 100 articles on it.⁷ Far from stumbling across their dispute, Gompers and Van Cleave self-consciously selected *Buck's Stove* as a test case. Both conceived of it as a last stand on key aspects of the labor problem. Gompers hoped to establish once and for all the right of labor to assert its powers of collective action via the boycott in the interest of the unionization of the U.S. economy. For his part, Van Cleave was just as determined to crush this development before it dealt a crippling blow to the rights of property and the prosperity of American business. Moreover, Gompers and Van Cleave both approached the case as an opportunity to consolidate their personal positions as leaders of

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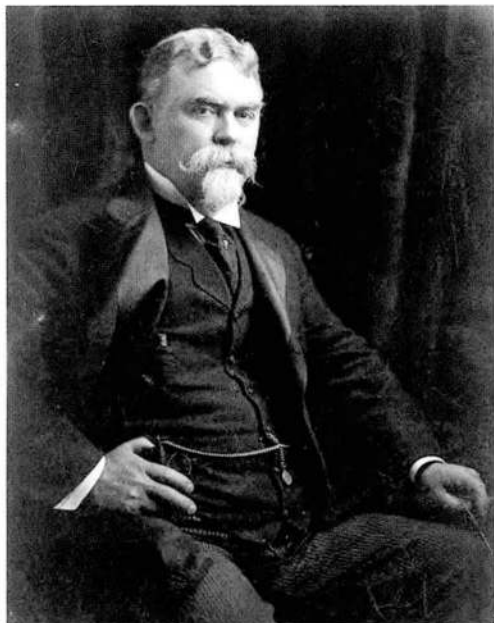
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Buck's Combination Ranges are the acme of simplicity, yet give matchless results with any fuel. They are the result of seventy-five years of stove-making experience and are, we believe, the most graceful, useful, and sold by good dealers everywhere. Booklet mailed upon request.

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Established 1841—America's Foremost Makers of Tin, Cook, Wash and Oil Heating and Cooking Stoves—and FURNACES

BUCK'S
STOVES, RANGES & FURNACES
FOR GAS, COAL OR WOOD

Buck's Stove used this stereotyped image of a Chinese man in its advertising campaign to sell its product to American homemakers.



James Van Cleave was president both of the Buck's Stove company and of the National Association of Manufacturers, an industry trade group that lobbied for the rights of property and the rights of American business.

their respective sides in this epic confrontation and, in the process, build their organizations.⁸ The agents of the battling parties in *Buck's Stove* were as poetically matched as their prin-

cipals. To lead the legal fight, Van Cleave hired Daniel Davenport, the ubiquitous head of the American Anti-Boycott Association and perhaps the most eminent anti-labor lawyer of his day.⁹ Gompers, in turn, signed up Alton D. Parker, a New York lawyer and judge and American Bar Association president, who had been the Democratic party's nominee for President in 1904 (he was defeated by Theodore Roosevelt).

Far from being a matter of law alone, the Buck's Stove episode was intertwined with national politics from its very inception. When, at Van Cleave's request, the AFL was forbidden by a lower-level court from speaking publicly about any boycott of the Buck's Stove and Range Company, Gompers deliberately defied the injunction at the height of a presidential campaign in which the "labor problem" was front and center. As such, he acted deliberately to provoke the parties and candidates to take a clear stand on the *Buck's Stove* case—and thus on the labor problem itself. The judges who were called upon to rule in *Buck's Stove* were acutely aware of the ambient political context and self-consciously timed their rulings with electoral politics in mind. In both the 1908 and 1912 campaigns, both the



Gompers hired Alton D. Parker, a New York lawyer and judge, to argue his case. President of the American Bar Association, Parker had been the Democratic party's nominee for president in 1904.



Justice Daniel Thew Wright heard Gompers' case before the Supreme Court of the District of Columbia. Wright was ultimately forced to resign from that bench after Gompers alleged judicial improprieties.

Democrats and the Republicans added planks to their party platforms speaking to the ongoing Buck's Stove controversy. When Gompers was convicted and sentenced to jail, massive political demonstrations erupted around the country demanding that the President pardon the AFL leaders. In a series of acts of constitutional resistance—if not civil disobedience—Gompers besieged not only Van Cleave, but also the judiciary itself. “Many injunctions have sought to prohibit workers from exercising their constitutional rights,” he later wrote in his autobiography.¹⁰ “Such injunctions can and ought to have no real authority. I believe,” he asserted defiantly, “that those to whom such injunctions are intended to apply ought to pay no attention to them whatsoever, but should stand on their constitutional rights and take the consequences whatever they may be. ‘Resistance to tyranny is obedience to God,’ and resistance to the tyranny and injustice of injunctions which have been issued by our courts is necessary for a clear under-

standing by all our people of the principles involved.”¹¹ Indeed, Gompers ultimately succeeded in having Congress hold hearings on alleged improprieties of his judicial nemesis in the case, Justice Daniel Thew Wright of the Supreme Court of the District of Columbia, with an eye to Wright's impeachment—and Wright was eventually forced to resign from the bench.

Gompers' repeated defiance of the courts in the name of his sacred constitutional rights was meant not only to stoke the fires of the labor movement and tilt the balance in the upcoming presidential race, but also to alter the course of crucial legislation before Congress.¹² At the time of the Buck's Stove episode, the AFL and organized labor more generally were embroiled in a twenty-year fight against injunctions. When the Sherman Anti-trust Act was passed in 1890, the AFL and other labor organizations had been assured that its prohibitions on combinations in “restraint of trade” would apply to businesses and not to labor unions. Courts soon ruled otherwise, however, and began to issue a seemingly endless stream of injunctions against a broad array of assertions of labor union power, including, most prominently, strikes and boycotts. Diverse types of injunction reform—efforts to statutorily narrow the definition of criminal conspiracy as applied to labor unions, secure labor an exemption from the antitrust laws such as the Sherman Act, and limit the equity jurisdiction of the federal courts—were at the heart of the AFL's agenda in Congress between 1900 and 1914, when, at last (with Gompers' support), Woodrow Wilson signed the Clayton Act into law. The Buck's Stove controversy was an integral part of Gompers' campaign to rally support for the Clayton Anti-trust Act, which was aimed at trimming the injunctive power of the federal courts—an act that the AFL leaders celebrated as “the most important legislative victory ever achieved by the American labor movement.”¹³

Like the final Supreme Court opinion in 1914 that brought the Buck's Stove episode to

a conclusion, many of the judicial opinions in the succession of decisions and appeals at various levels in the matter avoided or dismissed free-speech concerns, relying instead on legal technicalities or upon what were, at the time, more familiar appeals to the property rights of the boycotted business. Gompers himself, however, made freedom of speech the centerpiece of the entire episode, as well as the political campaign that surrounded it. Accordingly, the newspaper coverage of the Buck's Stove episode positively swelled with free-speech arguments. Gompers' tearful statement in open court prior to his sentencing was one of the most eloquent defenses of free speech, and of constitutional resistance to an unlawful ruling in the name of fundamental rights, of his—or any—time.

Gompers' decision to rally the labor movement behind the banner of the defense of constitutional rights, while not providing a legal doctrinal "test" in the way that Holmes's more famous opinions in the later Red Scare cases did, nevertheless marked a crucial moment in the development of civil liberties in the United States. While many political progressives of the era were suspicious of "rights talk" and even—because of the rapid changes that the era's urbanization and industrialization had wrought—of the Constitution itself, Gompers' decision to embrace both rights talk and the Constitution set a path for progressives and liberals that was followed for years to come. That said, in many respects, labor's conduct in this episode did affect not only constitutional politics but also constitutional doctrine, albeit in an indirect way. In the aftermath of the Buck's Stove episode, organized labor honed its free-speech arguments in a whole series of cases that involved picketing—cases such as *Hague v. Committee for Industrial Organization*,¹⁴ which, unlike *Buck's Stove*, did become famous. The rights-infused constitutional doctrine forged in these subsequent cases, in turn, laid the groundwork for the civil-rights movement, which adopted the tactics of organized labor—boycotts, pick-

eting, and mass marches—and appealed to the precedent of labor picketing decisions to advance the struggle for civil rights.¹⁵ The language of the *Buck's Stove* case aside, the legal battle surrounding the Buck's Stove episode marked a legal and political landmark in civil liberties and the freedom of speech.

The Spark Ignites the Battle

In the fall of 1905, the heart of the "Lochner Era," during which the struggle for the rights of workers served as the axis of American politics, Van Cleave—the president of the open-shop Buck's Stove and Range Company of St. Louis, one of that industry's largest firms—got wind that some of the company's workers were ending their workday as much as an hour and a half prior to what he considered the official close of the day.¹⁶ He suspected that something was up. He had an inkling that the early knock-off was not a series of isolated instances, but rather the latest sally by his workers in their fight for the nine-hour day.¹⁷ As he saw it, his workers were contractually obligated to work a ten-hour day. Members of the company's Metal Polishers Union, however, saw it differently. They alleged that in 1904, Buck's Stove had agreed to a nine-hour day. After a year and a half in which Van Cleave had honored that agreement, however, Buck's Stove reverted to requiring ten hours of daily work on its own say-so, without leave from the union, a departure the workers acquiesced to only under protest.

Reports from some suggested that Van Cleave's decision to renege on this deal was aimed at deliberately goading the company's unions to take the sort of action that would provide a pretext for his breaking them.¹⁸ He denied the existence of any earlier agreement with the union and fired off a stern warning to his workers. Seemingly chastened, they returned to their allotted ten hours. But the retreat was only temporary. When they once again began calling it a day an hour early, Van Cleave made a point of ferreting out those he believed

to be the ringleaders. In August of 1906, he fired them. In response, all of the members of the Metal Polishers Union, No. 13, at Buck's Stove's St. Louis plant walked out. In high dudgeon, Van Cleave claimed that the union's decision to strike without notice violated the terms of the grievance procedure stipulated in their contract. The union commenced picketing. The combination of an infusion of non-union replacement workers and the defection of union members, however, soon defeated the strike.

The union then rallied to its next move: it called for a boycott of the company by adding Buck's Stove to the "unfair to labor" list it published in its official newsletter. News of the Buck's Stove boycott soon swept across the American labor movement. The boycott was endorsed by the Central Trades and Labor Union and the Metal Trades Council of St. Louis. After an initial period of hesitation in which an adjustment with the company was sought, the national AFL agreed at its annual convention in Indianapolis in November 1906 to add Buck's Stove to its national "We Don't Patronize" list, which was published in its newsletter, *The American Federationist*. When the notice appeared in the *American Federationist's* May 1907 edition, the announcement was reinforced by mailings to all AFL affiliates asking them to publicize the boycott against Buck's Stove.¹⁹

The standoff at Buck's Stove raised the issue of the legality of the secondary boycott, one of the central legal and political issues of the time. For much of Anglo-American legal history, labor unions themselves, strictly speaking, had been considered legal. But when the collective power of such a combination was directed against employers with the aim of extracting a concession, such as a wage increase or change in working conditions, the union was held to have crossed the line into criminal conspiracy. Boycotts and the means used to enforce them were understood as illegitimate deployments of criminally conspiratorial power aimed at causing concrete injury to the prop-

erty rights of businesses. Over time, primary boycotts came to be accepted in American law as a legally acceptable standoff between two sides of a contract. The spirit of the old common law of conspiracy, however, lingered in a rule against secondary boycotts, which were seen as broadening a private dispute between the employer and his employees in a single business into a wider, more combustible, and more damaging war of class against class. The Buck's Stove episode involved a frontal assault against the power of courts to issue injunctions that effectively banned the secondary boycott.²⁰

The Courts Enter the Fray

The first sally in the legal side of the Buck's Stove saga was launched on August 19, 1907, when Van Cleave initiated an action in the Supreme Court of the District of Columbia to enjoin the AFL, including its leaders—Gompers, vice president John Mitchell, and secretary Frank Morrison—from adding Buck's Stove to its list of companies "unfair" to labor, a step that allegedly illegally subjected the company to a nationwide secondary boycott. In seeking this injunction, Van Cleave had more than his own company on his mind. He was also the president of the National Association of Manufacturers (NAM). In that capacity, with hopes stoked by the U.S. Supreme Court's assertiveness in the recent Pullman decision, he was seeking to use the events at Buck's Stove as a test case that would establish as a national rule that the sort of "unfair" and "do not patronize" lists at issue in this case were a forbidden form of criminal conspiracy under the Sherman Act.²¹ He hoped, moreover, that the publicity surrounding the case would, as a side effect, bring a raft of new members into the NAM, members whose contributions would strengthen his side in battles to come. The NAM's actions here were close to its heart. The trade association, which represented mainly small businesses, was rabidly anti-closed shop, and had,

over the course of many years, challenged such shops repeatedly across a broad spectrum of American industries.²² The injunction sought by Van Cleave in the *Buck's Stove* case was broad. He implored the court not only to prohibit the placement of Buck's Stove on a "We Don't Patronize" list, but to also ban the AFL from making any public mention of the strike itself.²³

But Van Cleave was not the only national figure with an aggressive policy agenda for the *Buck's Stove* case. Gompers, the hard-bitten, brilliant, and charismatic leader of American labor, was itching to use the dispute as a test case to establish a legal proposition the opposite of that sought by Van Cleave. This contest of iron wills was leading Gompers into what he would later describe as his "most grilling experience with injunctions."²⁴ In the editorial notes of the October edition of the *American Federationist*, Gompers taunted his antagonist in the case, wondering "whether Van Cleave will try for an injunction compelling union men and their friends to buy the Buck's Stove and Range Company's unfair product." "Until the law is passed making it compulsory upon labor men to buy Van Cleave's stoves," he bristled, "we need not buy them, we won't buy them, and we will persuade other fair-minded sympathetic friends to co-operate with us and leave the blamed things alone. Go to—with your injunctions."²⁵ Van Cleave parried with a cry of "foul." In an article in the NAM counterpart to the *American Federationist*, *American Industries*, he charged that Gompers had committed perjury in his sworn answer to the suit by denying that Buck's Stove had been added to any sort of "unfair" list.²⁶ This charge for the first time in the dispute raised the possibility not only that the AFL leaders would lose the suit, but also that, like their rival Eugene V. Debs of the American Railway Union before them, they might very well end up in a jail cell.

The press, and broad swathes of the wider public, sat up and took notice. The *New York Times* announced "the beginning of an im-

portant legal struggle" and "the great test of strength between the National Manufacturers' Association and the Federation of Labor."²⁷ It quickly became clear that this battle would be every bit as much political as legal. Secretary of War William Howard Taft weighed in with the charge that organized labor—which was simultaneously pushing for the passage in Congress of legislation that would narrow the definition of criminal conspiracies, alter the application of the antitrust laws to organized labor, and limit the injunctive power of the federal courts in labor disputes—was endeavoring to set itself up as a privileged legal class by virtue of its claim for an exemption from the nation's conspiracy laws, the very sort of laws at the heart of the *Buck's Stove* case.²⁸ In a speech to the AFL's annual convention alluding to the *Buck's Stove* dispute, Gompers criticized the Taft speech and defended the legislation, claiming that Taft "could not help but know that labor's bill to regulate injunctions was not designed to create a privileged class of wrongdoers . . . but to restore to them the rights of which they have been robbed by court decisions."²⁹ The AFL girded its loins for the fight. It announced shortly thereafter that it had raised \$1,500,000 as a general "war fund" as a start and that, by a levy on its members, it would ensure the addition of \$500,000 annually to carry on the fight. For the benefit of those who might not have been following events closely enough, it declared the NAM one of its primary enemies. At the same time, the AFL opened an additional front in the war by asserting that *Buck's Stove* was not only a malefactor on the by now well-understood fronts, but was also a menace to the constitutional liberty of speech and of the press.³⁰

Buck's Stove won the opening skirmish. On December 17, 1907, Justice Ashley Gould of the Supreme Court of the District of Columbia issued a broadly worded temporary injunction (soon to be made permanent by Chief Justice Harry M. Clabaugh) against the AFL in the case that went so far as to forbid the union from making any public reference

at all to the dispute between it and Buck's Stove.³¹ On Alton Parker's advice, which was aimed at positioning the dispute as cleanly as possible as one implicating the freedom of speech and press, the AFL responded to the injunction by removing Buck's Stove from its "We Don't Patronize" list. At the same time, however, it redoubled its efforts to speak as loudly about the dispute as often as possible. In the very next edition of the *American Federationist*, Gompers fired back at the injunction, calling it an invasion of the "inherent, natural, and constitutional rights and guarantees." "It is an invasion of the liberty of the press and the right of free speech," he wrote of the court's ruling, adding "We should be recreant to our duty did we not do all in our power to point out to the people the serious invasion of their liberties which has taken place. That this has been done by Judge-made injunction and not by statute law makes the menace all the greater."³² Gompers' declamations on this point seemed to grow fierier by the day. In a speech at Indianapolis, he raged, "I want to say this to you . . . that so long as I retain my health and my sanity, I am going to speak on any subject on God's green earth. . . . I have not yet surrendered, and I am not likely to surrender, the fight of the freedom of speech and freedom of the press, and let the consequences be what they may. . . . I shall discuss the merits of the Buck's Stove and Range Company injunction . . . [I]f the injunction is strictly construed and enforced, I am in contempt of court again for telling you that, but I propose to discuss this thing. . . . I can't help it. I must discuss it. I will explode if I don't, and I don't want to go to jail, but I prefer that to exploding."³³

Van Cleave, of course, seized the opportunity. He announced that his next step would be to bring the union's conduct to the attention of the Justice Department's criminal division, which was charged with prosecuting Sherman Act violations. He even went so far as to suggest publicly that if the AFL's defiance of the courts were to continue, a Justice Department dissolution of the AFL would be an appropri-

ate move.³⁴ In the thick of this fight, President Theodore Roosevelt—a progressive Republican more sympathetic to labor than William Howard Taft—criticized Justice Gould's injunction for its invasion of "the fundamental rights of the individual" and positioned himself against the "ultra-conservatives" by expressing support of injunction reform legislation.³⁵ Van Cleave counterattacked, accusing the President of throwing a "sop" to "this wild wolf" (Gompers). In its landmark Pullman decision, the Supreme Court had declared the boycott illegal. It was no business of Congress, in Van Cleave's view, to alter this sound and highly principled decision. But as politicians like Roosevelt seemed to be getting soft on the law, he suggested, it might be high time for the nation's employers to involve themselves aggressively in national politics on the issue, including in the ongoing presidential campaign. A bolt from the Republican party, he hinted, might very well be in the offing.³⁶ "With organized labor," Van Cleave claimed, "we have no quarrel. We have no desire or intention to disrupt any labor organization. But the [NAM] will . . . maintain its unyielding opposition to boycott, closed shop, sympathetic strike, limitation of output, compulsory use of the union label, sacrifice of the independent workmen to the union, restriction as to the use of tools, machinery, or materials except such as are unsafe, and restriction as to the number of apprentices and helpers when of proper age."³⁷

Roosevelt's statements may have discomfited Van Cleave, but they did little to palliate Gompers, who remained skeptical of the Republican party. After all, his opponents in Buck's Stove were all staunch Republicans, and were able to meet his every plea to the Republican Party Platform Committee from inside the party itself. By contrast, his lawyer, Parker, a former Democratic nominee for President, was a member of the Democratic Platform Committee. From that perch, Parker succeeded in pushing through a more aggressively pro-labor plank than Gompers could ever expect from the Republicans. Gompers



Gompers stumped for labor candidate William Jennings Bryan (left) in the 1908 elections. Nervous incumbent William Howard Taft (right) secretly asked the Buck's Stove lawyers to delay the D.C. court's decision until after the election.

initially hedged, characterizing Roosevelt's campaign for a modification in the injunction laws as amounting to "hostility" to organized labor, and at the same time proclaiming himself in "accord" with the labor plank of the Republican party platform. Nevertheless, smack in the middle of the Buck's Stove dispute, Gompers announced that he was supporting the Democratic nominee, William Jennings Bryan, for President in his campaign against Roosevelt's hand-picked successor, William Howard Taft. This move was a risky one that troubled many, including many AFL members.

At the time of the Buck's Stove episode, organized labor—including the AFL—was embroiled in a series of contentious debates about the most promising and appropriate form of political action. A range of possibilities were on the table. Labor might, for example, jump into partisan politics, either under the guise of a third party or as part of a

coalition backing one of the established parties. For many, however, a series of stinging late-nineteenth-century defeats—those of the Greenback-Labor party, the People's (or Populist) party, and the Populist-Democratic fusion of 1896—counseled against such a move. Another option was to withdraw from partisan politics altogether and work to coordinate individual fights with employers in the private sphere in seeking, for example, collective bargaining agreements. For many, however, this path, too, seemed to promise only meager achievements. Those who favored this approach soon discovered that "relations within labor markets were shot through with politics and law—forms of contract and property, freedom of expression in the use of picketing or boycotts, the assignment of negligence and the content of implied contracts."³⁸ In the early twentieth century, the AFL was casting about for a strategy that would not alienate its

vast and far-flung membership, which was of diverse partisan loyalties, and yet would still enable it to achieve concrete political results. At the moment the Buck's Stove dispute was breaking, Gompers was forging and announcing his new "friends and enemies" strategy, in which the AFL would either endorse or oppose candidates of both parties based on their support for the policy positions advocated by the union.³⁹ It was a departure and a controversial move, and Gompers' endorsement of Bryan brought it to a head.

Many pointed out that the AFL bylaws and constitution forbade the AFL from engaging in partisan politics. This was not a simple matter of obeying the letter of the AFL's written policy, which now seemed to be under assault: Many AFL members were concerned about the payback that an endorsement of the Democrats could occasion should the Republicans win the election. But for Gompers, the appeal of endorsing the Democrats was hard to resist. Gompers also knew that the labor plank in the Democrat's party platform sent the nation's manufacturers into apoplexy, making the turn to the Democrats all the more appealing.⁴⁰

Despite a fair amount of grumbling, and past AFL practice notwithstanding, the AFL's aggressive turn to politics as part of its "friends and enemies" strategy seemed to many contemporary commentators a natural move. "There is a widespread feeling among trade-unionists," one contemporaneous analyst reported, "that they are gradually being shorn of their power by the courts. . . . The wage-workers are coming to feel more and more that if they are to secure favorable legislation and favorable court decisions they must elect men from their own ranks to the legislature and the bench. Judge Gould's decision will go far to strengthen that conviction. . . . Judge Gould's decision," he concluded, "will give a marked impetus to the growing sentiment among American trade-unionists in favor of independent political action. . . . The one powerful weapon, which, as yet, they have hardly begun to utilize, is the ballot."⁴¹

It was not long before charges were lodged against Gompers, along with fellow AFL executive council members Mitchell and Morrison, for contempt of court.⁴² Evidence was taken before a hearing examiner appointed by Judge Gould. Rallying to the case, Judge Parker represented Gompers and the other defendants *pro bono*. Parker was a strong advocate of anchoring their defense in a claim on behalf of the liberty of the press, explaining to Gompers "that if Judge Gould should summon me to show cause why I should not be punished for contempt of court, a clean-cut issue of the liberty of the press would be presented."⁴³ Davenport and James Beck appeared on behalf of Buck's Stove.

The contempt case turned on the question of whether Gompers' articles in the *American Federationist* involving the ongoing dispute at Buck's Stove, along with his public comments and speeches on the same, had violated the terms of the injunction. Exhibit A was the "We Don't Patronize" list itself, with Buck's Stove's name clearly appended, which appeared in the January 1908 edition of the *American Federationist* (the injunction had been issued in December). Exhibit B was the charge made by Gompers in the *Federationist's* February 1908 edition that Judge Gould's injunction was an invasion of the liberty of the press and freedom of speech, and, as such, it would be impossible for Gompers to comply with it.⁴⁴ As to the first, Gompers admitted to rushing out the January edition of the newsletter to beat the effective date of the injunction. He argued that this effort had succeeded, though he admitted that he had made no effort to recall that edition following the injunction's effective date. As to the second, Gompers contended that to the extent the ruling conflicted with the guarantees of the Constitution, its prohibitions were null and void.⁴⁵

Over the course of the fact-finding, Gompers' testimony took on an air of the dramatic. He alleged not only that he had been shadowed by a bevy of private detectives hired by Van Cleave, but that one of them, who

ultimately dropped his cover, had offered to reward Gompers with an annuity for life if he would quit the cause of organized labor. Van Cleave denied the allegations, spitting disdainfully that Gompers “seems to be trying to make a cheap martyr of himself.”⁴⁶

The looming presidential election was very much on the AFL’s mind as the contempt hearings proceeded. By waiving the AFL’s right to present evidence in the hearing at the close of the prosecution’s case, Gompers hoped to get the court to issue a ruling—indeed, an *adverse* ruling that would land him in jail—before November 1908. To this end, he baited the court throughout the hearing, asserting in one of his contemporaneous speeches, for example, that “I am in contempt of court this minute for talking about this case. I may be sent to jail for what I am saying. But I shall have to talk about it or explode, and I would rather go to jail than explode.”⁴⁷ For some, these hopes smacked of desperation, an effort on Gompers’ part to win public sympathy and to shore up loyalty to him within the labor movement itself, which remained divided over his decision to jump into the political fray in the first place.⁴⁸ Many, including the increasingly anxious Roosevelt and Taft, saw Gompers’ bid for jail time as an effort to draw sympathetic attention to himself as a martyr for organized labor and the freedom of speech. Indeed, Roosevelt and Taft used their back-channel Republican party connections to Davenport and Beck to lobby the Buck’s Stove lawyers to withdraw their push for the court to decide their case as quickly as possible, and to ask the court for more time. Justice Wright of the D.C. court, a staunch law-and-order conservative from Cincinnati who had been appointed to the D.C. bench in 1903 by Roosevelt at the behest of Ohio Senator Joseph Foraker, readily obliged. He announced in late October 1908 that further consideration of the case against Gompers would be held off until November 10—a date, of course, immediately after the November elections.⁴⁹

Following that announcement, Gompers hurled a series of aggressive attacks at Taft and set out on the stump for Bryan. In a speech delivered in the final days of the campaign at New York City’s Grand Central Palace, Gompers lit into Taft for his rulings as a federal appellate judge in Ohio, including upholding an anti-boycott injunction issued by lower court Judge Jeffries, whom Gompers characterized as “the most tyrannical and unjust Judge that ever sat on the bench,” a judge whose “memory is hated by all American and Anglo-Saxon people.” “Judge Taft says that he is benefactor of labor,” Gompers spat. But “[t]here is not one single injunction which he issued but is an invasion of the rights of every man he enjoined . . . [The] Judge would not have issued any such injunction against any other man in the entire country as he did against workmen.”⁵⁰ The *Times* reported that Gompers drew “a storm of applause” in the same speech when he invoked the ongoing proceedings in Buck’s Stove. “I am in contempt now in saying that I will not use a Buck stove or range. I am in contempt when I say that [I] have advised workingmen not to use them. According to the decision, I and the other members of the Executive Council ought to be put in jail. But, as for me, injunction or no injunction, jail or no jail, I shall never surrender my constitutional right to free speech.” The *Times* reported that immediately following this appeal to the Buck’s Stove affair and the freedom of speech, he called upon his listeners to vote for “[t]hat great commoner, that great tribune, that great defender of human rights, that transcendent American, who will live in the memories of men so long as freedom obtains—William Jennings Bryan.”⁵¹

At the AFL’s annual convention later that month in Denver, the group went on record as advocating the outright and systematic defiance on free-speech grounds of judicial injunctions in cases involving boycotts, which amounted to a call for nullification and civil disobedience. The convention declared it the high duty in such cases for its members to

go to jail. As for himself, Gompers declared that “[w]hen an injunction is issued against me which invades my rights as a man and a citizen, I am going to resist that injunction.”⁵² At the behest of Mitchell, Gompers’ co-defendant in the *Buck’s Stove* case, language was added to the meeting report that provided that “[w]hensoever the courts issue an injunction to regulate our personal relations we declare we will exercise all the rights and privileges guaranteed by the Constitution and laws of our country, and insist that it is our duty to defend ourselves at all hazards and recommend that such be our action, taking whatever results may follow.”⁵³

Soon, however, it was the court’s turn. With the wind of Taft’s victory in its sails, it struck back hard: Gompers and his co-defendants were held to be in criminal contempt. With a severity that stunned the defendants, the bar, and the nation, on the day before Christmas Eve 1908, Justice Wright sentenced Gompers to one year in prison, Mitchell to nine months, and Morrison to six months.⁵⁴ “While Wright was reading his opinion,” a Gompers biographer reported, “Mitchell and Morrison listened with self-possession, apparently indifferent, and a trace of scorn on their lips. But Gompers, always emotional, seemed to be cut by every statement uttered by the youthful judge. Astonishment and grief were visible on his face; he turned pale and red by turns, constantly shifting his position, and his lips worked involuntarily, as though constantly suppressing his urge to protest the unfair declarations from the bench.” It was reported that “tears flowed down his cheeks.”⁵⁵

When asked by the judge if he had anything to say, Gompers launched into a passionate courtroom oration appealing to the rights of labor, the right to trial by jury (a jury does not sit in either injunction or contempt cases), and—most prominently—the freedom of press and speech. As he did so, he urged aggressive constitutional resistance.⁵⁶ Gompers characterized the dispute in the case as first and foremost “a struggle for rights.” He claimed, “I am

not conscious at any time during my life of having violated any law of the country or of the District in which I live,” adding, “I would not consciously violate a law now or at any time during my whole life.” He noted that Great Britain had recently enacted statutory protection for the labor boycott, and he remonstrated that “[i]f in monarchial England these rights can be accorded to the working people, these subjects of the monarch, they ought not be denied to the theoretically at least, free citizens of a republic. . . . If I can not discuss grave problems, grave questions in which the people of our country are interested, if a speech made by me on a public rostrum during a political campaign after the close of the taking of testimony in this case, if the speeches in furtherance of great principle, of a great right are to be held against me, I shall not only have to, but I shall be willing to bear the consequences.” He concluded his courtroom oration with a paean to constitutional freedom, pronouncing that “The freedom of speech and the freedom of the press have not been granted to the people in order that they may say the things which please, and which are based on accepted thought, but the right to say the things which displease, the right to say the things which may convey the new and yet unexpected thoughts, the right to say things, even though they do a wrong, for one can not be guilty of giving utterance to any expression which may do a wrong if he is by an injunction enjoined from so saying. It then will devolve upon a judge upon the bench to determine in advance a man’s right to express his opinion in speech and in print. . . . If men must suffer because they dare speak for the masses of our country. . . . then they must bear the consequences.”⁵⁷

Justice Wright did not take this lying down: he answered back. He quoted a passage from the book that Mitchell had published declaring it a duty to resist or disregard injunctions understood as unlawful. He added that the Constitution did not confer any right to speak, to print, or to publish. It only forbade Congress from abridging such a right. States

had full discretion in this area, and the case at bar involved no congressional statute.⁵⁸

Industry, of course, was delighted. Beck, at Davenport's side as counsel for Buck's Stove (and a future Solicitor General of the United States), declared hopefully that "[t]his case ought to be the deathknell of the boycott. If so, it is the most important decision in the labor controversy since the Debs case of 1904 [sic], from which it only differs in the fact that in the Debs case physical violence was used to paralyze inter-state traffic. In the *Buck's Stove* case the insidious and far more dangerous method of a National boycott was employed."⁵⁹ For his part, Bryan, who had recently lost his third and final bid for presidency, announced that "it is not my policy to criticize either Federal courts or their action." Nevertheless, he asserted ominously, "the commitment to prison of two men so prominent in the labor movement as Gompers and Mitchell is unique in the annals of labor movements in this country."⁶⁰ In a reaction typical in the labor movement, William Mahon, president of the Amalgamated Association of Street Railway Employees, declared the decision "an outrage; an absolute outrage," adding that "[t]his is the end of the declaration of free speech."⁶¹

Parker, counsel for the defense, immediately announced that he would appeal the decision (in the meantime, all three defendants were released on bail). In so doing, he too publicly trumpeted free-speech arguments, declaring that "if the order can be so construed as to prevent respectful editorial comment upon the scope of the decree, or to prevent a free discussion of it, and an expression of opinion that if it does seek to prevent such discussion, in such event, it offends against the Constitution, then so much of it as attempts to do so is void."⁶²

No sooner did the sentence come down than the focus of the Buck's Stove saga shifted from the courts to the executive branch. Pressure built fast for a presidential pardon. As news of Justice Wright's ruling spread, the *New York Times* reported that "a steady stream of telegrams protesting against the sentence

poured in the White House. These telegrams, which came from all parts of the country, are being carefully read by Mr. Roosevelt, and then turned over for further scrutiny to the Attorney General." Roosevelt's close personal friendship with Mr. Mitchell was noted, and the *Times* predicted confidently that the President was likely to at least reduce the labor leaders' sentences.⁶³ As the telegrams were coming in, organized labor was holding mass public meetings condemning the sentences. Labor unions across the country passed resolutions declaring that "the use of the writ of injunction in labor disputes is contrary to constitutional law and destructive of American liberties, and a denial of the right of free speech and free press."⁶⁴ In a message to the labor unionists of New York, Gompers thanked them for their efforts "at this crucial time in the effort we have made and are making to maintain the principle of justice and right and the Constitutional guarantee of freedom of speech and of the press."⁶⁵

It was at this very moment that the Supreme Court handed down its decision in the other great boycott case of the time, the Danbury Hatters case, in which the Court upheld the award of treble damages under the Sherman Act to a company that had been the subject of a boycott from the hatters union.⁶⁶ Flush from his victory, Beck, who had argued the company's case in the Supreme Court, made a public statement linking the two cases together. "The *Buck's Stove* case," Beck asserted, "established the right of a court of equity to enjoin the continuance of a boycott: while the Danbury hat case establishes the power of a court of law to give punitive damages for the injuries previously inflicted by the boycott. Taken together, the two decisions give an effective defense both to employers and to independent employees. The two decisions are likely to play an . . . important part in the social and political history of this country." This double blow from the courts, observers at the time predicted, would drive the labor movement even more deeply into political action.⁶⁷

As pressure on the President built, the fight also turned once again to Congress. On the advice of counsel, and in light of the Court's just-issued decision in the *Danbury Hatters* case, Gompers announced his intention to drop the "We Don't Patronize" lists from future editions of the *American Federationist*. In the meantime, he said, he would take the battle to Congress, where he would fight the battle by lobbying for corrective legislation.⁶⁸ The NAM announced that they were more than ready for a fight on this front, too. In an article published in *American Industries* in late December 1908, Van Cleave warned the National Council for Industrial Defense, which had been organized by the NAM, that labor was going to use the opportunity presented by the *Buck's Stove* ruling to make a concerted press for the passage of anti-injunction legislation in the next session of Congress. Van Cleave pronounced the proposed legislation an assault on the core principles of the Sherman Act, and he urged the Council to fight it.⁶⁹

As the battles raged in all three branches of government, in the press, and in the streets, Gompers once again defiantly mounted the stage, repeatedly announcing his willingness to go to jail to defend the rights of labor and his—and all Americans'—constitutional rights. In January 1909, in a New York City speech before the Ethical Social League entitled "Trades Unions and Social Progress," Gompers invoked the colonial boycott of British tea during the run-up to the American Revolution. He characterized the boycott as an inherent right of society. In the teeth of the ongoing injunction, and to the reported laughter and cheers of the crowd, he coyly explained that "[s]ome men of labor were recently enjoined either from speaking or writing on a given subject. You know I can't mention the subject." But "the natural and God-given right to express thought cannot be denied," he thundered. "If Mitchell, Morrison, and I go to jail we can at least contribute to the yeomanry of American manhood—others have gone to jail—the pages

of history are red with the blood of those who have suffered for liberty. If they want their pound of flesh—well, they can have it, but they'll find no yellow streaks in it." In a combative climax, he added that if the Constitution as read by American lawyers required that he and his co-defendants be punished for their utterances, it was time for the people to rise up and get a new Constitution.⁷⁰ In the same spirit, in a Mephistophelian stunt a few months later, Gompers showed up unannounced at a meeting of the National Civic Federation, an establishment reform group devoted to the promotion of harmonious business-labor relations, inched his way stealthily from the back row to the front, and asked the meeting's astonished organizers for permission to speak. Feeling they had little choice, they grudgingly assented. "I realize I am entirely out of place in entering into the discussion of a subject purely from a legal view," Gompers pleaded slyly. "I am not a lawyer." But he told them that, his lack of legal training notwithstanding, he knew that "[e]ven in time of war the suspension of the free press is temporary. In the case of the *Buck's Stove* and *Range Company*, however, free speech and free press were enjoined perpetually and that which the Government suspends temporarily in time of war is accorded for the protection of a stove in perpetuity."⁷¹ In a speech a few days later to Columbia University's student Christian Association, Gompers defended the Constitution, but lit into the doctrine of judicial supremacy. "I still believe that the Constitution of the United States is greater than any Judge, his injunction included," he pronounced, adding, "You perhaps have heard about the *Buck's Stove* and *Range Company*. Well, I said that this company was unfair to labor. I said this on the platform. I made reference to it in some of the speeches I delivered for one of the candidates in the last campaign. I didn't get my choice for president, and many others didn't too. Now I have been denied the right by the courts to make any reference to this subject either by letter, in print, or from the public platform. But I propose to speak about

the injunction right here. No one can interfere with my freedom of speech."⁷²

In March 1909, the Court of Appeals of the District of Columbia upheld the injunction, but, in doing so, slightly narrowed its scope. The court reviewed at length evidence from around that country that a secondary boycott of Buck's Stove had taken hold and was having real effects on that company's business. The AFL defended itself against this evidence, to no avail, by arguing that it had only intended to initiate a primary boycott and should be held responsible, not for what occurred, but only for what it intended. The appellate court's decision was notably different in tone from the ruling of Justice Wright, calling Gompers "a man of ability and a natural leader of men."⁷³ Nevertheless, in support of its holding vindicating the core holding of the decision below, the court quoted Gompers' own writings, which had argued that "[a] sympathetic boycott is as legal and legitimate as a sympathetic strike."⁷⁴ It cited a raft of persuasive evidence, from the case at bar and from the AFL's past practice, that suggested "that what actually happened was the result intended."⁷⁵ Looking at the efficacy of the secondary boycott nationwide, the court asked persuasively, "From whom did they derive their inspiration? Was it a mere coincidence that they acted in perfect harmony and ever to the same end and purpose? We think not. . . . If . . . anyone is responsible for what happened, these defendants certainly are."⁷⁶ This is an issue of conspiracy and coercion, the court explained to those who might have been confused by a long series of public utterances, and not freedom of speech or of the press. "Oral and written declarations in furtherance of a conspiracy are tentacles of the conspiracy, and must be treated as such." "Freedom of action," it continued, "is at least as sacred as an untrammelled tongue or pen, and those who conspired to defeat the former right ought not to be permitted to interpose a plea based on the latter."⁷⁷ "It must be remembered . . . that there is a point where the right of free speech and a free press ends, and unlawful

interference with personal and property rights begins."⁷⁸

The court nevertheless concluded that Justice Wright's injunction had gone too far in one respect that did affect the legitimate free speech rights of the AFL leaders: It forbade the AFL, in its public utterances, from publishing or making any reference at all to Buck's Stove. The court held, however, that the limits on such utterances should apply only to utterances in furtherance of the boycott. In his concurrence, Justice Josiah Van Orsdel agreed that an unmodified injunction "would violate the constitutional rights of the citizen. It would mark the beginning of the era of judicial tyranny by the branch of government charged with the duty of protecting the citizen in his constitutional and legal rights."⁷⁹ In reasoning his way through the problem, Justice Van Orsdel alighted on what, at the time, was an expansive understanding of the freedom of speech. He rejected the view that "this provision of the Constitution is a mere inhibition on Congress from passing any law abridging the freedom of speech and the freedom of the press. It forbids government censorship in all its forms," he explained, "and it would be difficult to conceive of a more effective method of establishing a government censorship than through the writ of injunction."⁸⁰ In his opinion dissenting in part, Chief Justice Seth Shepard was even more expansive, declaring that "the liberty of the press . . . consists in complete freedom from any kind of restraint."⁸¹

This same court, however, dealt the defendants another blow in November 1909 when it affirmed the lower court's contempt judgment against the labor leaders.⁸² In this proceeding, Gompers argued that he and his co-defendants had violated only that portion of the injunction that the appellate court had invalidated in its previous decision narrowing the injunction's scope. The court of appeals, however, disagreed. It found ample evidence that the defendants had committed significant violations of the portion of the injunction that it had upheld back in March. Because of this, Justice

Van Orsdel, who had written so passionately about free speech in his earlier concurrence, now concluded in his opinion for the court that "hence, for the purposes of this case, we may dismiss all further reference to the 1st Amendment to the Constitution of the United States." "The fundamental issue," he concluded, "is whether the constitutional agencies of government shall be obeyed or defied."⁸³

One silver lining remained. Chief Justice Shepard penned a passionate dissent, on the grounds that "much of the injunction order was null and void because opposed to the constitutional prohibition of any abridgment of the freedom of speech or of the press."⁸⁴ This dissent was flagged at the time by scholars, who noted that "certain dissenting opinions indicate the doubts which are beginning to afflict the judicial mind respecting the infallibility of ancient precedents."⁸⁵ Writing in the *Annals of the American Academy of Political and Social Science*, Margaret Schaffner observed that "[t]here has been a tremendous evolution not only in public opinion but in judicial thought since the days when the boycott was defined by Judge Taft" as presumptively coercive and malicious, even if peaceful.⁸⁶ "From the psychological standpoint," she wrote, "it seems strange that the courts have so generally held that the workingmen were actuated by malice in seeking to better their conditions through associated action in a strike or boycott."⁸⁷ "Chief Justice Shepard," she continued, "seems to point the way for a line of decisions which may in the future distinguish clearly between lawful acts due to the incentive of self-interest on the part of organized labor in conducting a peaceful boycott, and any unlawful acts which may be committed from a malicious or any other motive."⁸⁸ "The effect of the [recent boycott] decisions upon public opinion," she added, "has been enlightening. The appeal of the American unions for rights enjoyed by organized labor in England and Germany is awakening us out of our complacent toleration of situations which have been remedied in other countries."⁸⁹ And she pre-

dicted that "this country will not be many years in following the lead of England and Germany in maintaining the legality of peaceable organized effort on the part of laborers to better their own condition."⁹⁰

In the teeth of these twin defeats, Gompers remained defiant. "I can not surrender constitutionally guaranteed rights," he insisted, "because a judge will issue an injunction invading and denying these rights." Latching on to the life raft of Chief Justice Shepard's dissent, he noted hopefully that "[m]inority opinions of courts in the past, when human rights were invaded, have ultimately prevailed, become the law of the land and the generally accepted rule of life, and I have an abiding faith that the rule in this case will prove no exception." "If I must go to jail," he reassured himself, "I shall have the consciousness of the fact that other men have in the past been compelled to suffer in defense of justice and right, in the cause of humanity and for the maintenance of human liberty."⁹¹ "The doctrine that the citizen must yield obedience to every order of the court, notwithstanding that order transcends inherent, natural, human rights guaranteed by the Constitution of our country, is vicious, repugnant to liberty, human freedom," he declared. Under such circumstances, "it is duty, imperative duty, to protest."⁹² "We have come too far in the march of human progress for any set of influences to drive us back into slavery."⁹³

The appeal to free speech remained central to the case against the courts. "In case of a dispute with employers a Judge can now permanently rivet your jaws and lips. You must not utter the very thoughts that GOD has put into your mind," he animadverted in a speech before the Central Labor Union. On occasion, no holds barred his attack against the courts in the name of free speech. Justice Wright was "biased and . . . unfit to wear the judicial ermine," he asserted.⁹⁴ "When any court assumes to exercise powers not delegated to it by the Constitution," he told the AFL Annual Convention in Toronto, "it invades the rights

specifically reserved to the States and the people; its action becomes void from lack of jurisdiction and should not be obeyed.” He continued with a free-speech stemwinder: “We have dared to defend our constitutional rights as men and as citizens, despite the injunction of a court which sought to invade the rights of free speech and free press secured to the Anglo-Saxon people centuries ago by Magna Charta and clinched by the adoption of the first amendment to the Constitution of the United States. I say advisedly that the whole people of our country are aroused to the seriousness of the situation. They realize that this attack upon free press and free speech among the workers is only the insidious beginning of the entire withdrawal of those rights from the whole people whenever it might suit the plans of those who desire to profit by injustice and tyranny. The struggle is far from ended. Eternal vigilance ever was and always will be the price of the liberties of a people.”⁹⁵

When he was triumphantly nominated for re-election as head of the AFL—to chants of “What’s the matter with Gompers? He’s all right. Who’s all wrong? Wright”—“tears streamed down his cheeks. Twice he tried to speak and finally articulated: ‘I can’t—I can’t.’ He buried his face in his hands and retreated from view.”⁹⁶ Soon, however, he recovered his voice: “Whenever in the past it has been sought to stifle the voices of leaders of any cause by placing them behind prison bars, their voices have become more eloquent.”⁹⁷ For his part, Gompers’ co-defendant Mitchell appealed not only to the freedom of speech and the press but also to the right to trial by jury, “the traditional and constitutional right of a free people.”⁹⁸

Judges were not Gompers’ only target. He scorned the ostensibly expert academics who purported to tell him what the true legal issues were in the *Buck’s Stove* and other labor injunction cases. His voice dripping with sarcasm, Gompers echoed the stunt he had pulled a year earlier before the National Civic Federation by fomenting a disturbance during the typically staid proceedings of the American Academy

of Political and Social Science, noting that his understanding of the scope of his rights might be different from theirs since he lacked the full formal education the members of that organization had. “If I had come from generations of masters and employers, and had been sent to college and universities, and had been impressed mainly with the right of property and with little consideration for the rights of the man,” he observed, “I might have thought the same way as these Judges think today, but I am a graduate of the University of Hard Knocks, and I have come from a line of ancestors who were also graduates of the University of Hard Knocks. I myself was a laboring man working for wages for twenty-six years. . . . I do not speak as a lawyer, but as a layman, but I have the law rubbed so thoroughly against my fur the wrong way on this subject, I think I know something of the proposition.”⁹⁹ Once again, mass meetings were held, and the denunciations of the court decision poured in.¹⁰⁰

In an editorial critical of Gompers, the staid, establishment *New York Times* scoffed at Gompers for “boasting of his contumacy” in his “studied defiance of the law of the land.” “The right of free speech is not involved because Gompers says it is,” the *Times* sniffed. “There is nothing about trades unionism which gives it rights to commit crimes forbidden to other citizens.” Another long editorial in the *Times*, written and paid for by the staunchly anti-labor and pro-open-shop cereal magnate C.W. Post, similarly excoriated Gompers for his decision to “spit upon and defy our courts, seeking sympathy by falsely telling the people the courts were trying to deprive them of free speech and free press.” This was not a speech or press issue, Post explained; rather, it involved a “criminal conspiracy to injure and ruin other citizens.”¹⁰¹ The paper concluded, however, that, canards concerning free speech and free press aside, Gompers’ behavior was not without its strategic uses. Because he was born abroad, the paper explained, Gompers would never be able to sacrifice himself publicly in a losing campaign for the presidency, as

had Eugene Debs, "another sentenced philanthropist." Nevertheless, an editorial asserted, Gompers' "eagerly sought martyrdom . . . will be useful to him . . . in his business as a professional reformer."¹⁰²

The AFL decided to appeal both the injunction itself and the contempt ruling to the Supreme Court, in significant part on free-speech and free-press grounds.¹⁰³ In early December of 1909, the Court agreed to hear these appeals.¹⁰⁴ At this crucial moment in the case, the Buck's Stove saga took yet another dramatic turn when Van Cleave died suddenly of a heart attack. The *Times* reported that one of his close associates attributed his death to the strains of his ongoing battle with the labor unions. Van Cleave's successor at the helm of the NAM memorialized him publicly in the papers as "a martyr to his duty . . . [a man who] practically sacrificed his life for the benefit of the American employe [sic] as well as the American employer."¹⁰⁵

Both sides in the bitter dispute on the ground back in St. Louis, who were directly affected and exhausted, seized the opportunity presented by Van Cleave's death and sat down for talks that they hoped would end their long-standing dispute. Van Cleave had told friends that, despite the fact that the dispute had cost his company a million and a half dollars to fight, he would carry it on out of principle to the very last cent. The man who acquired Van Cleave's stock in the Buck's Stove Company upon his death, however, Frederic Gardner—long the majority stockholder of a company struggling under the boycott's heavy burden—was reportedly eager to settle the matter and get the company back on track. He soon succeeded in doing both. The Gompers legal appeal went on, but as part of the agreement reached between the company's new leaders and the unions, Buck's Stove agreed to take no position on the final disposition of the Gompers case. Gompers himself—who was every bit as much committed as Van Cleave was to fighting to the bitter end (and who did not want to show to his followers the slight-

est hint of a "yellow streak")—expressed the hope that any settlement reached between the company and the unions would not affect his case. "It is a principle we are standing for," he said.¹⁰⁶

Others, though, took the settlement reached at Buck's Stove as a hopeful sign that the era in which the Van Cleaves of the world were ascendant was fast receding into history. Morrison opined that "[t]he continued adjustment of the differences between employers and employes [sic] is but a manifestation of the steady growth of sentiment among employers in favor of the principles for which the American labor movement stands. It is an indication that in the near future there will be few employers who will not favor collective bargaining."¹⁰⁷ Despite his hope that his case would continue, Gompers read the tea leaves the same way: He was reportedly jubilant at the decision of Buck's Stove not only to recognize its unions, but to then leave the ranks of the NAM.¹⁰⁸ The tide seemed to be running hard in the AFL's favor. The leaders of the open-shop movement, including the activists in the American Anti-Boycott Association, were, of course, appalled at Gardner's capitulation. Some of Van Cleave's supporters within the company were not dead yet: for example, Post hurled a stockholder suit against Buck's Stove in an effort to block the settlement. This, however, was brusquely dismissed.¹⁰⁹

The settlement at Buck's Stove was big news. Given the broad coverage that the dispute at Buck's Stove had received, many could not quite believe that it had actually ended. For example, the questions posed by *Times* readers to the "Queries and Answers" column in the paper's September 11, 1910 edition concerned whether monarchs are permitted by their countries to visit republics, the temperature record for New York City, and the date of the opening of the New York City subway—and the following: "Is it true, as has been reported, that the Bucks Stove and Range Company of St. Louis finally surrendered unconditionally to

the labor union against which such a long war was waged. [sic]"¹¹⁰

In the early days of 1911, in light of the settlement, the U.S. Supreme Court threw out the *Buck's Stove* injunction case as moot.¹¹¹ The appeal of the Gompers contempt decision, however, continued and was argued before the Court shortly thereafter. As was widely reported in the papers, free-speech claims remained at the heart of the argument.¹¹² The doctrinal significance of the Court's first *Buck's Stove* decision¹¹³ was ambiguous: The case was decided largely on the technical grounds that the lower court had wrongly proceeded against the labor leaders on criminal contempt grounds, as opposed to civil ones, and the Court held that the lower court could move ahead with the civil charges, if it wished. This is why Justice Lamar's opinion in the case is rarely accounted for in discussion of constitutional doctrine concerning the freedom of speech. In fact, Lamar dismissed the free-speech and free-press claims out of hand at the opinion's outset, asserting that the case "raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage." These are not speech, but "'verbal acts,' and as much subject to injunction as the use of any other force whereby property in unlawfully damaged."¹¹⁴

Nevertheless, both sides publicly spun the Court's ruling as a landmark for the freedom of speech. In his first reaction to the decision, the lawyer for the NAM claimed that in the Court's opinion, "the boycott is vigorously condemned and . . . the injunction is declared to be an appropriate remedy against it . . . [Moreover,] it is specifically declared that to enjoin the printing or circulating of statements for the purpose of carrying on a boycott is not a violation of the constitutional guarantee of freedom of speech and of the press." A spokesman for the AFL, on the other hand, seeing its officials at long last walking free of the criminal charges, claimed

that the Court had affirmed "only what we have been contending, that the American Federation of Labor should be allowed the right of free speech." The AFL's lead counsel in the case, Parker, declared that "[a] monstrous injustice has now been averted . . . [T]he decision . . . furnishes another illustration of the care with which [the Supreme C]ourt regards and protects the personal rights of the citizen." Despite the fact that, by some measures, he had "won," however, Samuel Gompers was more subdued. He observed soberly that the Court's opinion "holds that the constitutional right of free speech and free press affords no protection to the boycotter." And he declared himself "disappointed that the court did not decide the principle in contention in the proceeding."¹¹⁵

While the *Buck's Stove* and Range Company, now under new management, would have been perfectly happy at this point to see the entire episode draw to a close, the Supreme Court of the District of Columbia, whose orders Gompers and the other defendants in the *Buck's Stove* case had defied, had other ideas. Acting on his own motion in light of the U.S. Supreme Court's ruling, and back in the saddle once again, Justice Wright moved ahead and appointed Davenport of the Anti-Boycott Association and Beck, counsel for *Buck's Stove*, to a committee to gather evidence for the court on the ongoing question of civil contempt. Gompers was predictably defiant. Disregarding a suggestion by the court-appointed committee that an apology would end the proceedings, he told the press that when he appeared before Justice Wright on July 17, he would apologize for nothing. Many in the labor movement began to contemplate a concerted attack upon the authority of Justice Wright, whom they considered abjectly biased, to even hear the case.¹¹⁶

The AFL defendants began the latest round in the *Buck's Stove* case by filing a motion to dismiss, alleging that the statute of limitations on the contempt charges had lapsed. On November 23, 1911, the D.C. supreme court denied the motion, arguing that the relevant

statute of limitations applied to criminal contempt proceedings only and, for good measure, referencing the imperative of preserving the dignity and authority of its orders. Gompers responded by questioning Justice Wright's mental competence.¹¹⁷

Meanwhile, Gompers kept up his busy schedule and peppered his speeches with coy allusions to the *Buck's Stove* case. In an address in Fresno, California, in September 1911, for example, Gompers explained to his audience that "[a] judge issued an injunction forbidding us to discuss a stove, forbid us from mentioning it, almost from thinking of it. . . . It enjoined our council from mentioning that there was such a thing as this stove in question or that there was a dispute or that there had ever been a dispute between the proprietors of this stove and us."¹¹⁸ The case, of course, was already famous enough across the country that no real need existed any more for Gompers to name the company. He explained further that his past discussion of "the stove" involved what lawyers would call core political speech. "I was appealing to my fellow citizens during the last presidential campaign, urging them to vote against the man who was the father of all these injunctions,"¹¹⁹ he explained, implicitly referencing Taft. In concluding, he announced proudly, "Well, you see I have, as nearly as I could, complied, this evening, with the terms of the injunction—I haven't mentioned the name of the stove. (Applause). But I suppose you know the stove and I, and we rather, are friends now."¹²⁰

When the contempt trial began, Gompers asserted that he had had no intention of aiding or abetting the boycott—and hence of defying Justice Wright's injunction—by statements he had made concerning Buck's Stove during the presidential campaign of 1908. His speeches at that time, he said, were made in line with his understandings of his fundamental First Amendment free speech rights. What then, he was asked by the court, did he mean when he wrote, "The things that I am charged with I did. Go to—with your injunctions"? Replied

Gompers, "I like Shakespeare and had in mind some of his expressions, such as 'avaunt,' 'go to with thy prattle,' when I wrote that. . . . It was in the Shakespearean sense that I used it, and I meant no disrespect of this court or its decree. I meant 'go to,' 'wait,' or 'stop' with your injunction." The stand-off was tense. When the trial recessed for lunch, the *Times* reported, Justice Wright was escorted from the room by three policemen and a deputy U.S. marshal; because of his actions against the AFL leaders, it was reported, he had received a stream of threatening letters.¹²¹ As the trial proceeded, Justice Wright, grasping for some sort of resolution that he believed would preserve the dignity of the court, asked the defendants to give him their assurances that they would obey all judicial decrees in the future. They refused.¹²²

At this very moment, the U.S. Congress was debating legislation, later to come to fruition in the Clayton Act, that would limit the injunctive and contempt power of the federal courts in labor disputes. In reporting its deliberation on the bill, the *Times* noted, "There was fitness in the fact that Mr. Gompers sat in the gallery as his bill was passed." The subject of bill, the paper noted, "was the act complained of in the Bucks Stove case, and for the repetition of which Mr. Gompers is still in danger of punishment for contempt of court."¹²³

On June 24, 1912, Justice Wright struck again, resentencing the defendants—in the middle of yet another presidential campaign in which the labor question figured prominently, and in which the AFL's decision to endorse a candidate (Woodrow Wilson) had sparked controversy¹²⁴—to exactly the same terms of imprisonment given to them the first time around: one year for Gompers, nine months for Mitchell, and six months for Morrison. Whereas Gompers had been highly emotional the first time he was sentenced, he sat in stony silence this time. Justice Wright, however, displayed more than enough emotion for the both of them. He was blistering. "The evidence shows," he asserted in his opinion for the court, "for these respondents an assiduous and

persistent effort to undermine the supremacy of the law by undertaking insidiously to destroy the confidence of people in the integrity of the tribunals which maintain it, by inoculating the minds of their followers and the people with a virus of mischievous falsehoods and misrepresentation concerning the court and judges, seeking and hopeful that the support of the people might be withdrawn from these tribunals, and by this means their power undone, their judgment rendered useless and forceless."¹²⁵ Gompers answered these charges by calling Justice Wright's legal understandings two centuries out of date and more appropriate to the treatment of slaves and serfs than modern Americans. He charged, moreover, that Justice Wright's decision had been timed with political considerations in mind. "Information just came to me," he told the press, "that the decision was completed more than a month ago, but withheld until after the close of the Chicago Republican National Convention." "If true," he added, "the inference is obvious." The labor leaders posted bail and were released, pending yet another appeal.¹²⁶

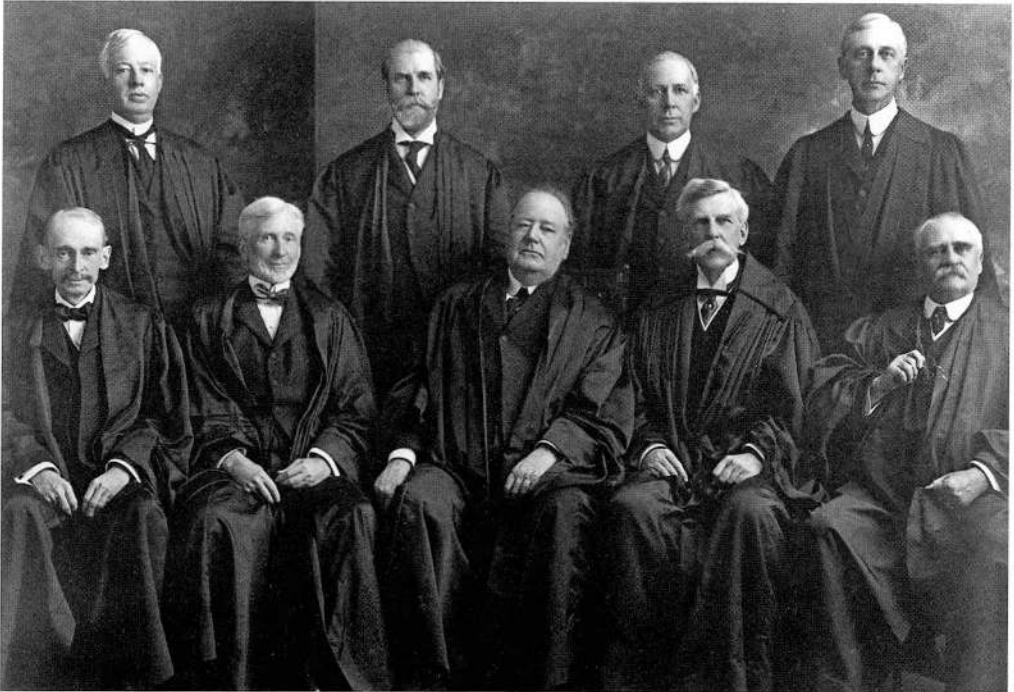
Organized labor's assault on Justice Wright continued unabated. A Washington lawyer presented the Speaker of the House, Champ Clark, and other members of Congress with a petition asking that the House begin impeachment hearings aimed at Justice Wright, asserting that any U.S. citizen had a right to call for the impeachment of any judge. Focusing in particular on the justice's decision to appoint Beck and Davenport as the principal fact-gatherers in the contempt proceedings, the lawyer alleged that there had been unethical collusion amounting to a violation of the judicial oath of office between Justice Wright and the lawyers for Buck's Stove. Others lodged similar charges.¹²⁷

On May 5, 1913, the D.C. Court of Appeals backed off somewhat, holding that the sentences handed down by Justice Wright had been too severe. Without making any comment on the underlying merits of the case, it gave Gompers a sentence of thirty days and as-

essed fines of \$500 each against Mitchell and Morrison. Once again, Chief Justice Shepard filed a dissent. Of course, yet another appeal to the U.S. Supreme Court was expected, and soon taken.¹²⁸

Typically for the Buck's Stove episode, the drama continued when it was reported that the U.S. Supreme Court's members were evenly divided on the appropriate disposition of the case.¹²⁹ In light of this, the Court was forced to schedule a rehearing. But on May 11, 1914, the Court finally brought the Buck's Stove saga to a close, almost a decade after it had begun. It reversed the lower courts and dismissed the case against Gompers, Mitchell, and Morrison. But it did so, once again, on technical grounds (what one historian characterized as a "dull finish"¹³⁰), declaring, in a characteristically curt opinion by Justice Holmes, that a general three-year statute of limitations applicable to all non-capital offenses had run out before Justice Wright began his second inquiry, as the labor leaders had alleged.¹³¹ Nonetheless, the Court's opinion was taken to have made the important point that contempt proceedings in labor injunction cases were, in effect, criminal matters and needed to be treated by courts as such. It also distinguished between the sorts of contempt made in the presence of the court and cases of constructive contempt, as it interpreted Gompers' actions here. The *Times* reported that the tone of the Supreme Court decision implied a clear, if understated, rebuke to Justice Wright, suggesting that he had acted in a spirit of vengeance against the labor leaders.¹³²

Despite being freed by the Court's actions, however, Gompers was not happy. "[T]he judiciary," he asserted, "has refused to pass upon the great human issues involved in the case. The principles of justice have been lost in a maze of legalism. Instead of clearing aside everything that would in any way interfere with justice, technicalities and legal quibbles were allowed to obscure the great things and were used to avoid deciding the big issues." He added, "Since the reform of the abuses



With Justice Horace Lurton (seated at far right) absent due to illness and the Justices evenly divided, the Supreme Court was forced to schedule a rehearing of the *Buck's Stove* case. Justices Willis Van Devanter (standing second from right) and Mahlon Pitney (standing at far right) were the dissenters, without opinion, in the eventual ruling in 1914.

of the injunctive process can not be secured by a legal decision . . . the workers must rely upon other methods. These reforms must be secured by an act of legislation."¹³³ The passage of the Clayton Act would be this story's next chapter.

Conclusion

"I entered into this case with my eyes wide open," Gompers reflected about the *Buck's Stove* saga in his autobiography. "There were two points of advantage in having the fundamental questions brought before the court and the public. We hoped to obtain a decision from the courts that would sustain labor's contention that the issuance of injunctions in a dispute over labor relations was unwarranted and unconstitutional. We hoped that the issue would attract country-wide interest and concentrate the thought of the people upon the principles involved; that if we failed to gain a favorable

decision from the court, the subject would become an issue of paramount importance in the political campaign, and finally, as a cumulative result, we would obtain from Congress the legislation establishing justice denied us by the courts."¹³⁴

From the very beginning, Gompers recognized that the best way to galvanize public attention and win public and labor movement sympathy in service of these ends was to frame the case as a twilight battle over the God-given and constitutional right to freedom of speech. From this perspective, Gompers' *Buck's Stove* strategy was a stunning success. The Court's final ruling ending the case coincided with Wilson's signing into law the Clayton Act, which announced that "the labor of a human being is not a commodity or article of commerce" and set out explicit limitations on the injunctive powers of the federal courts. To be sure, in subsequent years, federal courts interpreted these provisions narrowly.¹³⁵ But the

politics of organized labor did not stop there either: with the Norris LaGuardia Act (1932), Congress struck back, this time even more emphatically limiting the injunctive power of the courts in labor disputes.

In a direct response to situations such as the one Gompers and his co-defendants faced in the *Buck's Stove* case, both the Clayton Act and the Norris LaGuardia Act took on not only the injunctive powers of the federal courts in general, but the contempt power of those courts in particular. The initial response was halting in the Clayton Act, which provided for a new right to a jury trial in criminal-contempt cases involving willful disobedience to the orders of a federal district court. Because the Clayton Act limited the applicability of this provision to cases involving the violation of state or federal criminal statutes, however, it would not have applied to situations such as the one Gompers faced in the *Buck's Stove* saga, where he stood in violation, not of a statute, but of a court order. The Norris La Guardia Act, however, provided for trial by jury in all contempt cases involving labor disputes, not just those involving the violation of statutes. Moreover, it disqualified the judges who had issued the contempt order from presiding over the trial for contempt of court, thus solving the Justice Wright problem. Subsequent reforms to the Federal Rules of Criminal Procedure both broadened and institutionalized the procedural protections afforded to defendants facing charges of criminal contempt, whether they had violated a statute or an order of a federal judge.¹³⁶

With the passage of the Wagner Act in 1935 as a centerpiece of the New Deal, the power of labor unions was at last welcomed as a pillar of the modern American state. Organized labor's orientation towards issues of free speech reflected its new-found power. Ironically, in the 1930s and 1940s, it was the employers who found their comments critical of labor unions during government-supervised union election campaigns attacked—and, in some cases, outlawed—as a form of “coercive” speech or “verbal acts.” In the interest of

buttressing the power of labor unions as collective entities, the speech of their dissenting individual members was similarly repressed.¹³⁷

On the other hand, in a series of more famous cases, labor remained a celebrated champion of the freedom of speech. In a sign that the relationship between the labor movement and the courts was changing with the consolidation of modern liberalism, labor began to have faith in the courts, looking to them less, in a play for political sympathy, as an institution to revile and defy than as a safe harbor and a beacon of hope. When labor protests and pickets were barred, attacked, and dispersed in the transitional decade of the 1930s, labor turned to the courts, seeking injunctions against their antagonists while armed with loud appeals to the freedom of speech. In *Senn v. Tile Layers Union*, Justice Louis D. Brandeis upheld the right of labor unions to picket a business against property rights claims as, in significant part, a matter of the freedom of speech.¹³⁸ And in *Hague v. CIO* (1939), labor union protesters sought and won a federal court injunction that prohibited the anti-labor Mayor of Jersey City from banning their protests in a public park.¹³⁹ The *Hague* decision invented the “public forum” doctrine, which gave special protection to speech in public spaces—a critical touchstone of the contemporary constitutionalism of the freedom of speech. Such decisions, in turn, set the framework within which subsequent courts considered the legality of the marches, pickets, and protests adopted by the next major social movement seeking to transform American life: the movement for civil rights.¹⁴⁰

For those who look to the words printed in the U.S. Reports alone, the *Buck's Stove* decisions may not amount to much. But for those who are willing to consider cases such as *Buck's Stove* not as hermetic legal rulings but as broader political episodes, a world of vivid constitutional politics suddenly springs to life. In this way, the *Buck's Stove* saga is a genuine landmark: after the battle between Gompers and Van Cleave, the politics

and law of speech were never to be the same again.

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ENDNOTES

¹"Jail for Gompers," *N.Y. Times*, Nov. 3, 1909, at 10 (quoting a speech before the Central Labor Union).

²*Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, (1911); see also *Gompers v. United States*, 233 U.S. 604 (1914) (finding a three-year statute of limitations applied to the 1911 *Buck's Stove* case). The *Buck's Stove* case is discussed at slightly greater length in historical accounts of the freedom of speech in its early years. See, e.g., Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* 123–49 (1995); see also David M. Rabban, *Free Speech In Its Forgotten Years* 171 (1997); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 253 n.4 (1991).

³E.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

⁴See, e.g., Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Neal Devins & Louis Fisher, *The Democratic Constitution* (2004); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994); James Gray Pope, "Labor's Constitution of Freedom," 106 *Yale L.J.* 941 (1997); James Gray Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957," 102 *Colum. L. Rev.* 1 (2002); J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (2004); Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (2004); Michael Kent Curtis, *Freedom of Speech: "The People's Darling Privilege"* (2000).

⁵See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (1994).

6208 U.S. 274 (1908). When *Loewe* was decided, the *New York Times* explained to its readers that the later decision "was of equal importance with the [ongoing] *Buck's Stove* case." See "End of Boycott in \$222,000 Verdict," *N.Y. Times*, Feb. 6, 1910, at 2.

⁷Although I have supplemented the story through other sources here, I use *New York Times* stories as my primary point of entry. This allows me to follow the way in which this constitutional drama was presented to the common reader in one highly significant media market. I am less interested here in the secret history of the case than in the way in which it was experienced by the public.

⁸See Bernard Mandel, *Samuel Gompers: A Biography* 263 (1963); Ernst, *supra* note 2, at 125, 130–33 (1995).

⁹On Davenport, see Ernst, *supra* note 2, *passim*.

¹⁰Samuel Gompers, *Seventy Years of Life and Labor: An Autobiography* 168 (Nick Salvatore ed., 1984).

¹¹*Id.*; see also Mandel, *supra* note 8, at 266–67.

¹²See Gompers, *supra* note 10, at 169.

¹³George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* 99 (2003); Gerald E. Stearn, *Gompers* 13 (1971). See generally Lovell, *supra* this note, at 99–160 (discussing the circumstances surrounding the adoption of the Clayton Act); Elizabeth S. Clemens, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890–1925* at 100–44 (1997). 14307 U.S. 496 (1939).

¹⁵*Id.* See Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* 167–86, 201–17 (2004) [hereinafter Kersch, *Constructing Civil Liberties*]; Ken I. Kersch, "How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech," 8 *U. Pa. J. Const. L.* (forthcoming).

¹⁶Key issues involved the constitutional legitimacy of health and safety, minimum wage and maximum hours laws, and the legality of the right to organize and strike. See William Forbath, *Law and the Shaping of the American Labor Movement* (1991).

¹⁷Will Chasan, *Samuel Gompers: Leader of American Labor* 111 (1971); Rowland Hill Harvey, *Samuel Gompers: Champion of the Toiling Masses* 158 (1935); Ernst, *supra* note 2, at 127–28.

¹⁸Mandel, *supra* note 8, at 263; Ernst, *supra* note 2, at 127.

¹⁹"Asks Injunction Against Boycott," *N.Y. Times*, Aug. 20, 1907, at 4; "Gompers Assailed," *N.Y. Times*, Dec. 1, 1907, at 9; "Story of Boycott Which Beat Gompers," *N.Y. Times*, Dec. 29, 1908, at 5; "Van Cleave Is Dead; Was Foe of Gompers," May 16, 1910, at 9; Harold C. Livesay, *Samuel Gompers and Organized Labor in America* 146 (1978); Stearn, *supra* note 13, at 13; Gompers, *supra* note 10, at 168; Mandel, *supra* note 8, at 263.

²⁰See Kersch, *Constructing Civil Liberties*, *supra* note 15, at 144–45; Victoria Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (1993); Ernst, *supra* note 2. For roughly contemporaneous overviews placing the *Buck's Stove* dispute in context, see E.M.P., "The Injunction in Strikes, Boycotts

- and Picketing," 7 *Va. L. Rev.* 462 (March 1921); Margaret A. Schaffner, "Effect of the Recent Boycott Decisions," 36 *Annals Am. Acad. Pol. & Soc. Sci.* 23 (1910).
- ²¹*In re Debs*, 158 U.S. 564 (1895); Ernst, *supra* note 2, at 76–77.
- ²²Livesay, *supra* note 19, at 146; Stearn, *supra* note 13, at 12–13; Mandel, *supra* note 8, at 263; John C. Kennedy, "An Important Labor Injunction," 16 *J. Pol. Econ.* 102, 103 (1908) (case note).
- ²³Chasan, *supra* note 17, at 111.
- ²⁴Livesay, *supra* note 19, at 146; Gompers, *supra* note 11, at 169 ("Abuse of the injunctive writ had grown in frequency, until it had become the paramount issue in labor problems. It was at my suggestion that the Federation determined to select a particularly flagrant injunctive abuse to make a test case. . . . This case was selected as it contained practically every phase of the abuse we wished to remedy.")
- ²⁵Mandel, *supra* note 8, at 266.
- ²⁶"Gompers Assailed," *supra* note 19.
- ²⁷"Seeks to Enjoin Unions," *N.Y. Times*, Nov. 8, 1907, at 9; "Labor Federation Enjoined," *N.Y. Times*, Dec. 18, 1907, at 2.
- ²⁸"Gompers Answers Taft," *N.Y. Times*, Nov. 12, 1907, at 6. See generally Lovell, *supra* note 13, at 107–31.
- ²⁹"Gompers Answers Taft," *supra* note 28.
- ³⁰"Labor's \$500,000 War Fund," *N.Y. Times*, Nov. 19, 1907, at 1.
- ³¹"Labor Federation Enjoined," *supra* note 27. The temporary injunction was made permanent on March 23, 1908. "To Prosecute Labor Leaders," *N.Y. Times*, Mar. 24, 1908, at 2.
- ³²"Gompers Defies Court," *N.Y. Times*, Jan. 25, 1908, at 1.
- ³³Mandel, *supra* note 8, at 270; Ernst, *supra* note 2, at 134.
- ³⁴"To Prosecute Labor Leaders," *supra* note 31.
- ³⁵Ernst, *supra* note 2, at 124–25.
- ³⁶"Roosevelt Classed with Demagogues," *N.Y. Times*, May 11, 1908, at 3. See Clemens, *supra* note 13, at 72.
- ³⁷"Roosevelt Classed with Demagogues," *supra* note 36.
- ³⁸Clemens, *supra* note 13, at 108.
- ³⁹*Id.* at 102–18; Ernst, *supra* note 2, at 131–32.
- ⁴⁰"Gompers Worries Unions," *N.Y. Times*, July 21, 1908, at 3; "Gompers Charges Attempted Bribery," *N.Y. Times*, Sept. 25, 1908, at 4; "Gompers Anxious to Be Put in Jail," *N.Y. Times*, Oct. 29, 1908, at 16; Ernst, *supra* note 2, at 135. See also Ross, *supra* note 5, at 72–74.
- ⁴¹Kennedy, *supra* note 22, at 104–05.
- ⁴²On the history of the contempt power, see Ronald L. Goldfarb, *The Contempt Power* (1971).
- ⁴³Confidential memo from Samuel Gompers to the AFL Executive Council (Jan. 10, 1908), reprinted in 7 **Samuel Gompers Papers** 295–96 (Stuart B. Kaufman et al. eds., 1999). See also Samuel Gompers, "Editorial," 15 *Amer. Federationist* 98 (1908).
- ⁴⁴"Labor Men's Trial Shifted by Court," *N.Y. Times*, Sept. 10, 1908, at 6.
- ⁴⁵"Gompers on the Stand," *N.Y. Times*, Sept. 18, 1908, at 3.
- ⁴⁶"Gompers Charges Attempted Bribery," *N.Y. Times*, Sept. 25, 1908, at 4.
- ⁴⁷"Gompers Anxious to Be Put in Jail," *supra* note 40; see also "To Press Boycott Case," *N.Y. Times*, Oct. 29, 1908, at 3.
- ⁴⁸"Gompers Anxious to Be Put in Jail," *supra* note 40.
- ⁴⁹"Gompers Decision Put Off," *N.Y. Times*, Oct. 31, 1908, at 3; Ernst, *supra* note 2, at 136–38.
- ⁵⁰"Gompers Begs Labor to Work for Bryan," *N.Y. Times*, Nov. 2, 1908, at 2.
- ⁵¹*Id.*; see Ernst, *supra* note 2, at 136.
- ⁵²"Gompers Indorsed on Bryan," *N.Y. Times*, Nov. 20, 1908, at 13.
- ⁵³*Id.*
- ⁵⁴"Roosevelt Holds Labor Leaders' Fate," *N.Y. Times*, Dec. 25, 1908, at 1; "What Embittered Mitchell," *N.Y. Times*, Feb. 10, 1912, at 6; Chasan, *supra* note 17, at 112.
- ⁵⁵Mandel, *supra* note 8, at 273–74.
- ⁵⁶"Jail for Gompers in Contempt Case," *N.Y. Times*, Dec. 24, 1908, at 1. Article III, Section 2 of the U.S. Constitution provides that "[t]he Trial of all crimes, except in cases of Impeachment, shall be by Jury." The Fifth Amendment provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury." And the Seventh Amendment provides that "[i]n suits at common law . . . the right of trial by jury shall be preserved." (The *Buck's Stove* case was an equity action, not a suit at common law). Contempt prosecutions, however, have a long history of being construed as falling outside these protections. See Ernst, *supra* note 2, at 138–39. See generally Goldfarb, *supra* note 42, at 138–39.
- ⁵⁷Mandel, *supra* note 8, at 274; Samuel Gompers, **2 Seventy Years of Life and Labor: An Autobiography** 213–14 (E.P. Dutton & Co. 1925); "Jail For Gompers in Contempt Case," *supra* note 56. On the political successes of the trade unionists in Great Britain in 1906 as encouraging American labor's decision to move into politics at about the same time, see Ross, *supra* note 5, at 71.
- ⁵⁸"Jail for Gompers in Contempt Case," *supra* note 56.
- ⁵⁹"Comment on the Decision," *N.Y. Times*, Dec. 24, 1908, at 2.
- ⁶⁰*Id.*
- ⁶¹*Id.*; see also Ernst, *supra* note 2, at 140.
- ⁶²"Judge Parker's Opinion," *N.Y. Times*, Dec. 25, 1908, at 1.
- ⁶³"Jail for Gompers in Contempt Case," *supra* note 56; "Roosevelt Holds Labor Leaders' Fate," Dec. 25, 1908, at 1; "Reduced Sentences for Labor Leaders," *N.Y. Times*,

Dec. 26, 1908, at 2; "Seek Gompers Pardon," *N.Y. Times*, Dec. 30, 1908, at 18.

⁶⁴The language quoted is from a resolution passed by the Central Federated Union. "Gompers Drops Boycott," *N.Y. Times*, Dec. 28, 1908, at 4; "Story of Boycott Which Beat Gompers," *N.Y. Times*, Dec. 29, 1908, at 5; "Protest from Porto Rico," *N.Y. Times*, Jan. 3, 1909, at C4; "Gompers Thanks Unions," *N.Y. Times*, Jan. 4, 1909, at 18; "Mass Meeting for Gompers," *N.Y. Times*, Jan. 29, 1909, at 2; "Big Boston Labor Protest," *N.Y. Times*, Mar. 15, 1909, at 3; see also Mandel, *supra* note 8, at 275.

⁶⁵"Gompers Thanks Unions," *supra* note 64.

⁶⁶*Loewe v. Lawler*, 208 U.S. 274 (1908).

⁶⁷See "End of Boycott in \$222,000 Verdict," *supra* note 6.

⁶⁸"Gompers Drops Boycott," *supra* note 64. See Clemens, *supra* note 13, at 108–09.

⁶⁹"Van Cleave Reopens Injunction Fight," *N.Y. Times*, Dec. 28, 1908, at 4.

⁷⁰"Mass Meeting for Gompers," *supra* note 64.

⁷¹"Gompers Stirs Up Clinic Federation," *N.Y. Times*, Apr. 3, 1909, at 6.

⁷²"Gompers Raps the Courts," *N.Y. Times*, Apr. 6, 1909, at 18; see also "Unions in Europe Firm, Says Gompers," *N.Y. Times*, Oct. 10, 1909, at 7 (quoting Gompers referring to the *Buck's Stove* case during his tour of trades unions conferences in England, France, and Italy, declaring, "I am ready to go to prison here or anywhere else in defense of the right of American speech.").

⁷³*AFL v. Buck's Stove & Range Co.*, 33 App. D.C. 83, 90–94 (1909).

⁷⁴*Id.* at 94.

⁷⁵*Id.* at 93.

⁷⁶*Id.* at 99.

⁷⁷*Id.* at 109.

⁷⁸*Id.* at 112 (J. Van Orsdel, concurring).

⁷⁹*Id.* at 125 (J. Van Orsdel, concurring).

⁸⁰*Id.* at 125 (J. Van Orsdel, concurring).

⁸¹*Id.* at 129 (C.J. Shepard, concurring in part and dissenting in part). On Shepard, a well-regarded Democrat from Texas (and a Confederate veteran) elevated to the Chief Justiceship by Republican Theodore Roosevelt, see Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* 64 (2001).

⁸²*Gompers v. Buck's Stove & Range Co.*, 33 App. D.C. 516 (1909). Its earlier ruling had dealt with the terms of the injunction itself—a separate issue.

⁸³*Id.* at 576, 577.

⁸⁴*Id.* at 584 (C.J. Shepard, dissenting).

⁸⁵Schaffner, *supra* note 20, at 277.

⁸⁶*Id.* at 280.

⁸⁷*Id.* at 281.

⁸⁸*Id.* at 279.

⁸⁹*Id.* at 287.

⁹⁰*Id.* at 283. See also Kennedy, *supra* note 22, at 104 ("Already leading trade-unionists are comparing this with the

famous Taff-Vale decision in England, and are predicting similar consequences."); Ross, *supra* note 5, at 71. On transatlantic legal and political influences, particularly of the reformist variety, see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (1998); James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (1986).

⁹¹"Affirms Jail Terms for Labor Leaders," *N.Y. Times*, Nov. 3, 1909, at 3.

⁹²"Gompers Assails Action of Court," *N.Y. Times*, Nov. 9, 1909, at 5.

⁹³Mandel, *supra* note 8, at 178.

⁹⁴"Jail for Gompers," *supra* note 1; see also "Gompers Assails Action of Court," *supra* note 92; "Gompers Scorns Judge," *N.Y. Times*, Nov. 27, 1909, at 3.

⁹⁵"Gompers Assails Actions of Court," *supra* note 92; "Labor Condemns Language of Judges," *N.Y. Times*, Nov. 20, 1909, at 6.

⁹⁶Mandel, *supra* note 8, at 278.

⁹⁷"Gompers Cheered as He Is Re-elected," *N.Y. Times*, Nov. 21, 1909, at 5; Mandel, *supra* note 8, at 278.

⁹⁸"Mitchell Asks Jury Trial," *N.Y. Times*, Nov. 4, 1909, at 7; "Labor Federation Stands By Boycott," *N.Y. Times*, Nov. 18, 1909, at 5; see also "John Mitchell Gives Defi [sic] to United States Courts [November 18, 1909]," reprinted in 8 *Samuel Gompers Papers* 12–16 (Peter J. Albert & Grace Palladino eds., 2001).

⁹⁹"Gompers Resents Littlefield Speech," *N.Y. Times*, Apr. 10, 1910, at 4.

¹⁰⁰"Labor Decision Denounced," *N.Y. Times*, Nov. 7, 1909, at 1; see also Schaffner, *supra* note 20, at 32 ("The immediate effect upon the trade unions appeared in the call to political action.").

¹⁰¹C.W. Post, "Don't Weep at the Ice House," *N.Y. Times*, Jan. 2, 1910, at 6; untitled article, *N.Y. Times*, May 10, 1914, at 12.

¹⁰²"Jail for Gompers," *supra* note 1; see also McCann, *supra* note 4.

¹⁰³"To Keep Up Gompers Fight," *N.Y. Times*, Nov. 10, 1909, at 7 (noting report adopted by the AFL at its annual meeting declaring, "We cannot permit these decisions to go unchallenged. They affect fundamental rights, and either the courts or Congress must safeguard them."); "Labor Appeal Ready for Supreme Court," *N.Y. Times*, Nov. 28, 1909, at 4; "Labor Case Taken to Supreme Court," *N.Y. Times*, Nov. 30, 1909, at 3; see also Samuel Gompers, "Free Speech and the Injunction Order," 36 *Annals Am. Acad. Pol. & Soc. Sci.* 1 (1910).

¹⁰⁴*Gompers v. Buck's Stove & Range Co.*, 215 U.S. 605 (1909).

¹⁰⁵"J. W. Van Cleave Ill," *N.Y. Times*, May 2, 1910, at 9; "Van Cleave Is Dead: Was Foe of Gompers," *supra* note 19.

¹⁰⁶"Peace Settlement in Gompers Case," *N.Y. Times*, July 20, 1910, at 1; "Gompers Wants His Case to Go On," *N.Y.*

Times, July 21, 1910, at 2; "Strike Conference Rules," *N.Y. Times*, July 21, 1910, at 2; Mandel, *supra* note 8, at 278–79; Ernst, *supra* note 2, at 142.

¹⁰⁷[Untitled article] special to the *New York Times*," *N.Y. Times*, July 21, 1910, at 2.

¹⁰⁸"Gompers Is Jubilant," *N.Y. Times*, July 27, 1910, at 6;

"Parker Praises Gompers," *N.Y. Times*, Aug. 7, 1910, at 3.

¹⁰⁹"Post Sues to Stop Gompers Peace Plan," *N.Y. Times*, Sept. 4, 1910, at 3; "Post Injunction Denied," *N.Y. Times*, Sept. 6, 1910, at 3.

¹¹⁰"Queries and Answers," *N.Y. Times*, Sept. 11, 1910, at X16.

¹¹¹*Buck's Stove & Range Co. v. AFL*, 219 U.S. 581 (1911).

¹¹²"Stops Labor Boycott Case," *N.Y. Times*, Jan. 28, 1911, at 2; "His Rule Confronts Parker," *N.Y. Times*, Jan. 31, 1911, at 2.

¹¹³A second followed in 1914.

¹¹⁴*Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, at 437, 439 (1911). The criminal-versus-civil distinction in contempt cases has often been found to be a messy and intellectually confounding one. A leading historian of the contempt power, citing the 1914 *Buck's Stove* opinion as a case in point, has concluded that "inconsistent, illogical judicial treatment is not unusual in contempt cases," and that the criminal-versus-civil distinction "has often been no more than a matter of hind-sighted classification of characteristics." Goldfarb, *supra* note 42, at 160–61.

¹¹⁵"Jail Term Revoked in Gompers Case," *N.Y. Times*, May 16, 1911, at 6; "Lucky Mr. Gompers," *N.Y. Times*, May 16, 1911, at 12; "Victory, Manufacturers Say," *N.Y. Times*, May 16, 1911; "Calls It a Great Victory," *N.Y. Times*, May 16, 1911, at 6; "Ex Judge Parker Rejoices," *N.Y. Times*, May 16, 1911, at 6; "Gompers Gratified," *N.Y. Times*, May 16, 1911, at 6; "History of Contempt Cases," *N.Y. Times*, May 16, 1911, at 6.

¹¹⁶"Gompers Case Up Again," *N.Y. Times*, May 17, 1911, at 7; "Mr. Gompers' Prematurity," *N.Y. Times*, May 17, 1911, at 12; "Gompers Won't Apologize," *N.Y. Times*, June 28, 1911, at 8; "Gompers Case Postponed," July 18, 1911, at 2.

¹¹⁷"Labor Chiefs Must Face a New Trial," *N.Y. Times*, Nov. 24, 1911, at 5.

¹¹⁸"A News Account of An Address in Fresno, California, [September 23, 1911]," *Fresno Labor News*, Sept. 23, 1911, reprinted in 8 *Samuel Gompers Papers*, *supra* note 98, at 261, 269–70.

¹¹⁹*Id.* at 270.

¹²⁰*Id.* at 270–71.

¹²¹"Gompers Denies Contempt," *N.Y. Times*, Feb. 7, 1912, at 2; "Gompers a Shakespearean," *N.Y. Times*, Feb. 8, 1912, at 3; Mandel, *supra* note 8, at 271.

¹²²"Mitchell Won't Promise," *N.Y. Times*, Mar. 7, 1912, at 6.

¹²³"Legalizing Unlawful Acts," *N.Y. Times*, May 16, 1912, at 10. The Clayton Act debate in Congress began in 1912.

The Act was ultimately signed into law by President Wilson (with Gompers' support) in 1914. See Lovell, *supra* note 13, at 158.

¹²⁴The Progressive party plank on labor was stronger than that in the Democratic party's platform. Gompers nevertheless made a pragmatic decision to stick with the major party, a decision that paid off when Wilson signed the Clayton Act into law two years later. See Lovell, *supra* note 13, at 158; Kirk H. Porter & Donald Bruce Johnson, *National Party Platforms: 1840–1968* (1972).

¹²⁵"Gompers Convicted; Resentenced to Jail," *N.Y. Times*, June 25, 1912, at 13.

¹²⁶*Id.*; "John Mitchell Sentenced," *N.Y. Times*, July 24, 1912, at 14.

¹²⁷"For Ousting Judge Wright," *N.Y. Times*, Aug. 2, 1912, at 1; "Refuses to Impeach Judge," *N.Y. Times*, Mar. 11, 1914, at 13; "Labor Chiefs Win in Supreme Court," *N.Y. Times*, May 12, 1914, at 6. The House Judiciary Committee initiated preliminary impeachment hearings against Justice Wright in the summer of 1914, and reviewed the petitions. The hearings proved highly embarrassing to Wright, revealing improprieties extending well beyond those at the fore of the *Buck's Stove* case. The pressure was such that Wright soon resigned voluntarily from the bench. President Woodrow Wilson named his replacement: Frederick L. Siddons, who had represented Gompers as a co-counsel to Alton Parker in the *Buck's Stove* case. Gompers, *supra* note 57, at 219; Morris, *supra* note 81, at 62; Ernst, *supra* note 2, at 138, 146.

¹²⁸*In re Gompers*, 40 App. D.C. 293 (1913); see also "Reduces Sentences of Labor's Chief," *N.Y. Times*, May 6, 1913, at 2; "New Appeal for Gompers," *N.Y. Times*, May 9, 1913, at 1; "Gompers Appeal Granted," *N.Y. Times*, June 20, 1913, at 18.

¹²⁹Justice Lurton was ill and did not participate.

¹³⁰Mandel, *supra* note 8, at 283.

¹³¹*Gompers v. United States*, 233 U.S. 604 (1914). Justices Van Devanter and Pitney dissented, without opinion. Morris, *supra* note 81, at 70–71; Goldfarb, *supra* note 42, at 233.

¹³²"Labor Chiefs Win in Supreme Court," *supra* note 127.

¹³³Mandel, *supra* note 8, at 283.

¹³⁴Gompers, *supra* note 57, at 221.

¹³⁵See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); Kersch, *Constructing Civil Liberties*, *supra* note 15, at 167–69.

¹³⁶Goldfarb, *supra* note 42, at 148–49; see also Felix Frankfurter & James M. Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 *Harv. L. Rev.* 1010 (1923–1924). In a decision relying on its opinion in *Buck's Stove*, the Supreme Court had recently held that statutes barring a judge from presiding over a trial involving contempt of his orders did not violate the separation-of-powers scheme embodied in the Constitution. *Michaelson v. United States*, 266 U.S. 42 (1924).

¹³⁷See Comment, "Recent Limitations on Free Speech and Free Press," 48 *Yale L.J.* 54, 72 (1938) (discussing "Employer Freedom of Speech Under the Wagner Act" in Section 3 of the comment); Ken I. Kersch, "The New Deal Triumph as the End of History? The Judicial Negotiation of Labor Rights and Civil Rights," in **The Supreme Court and American Political Development** (Ronald Kahn & Ken I. Kersch, eds., 2006); Kersch,

Constructing Civil Liberties, *supra* note 15, at 226–28.

¹³⁸301 U.S. 468 (1937).

¹³⁹308 U.S. 496 (1939).

¹⁴⁰See Kersch, **Constructing Civil Liberties**, *supra* note 15; Harry Kalven, Jr., **The Negro and the First Amendment** (1965); Lucas A. Powe, Jr., **The Warren Court and American Politics** (2000).

Supreme Court Activism in Economic Policy in the Waning Days of the New Deal: Interpreting the Fair Labor Standards Act, 1941–1946

JEROLD WALTMAN*

Students of the Supreme Court universally agree that it made a dramatic shift in 1937. First, in *West Coast Hotel Company v. Parrish*,¹ it retreated from the unbridled use of the Fourteenth Amendment's Due Process Clause to invalidate state economic regulatory legislation. Then, in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*,² the Justices widened the reach of congressional power under the Commerce Clause. This looser reading of the Commerce Clause was solidified in 1941 with *United States v. Darby Lumber Company*³ and *Wickard v. Filburn*.⁴ So decisive were these cases in dividing what went before from what came afterward that Bernard Schwartz has said, "The 1937 reversal marked the accession of what may be considered the second Hughes Court—so different was its jurisprudence from that of the Hughes Court that had preceded it."⁵ Whereas the defining jurisprudence of the former had been close supervision of economic policy, the latter refused to second guess the economic wisdom of congressional (and state) regulatory initiatives. Alpheus T. Mason summarized Justice Harlan Fisk Stone's approach, which was indicative of the entire Court of this era, as one that would not say that "no economic legislation would ever violate constitutional restraints, [but that] . . . in this area the court's role would be strictly confined."⁶ Confirming this approach, between 1937 and 1957 the Supreme Court struck down only four federal statutes as unconstitutional, none of which were economic in nature.⁷

However, we must not take this retreat on the constitutional front as signaling a complete judicial abdication from involvement in economic policy. For in upholding the New Deal statutes, the Justices necessarily created a role for themselves in interpreting them. Given the numerous compromises President Franklin D. Roosevelt's congressional leaders had to make in order to secure these measures' passage, to say nothing of the inherent complexity and ambiguity of the statutes, giving life to these enactments necessarily involved the Court in policymaking. Understanding how active the Court really was in the realm of economic policy in the years following 1937, therefore, requires an examination of the path it followed in interpreting these statutes.

The purpose of this article is to scrutinize the Supreme Court's decisions regarding the Fair Labor Standards Act of 1938⁸ (FLSA) between 1941 and 1946, the five years after it was upheld.⁹ Such an exercise provides an impor-

tant window onto the Court's role in economic policy, inasmuch as the FLSA was one of the most far-reaching of the New Deal reforms.¹⁰ The first section is devoted to a brief discussion of how one determines judicial activism in statutory interpretation. The second part lays out the critical statutory provisions as they were written in 1938. In the third through seventh sections, the article takes a detailed look at the cases that came to the Court during this five-year period, searching for clues of heightened policy choice. There was a good bit of activism in these cases, and it had a detectable political slant. The Supreme Court, it turns out, was considerably more than a marginal player in economic policy.

Judicial Activism and Statutory Interpretation

Ernest Young has offered a six-fold classification of the various types of judicial activism in constitutional jurisprudence:



In *United States v. Darby Lumber Co.*, a 1941 decision involving the rights of lumber industry workers, the Justices widened the reach of congressional power under the Commerce Clause to a considerable degree. Pictured, cross ties are loaded at a lumber yard in Mississippi.



Franklin D. Roosevelt signed the Social Security bill in 1935, one of his many New Deal initiatives designed to protect workers. Three years later, he would sign the Fair Labor Standards Act into law at the urging of Frances Perkins (above, third from right, and right), his Secretary of Labor.

- (1) second-guessing the federal political branches or state governments;
- (2) departing from text and/or history;
- (3) departing from judicial precedents;
- (4) issuing broad or “maximalist” holdings rather than narrow or “minimalist” ones;
- (5) exercising broad remedial powers; and
- (6) deciding cases according to the partisan [party] political preferences of the judges.¹¹

Several of these, especially numbers two, three, and six, could apply to statutory readings as well as constitutional interpretation. Sailing away from the text and history (here, legislative intentions) could well be judicial activism, as could a willingness to set aside precedent or insert one’s party preferences into a decision.

However, we need a more systematic approach. The thread that ties Young’s categories



together is that all of them pull the judiciary into policymaking, and it is here that we must begin if we are to develop some sensible way to analyze judicial activism in statutory

interpretation. Statutes must be interpreted as they are administered: that is, in contrast to constitutional jurisprudence, there can be no judicial hand-washing that would leave matters to the political branches. Thus, every judicial decision in this field is policymaking. However, a reasonable distinction can be drawn between narrow and broad policymaking. Narrow policymaking has less ideological content and is more restricted in scope. Broad policymaking “takes sides” in policy struggles and states its decisions at a fairly high level of generality. The broader the type of policymaking taken on by a court, therefore, the more activist its decision.

The basic materials judges should employ in the task of interpreting statutes have been noted many times. However, it has been remarked equally often how inadequate these are in providing definitive answers, compelling the judge to look elsewhere.

The judicial decisionmaking process is a complex blend of conscious and unconscious factors. On an elementary level, a judge interpreting a statute considers the traditional array of evidentiary sources, including statutory text, legislative history, and prior cases construing the same or similar statutes. But, as much as the judge may want to limit consideration to these evidentiary sources, other factors inevitably enter into the judging process.¹²

Over the years, judges have developed a number of canons of statutory interpretation to serve as guide posts.¹³ Some of the more important include the following: “[I]f the language is plain, construction is unnecessary; penal statutes are to be construed narrowly, but remedial statutes broadly; the expression of one thing is the exclusion of another; repeals by implication are disfavored; and every word of a statute must be given significance.”¹⁴ While these precepts are helpful, they still leave plenty of room for discretion in indi-

vidual cases, discretion that contains an irreducible element of policymaking.

Nevertheless, all policymaking is not equal in either reach or import. The narrow and broad categories laid out above are not airtight, but they are useful. Two tests can help us identify the end of this continuum towards which a particular decision leans. The first is the degree to which there is a discernible social or economic theory underpinning the decision.¹⁵ This is a difficult task to perform, but not an impossible one. It will become rather easier, of course, if there are a number of decisions instead of only one. There are two inquiries to make here. First, has the judge construed the words—or, if there are several cases, consistently construed the words—in such a way as to favor particular social or economic groups? Second, does the rationale for the decision contain clues to judicial thinking? Can a social or economic ideology be inferred from the structure of the argument, its assumptions, its logic, its conclusions? It should be stressed that it is not necessary for the judge to be *consciously* applying an ideological framework. The question is whether it is present or not, not whether the judge believes he or she is reaching to a bookshelf outside the courtroom.

Major legislation will ordinarily contain numerous vague phrases that various legislative factions hope will be applied the way they wish.¹⁶ Is the court, in essence, siding with one of these factions over others? Does it appear that the judges see the world more in line with one particular congressional faction, especially if that faction has a coherent policy stance derived from a social and economic philosophy? If decisions bend in this manner, and especially if a line of decisions do so, we are entering a broader policymaking domain and finding judicial activism.

The second test is the degree to which the decision is maximalist. That is, to what degree is the language of the holding stated in broad versus narrow terms? Some decisions confine themselves to the immediate facts at hand, and may even say explicitly that nothing

more should be read into the decision. A different set of facts—even a *slightly* different set—may therefore produce a different decision. On the other hand, judges sometimes make sweeping pronouncements, sending signals to the lower courts—and administrative agencies, interest groups, and the general public as well—about how the statute should be applied. Doing this increases the span of the decision, moving judges several steps further into policymaking territory and hence into an activist stance.

Taken together, these two tests give us a reasonable standard against which to measure a line of cases to determine if they can fairly be called activist. Applying them to the decisions that the Supreme Court rendered through 1946 concerning the FLSA leaves little doubt that there was a clear activist trend, and that that trend favored the more pro-labor segments of the New Deal coalition.¹⁷

The Critical Provisions of the Fair Labor Standards Act

Few laws Congress has enacted have stirred more controversy than the FLSA.¹⁸ The law had three aspects: it required the payment of minimum wages for all covered workers; it required that all covered employees' overtime hours be compensated at time and a half; and it banned the use of child labor. For its enforcement, Congress prohibited the shipment in interstate commerce of any goods produced in violation of any of the three requirements, providing a number of penalties for firms doing so. The Act was strongly attacked by business interests, and every section was the subject of bruising confrontations in congressional committees and on the floor of both houses of Congress. Opponents sought to set the minimum wage as low as possible, to make the standard work week as long as possible, and to lower the age definition of "child labor"; they also struggled incessantly to restrict coverage as much as they could and to make enforcement largely toothless. At the same time, even the administration's congressional allies were

uncertain how best to phrase the relevant sections of the law. They were, after all, entering new legal terrain. In the end, the statute that emerged was much weaker than the administration had wished.

The final version of the bill set up a main coverage provision and then provided for a number of exemptions. Thus, there were two ways an employee could be outside the Act: either fail to be "covered"; or be "covered," but "exempt." To be covered initially, a worker had to meet one of two criteria. Sections 6(a) and 7(a) contained the pertinent phraseology:

Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates.

No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce [over so many hours without paying them time and a half].¹⁹

The definition of "commerce" provided in Section 3(b) was pedestrian enough: "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." "Production of goods" required a bit more complex definition, however, and ended up being the focal point of numerous cases.

Section 3(j): [F]or the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 13(a) granted ten types of exemptions. Only two of them were the subject

of Supreme Court cases during these years, however—those enumerated in subsections (2) and (10):

Section 13(a)(2): [A]ny employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Section 13(a)(10): [A]ny individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market.

Disputes over the main coverage provisions—whether employees were either “engaged in commerce” on in the “production of goods” for commerce, and then most often whether their activities or occupations were “necessary” to production—took up most of the Supreme Court’s time. Only four cases involved the exemptions.

In addition, two other parts of the Act provided work for the federal judiciary. One of these was the problem of when overtime began. If employees were covered and not exempt, then the Act (taking both sections together) mandated that they receive the minimum wage and be paid 150 percent of their “regular” hourly rate for overtime. This presented two problems. One was that as employers adjusted to the Act, they developed a number of plans—some with good intentions and some without—to calculate wage levels and allocate hours to work and nonwork periods. Some of these plans were soon challenged in court. The other was the matter of what counted as “working time.” At issue were instances in which employees were required to be present at an employer’s place of business during certain hours but were not engaged in any directly productive activities during those hours.

The final area of litigation involved the administrative operation of the Act. The statute created a Wage and Hour Division in the Department of Labor for enforcement purposes. Its administrator was given a variety of powers and responsibilities, and some of these ended up in court.

Thus, four types of FLSA cases worked their way up to the Supreme Court between 1941 and 1946. The following discusses each of them in turn.

The General Coverage Provisions of the Act

A total of fourteen cases involving the general coverage provisions of the FLSA came to the Supreme Court during these years. Several were heard because they involved especially difficult issues, while others ended up on the Court’s docket largely because of conflicting interpretations given the Act by the courts of appeal.

The first case, *A. B. Kirschbaum v. Walling*,²⁰ is indicative both of the ambiguities created by the congressional wording and of how the Supreme Court was to approach its interpretive task. At issue here were custodians, elevator operators, and various maintenance personnel of a building owned by a New York City firm but leased to a company that produced textiles for shipment in interstate commerce. The building’s owners stressed the local character of their business and their detachment from any type of productive processes, while the Wage and Hour Division²¹ argued that these workers were involved in a “process or occupation” that was “necessary” to the production of goods to be shipped in interstate commerce.

Justice Felix Frankfurter wrote for an 8–1 majority, with only Justice Owen J. Roberts dissenting. Frankfurter began by echoing *Darby Lumber Company*’s sweeping grant of power to Congress to regulate interstate commerce. By this act, he further noted, Congress had not reached the outer limits of its power to set standards for commerce.²² 1.

next pointed how at sea the courts were as they took up the new statute. Unlike other federal statutes, such as the Interstate Commerce Act and the National Labor Relations Act, the FLSA had created no administrative body to offer up an initial interpretation.²³ Instead, in this instance, the courts have

the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction.²⁴

These “larger considerations of national policy,” only implied here, would become ever clearer in subsequent cases.

The Court’s holding here was that the controlling factor was, not the nature of the employer, but the character of the activities that the employees performed. Would the employees be covered, in essence, if the manufacturer owned the building? The answer was in the affirmative.

Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. The normal and spontaneous meaning of the language [defining] the class of persons within the benefits of the Act . . . encompasses these

employees, in view of their relation to the conceded production of goods for commerce by the tenants . . . [T]he provisions of the Act expressly make its application dependent upon the character of the employees’ activities . . . [We cannot] find in the Act . . . any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production.²⁵

Two central lessons emerge from this case. First, it proved to be crucially important that it was the activity of the worker, rather than the nature of the employer, that was to be the test. Had it been the other way around, many workers would have been denied coverage.²⁶ Second, the general thrust of reading the statute expansively set the tone for subsequent cases.

A similar path was taken by Justice Frank Murphy, also writing for an 8–1 majority in November 1942, in *Warren-Bradshaw Drilling Company v. Hall*.²⁷ After an oil well is drilled, a rotary crew is brought to the site to operate and maintain the drilling equipment. The company that provided the rotary crew in this instance had no interest in the land, the equipment, or the oil. Nonetheless, Murphy noted, at least some of the oil from the well was destined for interstate commerce, and the crew’s work was “necessary” to its production. Therefore, the Act applied. Justice Roberts penned an almost sarcastic dissent asking where this logic would end—those who made the crew’s tools? Those who cut the wood for the platform? Or even those who fed the crew?²⁸

In January 1943, the Court again followed the same general lines when it handed down a unanimous decision in *Walling v. Jacksonville Paper Company*²⁹ dealing with the other prong of the Act’s coverage, regarding those “engaged in commerce.” The company in question was a paper wholesaler, most of the products sold by which were shipped to it from out of



In a case involving oil-rig workers, the Supreme Court held that it was the activity of the workers that determined whether the FLSA applied to them, not the nature of their employer's business. Pictured are members of an oil maintenance crew in Oklahoma City in 1942.

state. At issue were the workers who stacked and packaged the goods for shipment to retail customers. Justice William O. Douglas's opinion held that those who receive or process goods that originate in another state are "engaged in commerce" and therefore within the umbrella of the Act. However, it is his maximalist dicta that is most interesting:

It is clear that the purpose of the Act was to extend federal control in the field throughout the farthest reaches of the channels of interstate commerce. . . . There is no indication that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods into the warehouse can be allowed to defeat that purpose.³⁰

Immediately after laying out this extensive reading of the Act, however, Douglas noted two caveats. First, he said, it was clear that Congress meant to leave truly local businesses to be regulated by the states.³¹ Second, he indicated that nothing the Court said should be taken to mean that the Act would be read to extend to activities merely "affecting commerce."³² This was the standard used in the National Labor Relations Act, and what the Court often came to mean when it averred that Congress had not reached the limits of its power under the Commerce Clause by the terms of the FLSA.

These concerns became manifest in another January 1943 case, *Higgins v. Carr Brothers Company*.³³ The company sold fruits and vegetables wholesale in Maine, with purchases being made both within and outside the state. Higgins loaded trucks going to in-state customers and then drove them to their destinations. The supreme court of Maine held that

when the products came to rest, they lost their interstate character, and that Higgins therefore was not covered by the Act. Douglas, writing again for the Court, held that Higgins' activities here did not qualify. Had the relevant standard been the more broadly based "affecting commerce," he added, they would have. As it stood, though, the more restrictive terminology of the FLSA left Higgins' work outside its reach.

"This is another case," Justice Murphy wrote in February 1943 in *Overstreet v. North Shore Corporation*,³⁴ "in which we must define the scope of the Fair Labor Standards Act."³⁵ North Shore operated a drawbridge spanning a river over which people and goods moved in interstate commerce. The workers in question sold tickets to the facility and operated and maintained the equipment. Murphy began by asserting two points. First, the central issue was discerning the intent of Congress. Second, Congress had not exerted its power to the full, and consequently there would necessarily be certain workers whom the legislators meant to exclude.

Even so, Murphy stressed, it would be an error to read congressional intent too narrowly. For help, he turned to a case decided under the Federal Employer's Liability Act, *Pederson v. Delaware, L. & W.R. Company*.³⁶ Prior to a 1939 amendment, that Act had covered injuries sustained while working "in such commerce" (that is, "interstate commerce"). In *Pederson*, an employee had been carrying bolts to be used in repairing a railroad bridge. Tracks and bridges, the *Pederson* Court had held, were an indispensable part of commerce, and therefore repairing them was close enough to put the worker inside the Act's term. Analogously, Murphy said, the workers at issue in *Overstreet* exerted themselves in keeping an "instrumentality of interstate commerce" open and functioning. For emphasis, Murphy repeated that it was the character of the employees' work, not the employer's business, that provided the criterion.³⁷

That some of the Justices would depart from this contention when the facts moved further away from actual production is well illustrated by a June 1943 case, *McLeod v. Threlkeld*.³⁸ The company in question subcontracted with a railroad to furnish meals to its track maintenance employees. The workers in question were cooks. Speaking for a Court split 5 to 4, Justice Stanley Reed contended that when adopting the FLSA, "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority."³⁹ Plainly backing off from the previous cases, he wrote that "[t]he test under this present Act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."⁴⁰ If they were outside this test for the "engaged in commerce" portion, then they would have to fall under the production section in order to be covered. These cooks, however, were not really "necessary" to production, and hence would have to remain uncovered. Apparently, the slippery slope Justice Roberts had feared in his *Warren-Bradshaw Drilling* dissent did have a limit.⁴¹

Justice Murphy wrote a strongly worded dissent. First, he argued, Congress meant "engaged in commerce" to be read broadly. As important, the thrust of the Court's decisions in the "production" section of the statute had been read expansively, and that should serve as precedent for the "engaged in commerce" part of the law. The Court now had separate standards for the two sections setting out the Act's general coverage, which could only lead to confusion and uncertainty.

A few months later, the Court returned to its more expansive stance when presented with the case of *Walton v. Southern Package Corporation*.⁴² Walton was a night watchman at a plant that produced goods for interstate commerce. There were two salient facts: (1)

no production occurred during the hours Walton worked; and (2) a fire insurance company gave the firm a rate reduction because of Walton's presence. In an opinion written by Justice Hugo L. Black, the Court held that Walton was covered,⁴³ citing the insurance rate reduction as the major reason.

His duty was to aid in protecting the building, machinery, and equipment from injury by fire or trespass. The very fact that a fire insurance company was willing to reduce its premiums upon conditions that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to the continuous production of [the company's] goods . . . The relationship of Walton's employment to production was therefore not "tenuous" but had that "close and immediate tie with the process of production for commerce" which brought him within the coverage of the Act.⁴⁴

A similar group of workers won coverage in *Armour & Company v. Wantock*⁴⁵ in late 1944. In a unanimous opinion written by Justice Robert H. Jackson, a group of firefighters employed by a soap factory were placed within the Act's reach, on the ground that they not only helped "to safeguard the continuity of production against interruption but [served] a fiscal purpose as well"—namely, the reduction in fire insurance premiums.⁴⁶ To reach this result, Jackson had to soften the "indispensable" test hinted at in *Kirschbaum*. He wrote that it only applied to that case, and that it could be modified subsequently if need be in order to satisfy the general purposes of the Act. In addition, he indicated that the "engaged in commerce" section of the Act was at issue in *Kirschbaum*, while here the section under scrutiny was the "necessary to production" one. "[T]he test of whether one is in commerce is obviously more exacting than the test of

whether his occupation is necessary to production for commerce."⁴⁷ Why this should be so was left unexplained, however. Nor did Jackson address Justice Murphy's point, in his *McLeod* dissent, that this state of affairs would lead to confusion. It is hard not to conclude that the general interpretive framework of construing the Act broadly was really behind this decision, and the detailed explanations largely derivative from that.

The only case to arise under the child-labor stipulations of the Act, rather than the minimum-wage or overtime provisions, was *Western Union Telegraph Company v. Lenroot*.⁴⁸ The Court split 5 to 4 over whether the delivering of telegrams by youths fell within the scope of the Act—whether the delivering of telegrams constituted being "engaged in commerce" or whether, alternatively, telegrams were a "good" within the meaning of the Act. Writing for the majority, Justice Jackson said that "[a]scertainment of the intention of Congress in this situation is impossible."⁴⁹ It would be too much of a stretch, he felt, to say that telegraph delivery boys were "engaged in commerce," and nor was Western Union a "producer" of goods.

Justice Murphy saw the case differently.⁵⁰ While it might not be possible to locate congressional intent regarding every detail of every type of business, he argued, the clear intention of Congress was to rid the United States of oppressive child labor. That should trump, he believed, any technical arguments about the status of telegrams.

Murphy got his way in the next case, which found only Justices Stone and Roberts dissenting. *Borden v. Borella*,⁵¹ handed down in June 1945, again found night watchmen at the center of the controversy. The building that was the focus of interest here was utilized by the Borden Company solely for administrative purposes.⁵² Consequently, in contrast to the situations at issue in *Kirschbaum* and *Walton*, no production whatever occurred at the facility in question. The Court brushed this concern aside, however. It found that the distinction

between actual production and managing production

is without economic or statutory significance and . . . cannot form the basis for concluding that the [company's] employees are engaged in occupations unnecessary to the production of goods for commerce . . . [The company's] executive and administrative employees working in the central office are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants.⁵³

It is hard to imagine a more sweeping statement of the issue.⁵⁴

Murphy was foiled in a companion case, however, *10 East 40th Street Building, Incorporated v. Callus*,⁵⁵ in which a cautious five-Justice majority modified *Borden*. The building's owners rented office space to a variety of firms. Altogether, forty-eight percent of the space was leased to firms clearly engaged in interstate commerce. The employees at issue were again guards, elevator operators, and so forth. Assigned the job of drafting the opinion, Justice Frankfurter began by noting that the Court was involved in "drawing lines from case to case, and inevitably nice lines." Both the lower federal courts and the Supreme Court had "been plagued with problems in connection with employees of buildings occupied by those having at least some relation to goods that eventually find their way into interstate commerce."⁵⁶ He carefully reviewed both the previous cases and the facts of this one. In the end, he simply concluded that operating a building such as this was just too remote from interstate commerce to make the workers fall under the Act. He was clearly uncomfortable having to decide a case with so few touchstones.

On the terms in which Congress drew the legislation we cannot escape the

duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases . . . Of course an argument can be made on the other side. That is what is meant by a question of degree, as is the question before us.⁵⁷

Murphy believed the case was "indistinguishable" from *Borden* and that the spirit of *Kirschbaum* was also pertinent. Moreover, he noted that the Administrator of the Wage and Hour Division had set twenty percent as the threshold level of interstate-commerce-based-business rental space in a building that would trigger the Act's coverage. His opinion on the matter, Murphy believed, should be accorded a great deal of deference by the Court. The reality was, he said, that these workers performed tasks necessary for interstate production to occur and should consequently enjoy the Act's benefits.⁵⁸

Two additional 1946 cases under the general-coverage rubric, *Roland Electrical Company v. Walling*⁵⁹ and *Martino v. Michigan Window Cleaning Company*,⁶⁰ raised similar issues, and both were decided by 8–0 votes.⁶¹ Roland's employees serviced electrical motors for manufacturing firms producing goods for shipment in interstate commerce. The Court, speaking through Justice Harold H. Burton, quickly held that these workers were close enough to production to be covered. In *Martino*, the workers in question cleaned windows at similar manufacturing plants, an activity clearly a step further removed from production than repairing electrical motors. However, the Court, again via Burton, simply noted that if the manufacturer had employed the workers directly rather than obtaining a subcontractor, they would be covered, especially in light of *Walton*. Therefore—since, once again, it was the activity of the employees that was controlling—these workers fell within the Act.

Finally, there was the rather different case of *Mabee v. White Plains Publishing*

Company.⁶² Plains published a local newspaper with about a 10,000-reader circulation. Approximately one half of one percent of the papers were shipped to out-of-state subscribers. Was the company therefore producing goods for shipment in interstate commerce? In an opinion written by Justice Douglas, the Court held that if the shipments had been “occasional” or “sporadic,” then the company would be an intrastate firm. However, since the shipments were regular, the company fell within the scope of the Act. This position was buttressed by an opinion issued by the Administrator that emphasized the regularity of shipments for determining which firms were producing goods for interstate commerce. Also, of perhaps some weight was the fact that Congress had specifically exempted newspapers of less than 3,000-person circulation from the operation of the Act.⁶³ Therefore, Douglas argued, Congress must have meant newspapers above that threshold to be considered like any other business. Interestingly, Justice Murphy alone dissented, arguing that the business was a local one.⁶⁴

Three conclusions arise from the foregoing review. First, the Court held in favor of the employees far more often than not. Second, the Court’s language was often expansive, which undoubtedly set a tenor for the lower courts. Third, the more restrictive cases tended to arise in unusual situations and—except for *McLeod*—to be decided by bare majorities.

The Retail and Service Exemptions

Remember, the FLSA provided an exemption from coverage for “any employee engaged in any retail or service establishment the greater part of whose selling and servicing is in intrastate commerce.”⁶⁵ Not until 1945 did a case testing the limits of this provision come to the Supreme Court. At issue in *A. H. Phillips, Inc. v. Walling*⁶⁶ were the central warehouse and office employees of a firm that operated retail grocery stores in Massachusetts and Connecticut. Justice Murphy was selected to author the opinion, this time for an 8–1 majority. Al-

though he conceded that the legislative history of this provision was “sparse,” he nevertheless contended that the purpose was to exempt only small businesses. Furthermore, he argued, a chain store warehouse was similar in function to a wholesale firm with interstate customers. “Establishment,” he noted additionally, surely meant a single place of business. These employees, therefore, were covered.

As was so often the case, the packaging Murphy wrapped around the decision was as important as the decision itself. Beginning by quoting a statement from the President’s message proposing the FLSA that the Act’s purpose was “to extend the frontiers of social progress,” he moved to an explanation of how exemptions should be handled.

Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.⁶⁷

Roland Electrical Company and *Martino*, both discussed above, also raised the service-exemption issue. In both cases, the companies argued that even if their employees were covered by the Act, they were exempt through this section. Justice Burton, it will be remembered, wrote for an 8–0 majority in both cases. Burton turned to four sources to help decide what “retail” meant in this context: a dictionary, the *Encyclopedia of the Social Sciences*, Bureau of the Census definitions, and the bulletins of the Administrator. He concluded that the distinguishing mark of a retail business was that it sold goods or services to an ultimate consumer. In *Roland Electrical Company*, he then said that “[a]lthough in this case the motors . . . were not purchased . . . for resale . . . and although they were to be used and probably ‘consumed’ in the hands of the [firm’s] customers, these

motors remained actively in use in the production of the 'flow of goods in commerce.'"⁶⁸ Consequently, the exemption did not apply. As for the window washers in *Martino*, they were also not exempt, since their employer's customers produced goods to be shipped in interstate commerce.⁶⁹

The following year, *Boutwell v. Walling*⁷⁰ came to the Court's docket. Burton announced the opinion of the Court again, although this time for only a 5–3 majority. The company involved here had a shop for servicing trucks that hauled automobiles across state lines. Arguing that the facts were not dissimilar enough to justify a deviation from *Roland Electrical Company* and *Martino*, the Court held that the shop's workers were not subject to the exemption. That is, the trucking companies were not the ultimate consumers of the service. In all three of these cases, Burton seems to have been applying the narrow view of the exemption advocated by Justice Murphy in *Phillips*.

Taken together, these cases complement the judicial tendency elaborated in the general coverage area: employees were to be covered if possible, and the exemptions would be read as narrowly as the coverage provisions were expansively.

Alternative Pay Systems and Working Time

In most of the cases discussed above, employers were trying to escape both the minimum-wage and the overtime provisions of the FLSA. In the following cases, the employees were clearly covered by the Act and compensated above the mandated hourly minimum. The question, then, was the relationship between regular working hours and overtime,⁷¹ inasmuch as the FLSA required all covered employees to receive time-and-a-half pay for all overtime hours. In the first batch of cases, employers had reacted to the Act by establishing new pay systems for their employees; in the second, the question was when work hours began and ended. Presumably, after a few years, the first issue would more or less melt

away: that is, market forces would tend to force people to make various accommodations, and overall hourly rates would be adjusted accordingly in light of the new realities. Nonetheless, the cases concerning the first issue do present an opportunity to glimpse the framework through which the Court applied the law, furnishing an additional helpful set of clues to understanding the Justices' thinking. The second set of cases, however, posed issues that not only served to plumb judicial philosophy, but also remained salient far into the future.

Alternative Pay Systems. The Court began grappling with the overtime provisions of the law in June 1942, deciding two cases that seem to contradict each other. The first one, however, secured an 8–1 majority, while the second came down to a 5–4 vote.

In the first, *Overnight Motor Transportation Company v. Missel*,⁷² the employee in question was a clerk in a trucking company's office. He was paid a straight salary but required to work irregular hours, occasionally up to eighty hours per week. Even during his most lengthy weeks, however, his pay was still above the minimum wage for the statutory regular week and 150 percent of that amount for all overtime hours. His employer contended that there was no requirement under the Act to segregate his working time into regular and overtime hours as long as the total pay exceeded the statutory minimum. The eight-Justice majority searched the legislative history to divine any legislative intent on the subject. Failing in that endeavor, they turned to the broad purposes of the statute as laid out in the President's initial message proposing the measure and the speeches of various backers. The congressional goals, they found, were both to set a minimum standard of living and to relieve unemployment by spreading work. The division of the law into two separate sections, one setting the minimum wage and one mandating time-and-a-half pay for overtime hours, reinforced this conclusion: the minimum wage was designed to achieve the first objective,



In 1942, the Supreme Court grappled with two cases that examined overtime pay for trucking-company workers, in which it issued seemingly contradictory decisions. Pictured, striking delivery trucks jam West 37th Street in New York City.

while the financial penalty incurred by employers who worked fewer employees more rather than hiring additional workers would contribute to the second. Therefore, the sections could not be tied together; one could not be used to escape the other. Accordingly, employers had to set a regular rate as a basis on which overtime was to be calculated. There was no “liberty of contract” to do otherwise, even if the minimum-wage provisions of the law were met.⁷³

There was only a slight wrinkle in the second case, *Walling v. A. H. Belo Corporation*.⁷⁴ When the FLSA went into effect, Belo recalculated each employee’s pay by taking the hours each one was customarily working and calculating regular and overtime rates that would make their total compensation equal to what they were earning before. However, Belo also set a “guaranty” for each employee that would be paid regardless of hours worked. The Wage and Hour Division argued that the guaranty should be the regular rate for the standard work

week, meaning that overtime hours should be paid at time and a half based on this amount. Like Justice Reed in *Missel*, Justice James F. Byrnes searched the legislative record in vain for clues to solve the problem. He then tilted against the logic of *Missel*:

The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of “regular rate” when Congress failed to provide one . . . Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected.⁷⁵

In dissent, Justice Reed stressed that the Court had opened the door to a scheme that would allow employers to defeat the congressional goal of spreading work.⁷⁶

In subsequent cases, Reed’s approach carried the day and *Belo* was all but overruled.

In November 1944, the Court handed down a decision in *Walling v. Helmerich and Payne, Inc.*,⁷⁷ with Justice Murphy speaking for a unanimous Court. The company had established a “split day plan.” The first four hours of each shift were considered regular hours and the second four were considered overtime. Any hours over forty were calculated at the regular rate up to sixty. Each employee had his hourly rate calculated so that, as in *Belo*, his total compensation given his usual hours worked would equal his previous pay. Murphy’s opinion made two central points. First, if allowed to stand, this plan would frustrate the stated congressional goal of creating a financial incentive to spread work.⁷⁸ Second, the fact that the employer had a forty-hour requirement in the pay system differentiated this case from *Belo*. It is hard to see how this could matter, however, as the net effect of the two systems is identical. More to the point, Murphy explicitly qualified *Belo*’s market-based rationale: “[F]reedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.”⁷⁹

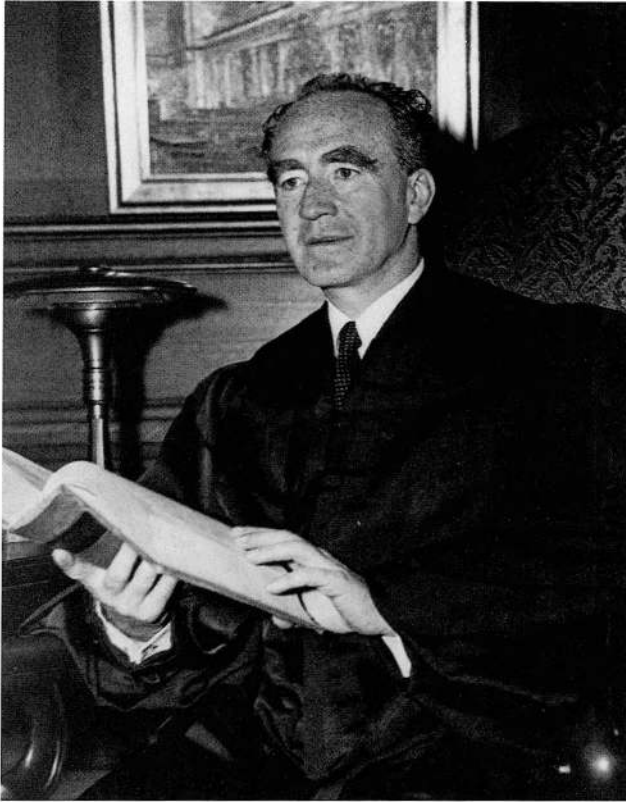
In *United States v. Rosenwasser*,⁸⁰ the Court had to decide whether piece-rate workers were covered by the Act, an issue it dealt with summarily. Over Roberts’ sole dissent, Murphy held for the Court that

[n]either the policy of the Act, nor the legislative history, gives any real basis for excluding piece workers from the benefit of the statute. This legislation was designed to raise substandard wages and to give additional compensation to overtime work as to those employees within its ambit. No reason is apparent why piece workers who are underpaid or who work long hours do not fall within the spirit or intent of this statute, absent an explicit exception as to them.⁸¹

The Court dealt with the piece-rate issue again in June 1945 in two companion cases, *Walling v. Youngerman-Reynolds Hardware*

*Company*⁸² and *Walling v. Haranischfeger Corporation*.⁸³ Justice Murphy wrote for 7–2 majorities in each case, with Stone and Roberts dissenting. The company in the first case traditionally paid its lumber-stackers on a piece-rate basis for the board feet actually stacked. When the Act took effect, stackers’ earnings averaged \$.51 per hour. The company then set its regular wages at \$.35 per hour—the statutory minimum wage—and paid overtime for work over forty hours. However, the company promised that the board feet stacked by each worker would be recorded and guaranteed that the total pay would not be less than what would have been earned under the piece-rate system. This payment plan was called an “incentive plan.” The Court said that the company was attempting to set arbitrary amounts in order to defeat the purposes of the Act. It indicated that an actual regular rate reflecting employees’ effective compensation must be established and used as a benchmark for calculating overtime pay. The Court divided the average total compensation by the average number of hours worked and held that to be the effective regular hourly rate. Straining to reconcile this holding with *Belo*, Murphy said that the difference was that the contract there “did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.”⁸⁴ Of course, that is exactly what the company did in *Belo*. In truth, what is visible in this case is the Court reading the Act more expansively and more favorably to workers.

Walling v. Haranischfeger Corporation presented only slightly different facts. The company published a complex system of time studies regarding how long various tasks at its plant should take. If workers completed an assigned task in less than the “normal” time allotted for it, then they received an “incentive bonus.” To comply with the technicalities of the law, the company set an artificially low



Justice Frank Murphy (left) wrote many of the Court's opinions interpreting the Fair Labor Standards Act in favor of the rights of workers. Owen J. Roberts and Harlan Fiske Stone were often in dissent.

hourly wage, which the workers easily exceeded with their incentive bonuses. The Court held, however, that the regular rate required by the statute must match what workers normally earn per hour: "[W]e look not to contract nomenclature but to the actual payments."⁸⁵

Within a short time, the firms involved undoubtedly recalibrated their wage systems to comply with the law, especially as they hired new workers. Hundreds of others surely did likewise. Thus, while some workers benefited immediately, the long-run economic impact of these decisions was probably minimal. Nonetheless, they do serve to illustrate that the Court was hardly taking a hands-off approach to interpreting the statute, a thrust that is amplified in the working-time cases.

Working Time. The Court did not hear a working-time case under the FLSA until March 1944. *Tennessee Coal, Iron, and Rail-*

*road Company v. Muscoda Local Number 123*⁸⁶ aptly presented the general issue and provided a chance for the Court to set the direction of policy. The case involved miners of iron ore, and the time at issue was that spent going to and from the ore face. The usual policy in the iron-ore mining industry had been to pay only for time actually spent at the mine face. Plainly, therefore, if traveling time were to be counted as working time, miners would reach the forty-hour threshold for overtime much sooner.

The wording of the statute provided little guidance, and the Court was forced to develop its own definition of "work." In the end, it settled for "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."⁸⁷ On this understanding, the decision of this particular case was simple: the trips



The question of whether travel time to and from ore mines should be compensated under the FLSA was examined in a 1944 case. If travel time were to be counted, miners would reach the forty-hour threshold for overtime much sooner. Above, ore is brought down from the face by truck.

to and from the face obviously met the terms of this definition. Nevertheless, the Court felt the need to state its conclusion in much broader terms:

[An issue such as this] can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion . . .

[The FLSA is] remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.⁸⁸

In dissent, Justice Roberts excoriated such wide-ranging ventures. He argued that Congress surely meant for the statute “to be fitted into the prevailing practices and understandings as to what constituted work in various industries.” More generally, the FLSA should not be construed “so as to accomplish what we deem worthy objects,” and the Court should stick to “what Congress has enacted rather than what we wish it had enacted.”⁸⁹

Armour & Company v. Wantock,⁹⁰ discussed above, also raised a working-time issue. The firefighters concerned in that case punched in at 8:00 a.m. and spent their workday cleaning and maintaining equipment. From 5:00 p.m. until 8:00 a.m., they slept on the premises and amused themselves with games and so forth. The question presented by the case was whether the evening hours were to be counted as work time for purposes of calculating overtime. Turning to *Tennessee Coal* for guidance, the Court noted the broad sweep of its interpretive principles. Employing

that marker, the Court held that “[r]eadiness to serve may be hired, quite as much as service itself,” making the firefighters’ evening hours compensable.⁹¹

The next case, *Jewel Ridge Coal Corporation v. Local Number 6167, United Mine Workers of America*,⁹² was one of the few that workers won by a narrow margin, 5–4. This time, Justices Jackson and Frankfurter joined the usual pair of dissenters, Justices Roberts and Stone. The issue here was whether *Tennessee Coal*’s travel-time holding should be extended to bituminous coal mines. Two wrinkles argued for restraint. First, no collective bargaining agreements in the coal-mining industry for the previous five decades had included travel time as work time. Second, the Administrator of the Wage and Hour Division had issued a public statement labeling that practice as “not unreasonable.”⁹³ The first issue was brushed aside by Justice Murphy for the Court, who simply reiterated the definition of work developed in *Tennessee Coal*: since travel time clearly involved exertion, was controlled by the employer, and was for the employer’s benefit, “to conclude that such subterranean travel is not work is to ignore reality completely.”⁹⁴ As for the second, the majority simply said that since the Administrator’s position was “legally untenable,”⁹⁵ it was not to be granted the usual respect.

In dissent, Jackson stressed not only the weight that should be given to collective bargaining agreements, finding several legislative speeches suggesting how important these contracts were, but also the deference that should be due the Administrator. He argued that in few cases had the Court “made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case.”⁹⁶

Finally, in 1946 the Court took up *Anderson v. Mt. Clemens Pottery Company*.⁹⁷ In addition to working time, this case dealt with the standard of proof for hours worked. The employees at issue showed up for work at a specific time. They then walked to a work-

shop and spent a few minutes getting their tools ready for the day’s work. The Court, with Justice Murphy writing the opinion for a 7–2 majority, held that both the walking and the tooling-up time were compensable. This ruling affirmed the decision of the lower courts. The district court, however, had held that the employees bore the burden of proving the exact extent of such time. The Court held that this was an unacceptably high barrier, since it was, after all, the employer who was compelled to keep records. The Court also returned once again to what it felt to be the broad purposes of the FLSA: “The remedial nature of this statute and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee.”⁹⁸

As with the cases under the general coverage provisions, the Court clearly came down on the side of workers and employees in this area. Businesses lost every case save one—and that one by only one vote—and in only a single instance was labor’s victory even close. In addition, the one case that business won, *Belo*, was soon gutted. Finally, these cases once again manifested a maximalist tone to the decisions, a tone that became *sotto voce* in *Tennessee Coal*.

Administrative Powers and Discretion

Four cases arose over this five-year period involving the powers and discretion of the Administrator of the Wage and Hour Division. In three of them, the Court upheld his action; in one, it clipped his wings, but only slightly.

The first of these came on the heels of *Darby Lumber*. Under the FLSA, the Administrator was empowered to establish committees for various industries. These committees were to investigate conditions in the industry and recommend moving to the statutory level of \$.40 an hour, which was to be universal for all covered workers by 1945, more rapidly if possible. If the Administrator agreed, then the new minimum wage went into effect. In *Opp Cotton Mills, Incorporated v. Administrator*,⁹⁹ the textile industry was attempting to block the

operation of its industry committee. The committee had made a recommendation, which the Administrator had adopted, suggesting a more rapid ascent toward the \$.40-per-hour rate than required by the Act. Opp Cotton made essentially two arguments: (1) that the operations of the committee were an unconstitutional delegation of legislative power; and (2) that its procedures violated the due process requirements of the Fifth Amendment. A unanimous Court, in an opinion written by Chief Justice Stone, gave each of these contentions a short shrift. This was important: had the Court decided the other way, it would have seriously hampered, if not negated, the administration of the Act.¹⁰⁰

A 1944 case, *Addison v. Holly Hill Fruit Products*,¹⁰¹ dealt with the complex “area of production” exemption for the processing of agricultural products. Recall that Congress had exempted people “employed within the area

of production.”¹⁰² What constituted the “area of production” was to be defined by the Administrator. In carrying out this command, he had established a ten-mile-radius baseline, but had then added non-geographical factors to the definition, including the requirement at issue here that the firm needed at least seven employees. That is, to qualify for the exemption, a firm had to be within a ten-mile radius of where whatever it was processing was grown and had to have seven or more employees. In an opinion written by Justice Frankfurter, the Court held 6 to 3 that “area” implied geography alone. The dissenters stressed the need to give the Administrator broad discretion, which would have resulted here in more workers being covered.

Historically, one of the great obstacles to enforcing minimum-wage legislation had been the practice of “industrial homework.” Utilized



In 1945, a group of textile companies challenged a law that banned “homework”—the practice of distributing raw materials to people in their homes and collecting and paying for the completed goods at a later date—because it made enforcing the minimum wage difficult. Pictured, textile workers in a mill put away spools to prepare for a strike.

heavily in the textile and related industries, the practice involved contractors distributing raw materials to people in their homes, collecting them at a later date, and offering payment for the completed goods. No direct mention of the practice was made in the Act, although it was briefly brought up in the congressional debates. The Administrator concluded that the only practical way to bring the textile industry inside the Act was to ban the practice entirely. He did so, under his authority to issue orders “to carry out the purposes [of the law], to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.”¹⁰³

A group of companies from the textile industry challenged this order in *Gemco, Incorporated v. Walling*,¹⁰⁴ decided in February 1945. The companies argued that congressional failure to include a ban on industrial homework after discussing it was determinative. The Court, however, with Justice Wiley Rutledge speaking for a 7–2 majority, emphasized the practicality of the situation: absent the power to abolish industrial homework, the minimum-wage law would fall apart, at least as far as this particular industry was concerned—a contention, incidentally, that the companies did not contest.

In this light, [the companies’] position is, in effect, that the statute cannot be applied to this industry. . . . So to state it is to answer it. The industry is covered by the Act. This is not disputed. The intent of Congress was to provide the authorized minimum wage for each employee so covered. Neither is this questioned. Yet it is said in substance that Congress at the same time intended to deprive the Administrator of the only means available to make its mandate effective.¹⁰⁵

The final case in this category, *Oklahoma Press Publishing Co. v. Walling*,¹⁰⁶ involved a challenge to the Administrator’s power to demand payroll records. A newspaper pub-

lisher contended that such powers breached First Amendment protections. The Court held 7 to 1, with only Justice Murphy dissenting, that to deny enforcement powers against particular businesses would cancel out congressional intent. Such records, the Court felt, had nothing to do with freedom of expression and posed no danger of limiting it.

Again, the victories of employers were limited, coming only in the “area of production” case. Otherwise, the powers of those administering the Act were given a reading that was more liberal—in both senses of the word.

Conclusion

When the Supreme Court upheld the FLSA, it was guaranteeing that it would have to play a role in defining the reach of the state into the commercial affairs of the nation. It did not, however, mean that the political direction—if any—of the coming choices was determined. It was possible, if unlikely, that the Justices could have read the Act in a somewhat, or even highly, restricted fashion, potentially hobbling the implementation of the program. Had Justice Roberts’ views prevailed, that would have been the inevitable result. More probably, the Court could have struck a neutral tone, leaning this way at times and that way at others depending on subtle distinctions of fact. It had “nice lines” to draw, as Frankfurter said, but they could have been drawn several ways.

At the same time, the type of guidance the Supreme Court provided to the lower courts was not preordained. The Justices could have spoken in more cautious language and left more issues to ripen further. Instead, they spoke expansively, almost philosophically. Altogether, the Court’s initial FLSA jurisprudence was a plain endorsement of the New Deal and its philosophy.

That these holdings had an important impact can be seen from the reactions of the Administrator. In his report for 1942, he noted with dismay the result in *Belo*, after which “a large number of employers have attempted to

avoid compensating their employees at higher rates for overtime than regular hours by making contracts they believe will comply technically with the requirements” of the decision.¹⁰⁷ After *Addison* he again noted the “widespread filing of claims.”¹⁰⁸

The importance of these cases to the development of economic policy can also be seen from congressional reaction. After this “widespread filing of claims,” and with a view to *Tennessee Coal* and *Jewel Ridge*, Congress passed the Portal-to-Portal Act of 1947.¹⁰⁹ This Act stated explicitly that working time included only workers’ “principal activities” and that “preliminary” and “postliminary” activities were not compensable. Then, in 1949, citing *Kirschbaum* and *Borden* as its rationale, Congress changed the word “necessary” in the general coverage provision to “directly essential.”¹¹⁰ Of course, all this was done by a Republican Congress and over President Truman’s strenuous objections. However, that merely underscores the point: that the Supreme Court was hardly exercising judicial restraint in economic policy from 1941 to 1946.

*An earlier version of this paper was presented at the Southern Political Science Association annual meeting, New Orleans, LA, January 2005. I would like to thank Professor Karen O’Connor for her helpful comments on that paper.

ENDNOTES

¹300 U.S. 379 (1937).

²301 U.S. 1 (1937).

³312 U.S. 100 (1941).

⁴317 U.S. 111 (1941).

⁵Bernard Schwartz, *A History of the Supreme Court* 238 (1992).

⁶Alpheus T. Mason, *The Supreme Court From Taft to Warren* 146 (1968).

⁷William E. Leuchtenberg, *The Supreme Court Reborn* 317, n. 87 (1995).

⁸*United States Statutes at Large*, 75th Cong. 3d Sess. ch. 676.

⁹The Court experienced only minor changes in personnel during these years. Of the *Darby* Court—Stone, Roberts,

Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, and Jackson—Byrnes departed in 1943 to be replaced by Rutledge, Roberts left in 1945 and was replaced by Burton, and Stone died in 1946, leading to Vinson’s appointment as Chief Justice.

¹⁰See Jerold L. Waltman, *The Politics of the Minimum Wage* (2000).

¹¹Ernest A. Young, “Judicial Activism and Conservative Politics,” 73 *U. Colo. L. Rev.* 1139, 1144 (2002).

¹²Nicholas Zeppos, “Judicial Candor and Statutory Interpretation,” 78 *Geo. L.J.* 353, 407 (1989).

¹³An excellent set of essays on this subject can be found in Symposium: “A Reevaluation of the Canons of Statutory Interpretation,” 45 *Vand. L. Rev.* 529–795 (1992), See also William Popkin, *Statutes In Court: The History and Theory of Statutory Interpretation* (1999).

¹⁴Robert Katzmann, *Courts and Congress* 49 (1997).

¹⁵I say “social or economic” rather than political, for some political theories can be institutional in character. The institutional questions—who should do what—arise much less frequently in statutory interpretation than in constitutional cases.

¹⁶George Lovell contends that, at times, Congress has deliberately pushed controversial decisions to the courts. See his *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (2003).

¹⁷I should perhaps add that from a policy perspective, I stand on the Court’s side. I argue my position in Jerold Waltman, *The Case for the Living Wage* (2004). My task here is solely to analyze the role the Court played.

¹⁸A good study of the administration’s handling of the FLSA is George Paulsen, *A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards, 1933–41* (1996). A detailed look at the legislative issues can be found in Orme Phelps, *The Legislative Background of the Fair Labor Standards Act* (1939).

¹⁹These two sections required the payment of minimum wages and additional rates for overtime. The child-labor provision was in another portion of the Act (Section 12) but had similar wording. 52 Stat. 1060; 29 U.S.C. 201.

²⁰316 U.S. 517 (1942).

²¹There were two ways cases could reach the courts under the FLSA. Under the terms of the Act, the Administrator of the Wage and Hour Division could seek to enforce the law against businesses that, in his judgment, were subject to its terms (Section 11(a)). Naturally, firms retained the right to challenge his reading of the statute, as was the case here. At the same time, an individual employee (or his or her “agent or representative”—e.g., unions) could bring a suit seeking to recover any back wages he or she thought had been improperly withheld (Section 16(b)).

²²The National Labor Relations Act had applied to all production “affecting” commerce, a much broader definition than that of the FLSA. This act had been upheld earlier, in *National Labor Relations Board v. Jones and Laughlin*

Steel Corp., 301 U.S. 1 (1937). Thus, Congress could have gone farther than it did in the FLSA.

²³In several later cases, the Court did note that the interpretation placed on the statute by the Administrator of the Wage and Hour Division was to be given a substantial degree of deference. It is still true, however, that the Administrator was an enforcing official and had no quasi-judicial powers, such as those given the Interstate Commerce Commission and the National Labor Relations Board.

²⁴*Kirschbaum*, 316 U.S. at 523.

²⁵*Id.* at 524.

²⁶In fact, this case was one of those that was continually cited by irate Republican Congressmen in 1949 when they attempted to rephrase the coverage provisions to be more restrictive.

²⁷317 U.S. 88 (1942).

²⁸*Id.* at 94–95.

²⁹317 U.S. 564 (1943).

³⁰*Id.* at 567–68.

³¹*Id.* at 569.

³²*Id.* at 570–71.

³³317 U.S. 572 (1943).

³⁴318 U.S. 125. The vote was 7–2.

³⁵*Id.* at 126.

³⁶229 U.S. 146 (1916).

³⁷This was important, since this case dealt with the “engaged in commerce” phrase, rather than the “production” phrase, as in the previous cases.

³⁸319 U.S. 491 (1943).

³⁹*Id.* at 493.

⁴⁰*Id.* at 497.

⁴¹317 U.S. at 94–95.

⁴²320 U.S. 540 (1944).

⁴³Justice Roberts said that he disagreed with the decision but felt bound by *Kirschbaum*.

⁴⁴*Walton*, 540 U.S. at 542–43 (quoting *Kirschbaum*, 316 U.S. at 525).

⁴⁵323 U.S. 126 (1944).

⁴⁶*Id.* at 131.

⁴⁷*Id.*

⁴⁸323 U.S. 490 (1945). This case is discussed as an example of an especially vexing instance of statutory interpretation by Popkin, *supra* note 13, at 142–43.

⁴⁹*Lenroot*, 323 U.S. at 508.

⁵⁰*Id.* at 509–15.

⁵¹325 U.S. 679 (1945).

⁵²Borden’s employees at its production facilities were covered inasmuch as they clearly produced goods for interstate commerce. Their status was not at issue.

⁵³*Borden*, 325 U.S. at 682–83.

⁵⁴Justice Stone, joined by Justice Roberts, dissented, arguing that the case was more similar to *McLeod* than to *Kirschbaum*.

⁵⁵325 U.S. 578 (1945).

⁵⁶*Id.* at 579.

⁵⁷*Id.* at 585.

⁵⁸*Id.* at 587.

⁵⁹326 U.S. 657 (1946).

⁶⁰327 U.S. 173 (1946).

⁶¹Justice Burton replaced Justice Roberts during this term, and Justice Jackson had already been dispatched to handle the Nuremberg trials.

⁶²327 U.S. 178 (1946).

⁶³Section 13(a)(8).

⁶⁴*Id.* at 185–86.

⁶⁵Section 13(a)(2).

⁶⁶324 U.S. 490 (1945).

⁶⁷*Phillips*, 324 U.S. at 493.

⁶⁸*Roland Electrical*, 326 U.S. at 423.

⁶⁹327 U.S. at 174.

⁷⁰327 U.S. 463 (1946).

⁷¹The Act set forty-four hours as the standard workweek during its first year and forty-two the second. Thereafter it was to be forty. Section 7(a)(1–3).

⁷²315 U.S. 572 (1942).

⁷³A compensation plan similar to the one at issue here was also voided in *Warren-Bradshaw Drilling*, discussed above. *Warren-Bradshaw Drilling*, 317 U.S. at 93.

⁷⁴316 U.S. 624 (1942).

⁷⁵*Id.* at 634–35.

⁷⁶*Id.* at 638–39.

⁷⁷323 U.S. 37 (1944).

⁷⁸Murphy also found a new congressional purpose: to compensate employees for excess work.

⁷⁹*Helmerich and Payne*, 323 U.S. at 42.

⁸⁰323 U.S. 360 (1945).

⁸¹*Id.* at 361.

⁸²325 U.S. 419 (1945).

⁸³325 U.S. 427 (1945).

⁸⁴*Youngerman-Reynolds Hardware Co.*, 325 U.S. at 425.

⁸⁵*Haranischfeger Corp.*, 325 U.S. at 430.

⁸⁶322 U.S. 771 (1944).

⁸⁷*Id.* at 598.

⁸⁸*Id.* at 592, 597.

⁸⁹*Id.* at 608, 606.

⁹⁰323 U.S. 126 (1944).

⁹¹That same day, the Court dealt with a companion case, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). A district court had dismissed the petition of a plant’s firefighters who simply had to stay “within hailing distance” between their shifts. The Court ruled that such a dismissal was premature.

⁹²325 U.S. 161 (1945).

⁹³*Cited at id.* at 169.

⁹⁴*Id.* at 166.

⁹⁵*Id.* at 169.

⁹⁶*Id.* at 196.

⁹⁷328 U.S. 680 (1946).

⁹⁸*Id.* at 686–87.

⁹⁹312 U.S. 126 (1941).

¹⁰⁰The work of these committees is discussed in Willis P. Nordlund, **The Quest For a Living Wage: A History of the Federal Minimum Wage Program** app. A (1997).

¹⁰¹322 U.S. 607 (1944).

¹⁰²Section 13(a)(10).

¹⁰³Section 8(f).

¹⁰⁴324 U.S. 244 (1945).

¹⁰⁵*Id.* at 255.

¹⁰⁶327 U.S. 186 (1946).

¹⁰⁷Department of Labor, Wage and Hour Division **Annual Report for 1942** at 73.

¹⁰⁸Department of Labor, Wage and Hour Division, **Annual Report for 1947** at 97.

¹⁰⁹**United States Statutes at Large**, 80th Cong., 1st Sess., ch. 52.

¹¹⁰**United States Statutes at Large**, 81st Cong. 1st Sess., ch. 736.

Oversimplifying the Supreme Court

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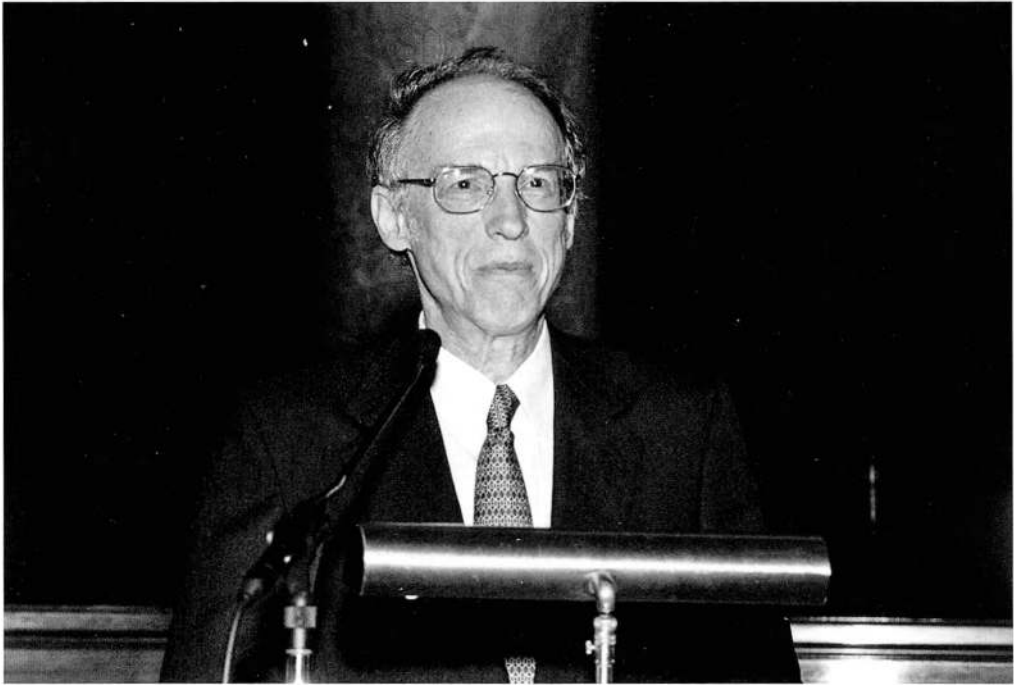
I cannot tell you what a pleasure it is to be at the Supreme Court Historical Society. Of course, the Supreme Court is fortunate to have a Chief Justice who is also Chief Historian. I have read each of Chief Justice Rehnquist's books on the Court, and they are engagingly written narratives filled with a love and knowledge of this institution. The Chief Justice is steeped in the folklore of this remarkable Court as few have ever been. This is just one reason those of us throughout the federal judiciary admire and love the Chief. He has shown kindness to me ever since I was a young law clerk for Justice Lewis Powell. I don't know if it's appropriate or not to dedicate a speech, but I am going to do so anyway. This speech is for him.

* * * *

My focus today will be on oversimplification of the Court's work in the twentieth century. I should note, however, that there has been a tendency to oversimplify the nineteenth-century Court as well. The Marshall Court, for example, is justly and frequently praised for its nationalistic vision. The famous case of *Gibbons v. Ogden* gave meaning to the commerce power.¹ *McCulloch v. Maryland* later advanced an expansive interpretation of the "necessary and proper clause."² By contrast, the *Dartmouth College* case, holding that the state of New Hampshire had impaired the obligations of a contract in amending the College's Royal Charter, took a less charitable view of state authority.³ Such cases left such an astute observer as Chief Justice Rehnquist to con-

clude "he [Marshall] found the national government with its fate as yet undetermined by any binding judicial interpretation as to the extent of its powers. He left it a limited but strong central government equal to the large tasks that would confront it."⁴

This description has quite a bit of accuracy, yet even here, the received wisdom needs to be qualified. There are counterexamples—and powerful ones—to any generalization about the Marshall Court's work. The supposedly nationalistic Marshall Court held in the 1833 case of *Barron v. Baltimore* that the Bill of Rights did not apply to State government.⁵ Chief Justice Marshall's opinion is a ringing endorsement of states' rights that would have made even his old adversary Thomas Jefferson exceedingly pleased. "Serious fears," wrote Chief Justice Marshall,



Author J. Harvie Wilkinson III (pictured) argues that many Supreme Court Justices resist oversimplification. Even the great Chief Justice John Marshall, a nationalist, wrote a consequential decision in *Barron v. Baltimore* limiting federal power in a profound and extraordinary way.

“were extensively entertained, that those powers which the patriot statesmen . . . deemed essential to union . . . might be exercised in a manner dangerous to liberty.”⁶

Barron was not, shall we say, a slam-dunk. Even in the pre-Civil War era, the question was not as textually clear as Marshall thought it. While the Chief Justice pointed to the fact that the language of the Bill of Rights did not parallel the “no State shall” language of Article I, Section 10,⁷ other scholars have noted that only the First and Seventh amendments inhibit by their terms the national government, but that other provisions of the Bill of Rights appear to proscribe government action at all levels and in general terms.⁸

It took a Civil War, the post-Civil War amendments, and a bruising debate over the Fourteenth Amendment’s incorporation of the Bill of Rights against the states between Justices Hugo L. Black and John Marshall Harlan to modify Marshall’s initial view. Still, it is interesting that even the great Chief Justice re-

sists oversimplification. One of the most consequential decisions of the thoroughly nationalistic Marshall Court limited federal power in a profound and extraordinary way.

Oftentimes, those who oversimplify the Supreme Court posit that the Court is acting politically rather than doctrinally.⁹ A prime example of this is the explanations offered for the Court’s apparent retreat in 1937 from its earlier and supposedly implacable opposition to the New Deal.¹⁰ The brunt of this political accusation fell on Justice Owen J. Roberts, a “swing vote” on the Court at that time.¹¹ Justice Roberts had voted in the 1936 case of *Morehead v. New York* to invalidate a New York minimum-wage law for women.¹² The next year, however, he cast the crucial fifth vote for Chief Justice Charles Evans Hughes’ opinion in *West Coast Hotel v. Parrish*, which upheld a minimum-wage law for women in the state of Washington and announced that the constitutional prohibition on the deprivation of liberty without due process “does not



The aphorism “a switch in time saves nine” oversimplifies Justice Owen J. Roberts’ seeming change of heart in *West Coast Hotel v. Parrish*. He did not uphold the minimum-wage law for laundresses (pictured) because of President Roosevelt’s ominous plan to pack the Court with new Justices: the secret plan was still months from being announced when the case was decided.

recognize an absolute or uncontrollable liberty” of contract.¹³ Justice Roberts’ apparent change of heart was widely ascribed to political motives, among them a desire to retreat in the face of President Franklin D. Roosevelt’s resounding re-election in 1936 and the imminent unveiling of the Court-packing plan. The whole episode gave rise to the popular aphorism of the “switch in time that saved nine.”

These crude political characterizations do a disservice to the Supreme Court. In his recent book, *Rethinking the New Deal Court*, Professor Barry Cushman points to a far more complicated reality than the political oversimplification of the Court’s work suggests.¹⁴ In the process, I think he does much to rehabilitate the reputation of Justice Roberts. Cushman notes that “Roberts cast his decisive vote in

conference on December 19, 1936, more than six weeks before the plan, a very closely guarded secret, was announced.”¹⁵ Moreover, Justice Roberts had authored the 1934 opinion in *Nebbia v. New York*, which, in its declaration that “neither property rights nor contract rights are absolute,” contained both reasoning and language very much in line with *West Coast Hotel*.¹⁶

Cushman goes on to make the broader point that *West Coast Hotel* and its companion cases in 1937 should not be viewed as a hasty political retreat in the face of President Roosevelt’s popularity.¹⁷ The Court had for years been cutting back on such landmarks of judicial invalidation of economic regulation as *Lochner v. New York* and *Adkins v. Children’s Hospital*.¹⁸ By 1937, notes Professor Cushman,

the prohibition against minimum wage legislation was about all that was left of economic substantive due process. A decision formally announcing the last breath of a moribund body of jurisprudence hardly deserves to be called a "constitutional revolution." It was instead the final phase of a long and unevenly staged judicial withdrawal. The empire of substantive due process was already in a state of collapse when the *Parish* decision officially lowered the flag over its last colony.¹⁹

This oversimplification of the Supreme Court's work continued through the 1960s. Indeed, the Warren Court was a target for oversimplification of all sorts. This was particularly true with issues of criminal justice. Decisions such as *Mapp v. Ohio*,²⁰ *Gideon v. Wainwright*,²¹ and *Miranda v. Arizona*²² are now a part of the fabric of our criminal law. At the time, however, those decisions were intensely controversial. Critics sought to link the Warren Court with the more lawless excesses of the 1960s, and Richard Nixon made the Court's alleged transgressions a centerpiece of his 1968 presidential campaign. In this enterprise, he was given considerable ammunition by dissenters on the Court itself. As Justice Byron White lamented in *Miranda*: "In some unknown number of cases the Court's rule will return a killer, or rapist, or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity."²³

But here, too, the picture is less simple than it may appear. In actual fact, the Warren Court could be supportive of the interests of law enforcement. Consider the seminal case of *Terry v. Ohio* from the high days of Chief Justice Earl Warren's tenure.²⁴ In *Terry*, the Court upheld the right of officers to stop and frisk suspects on the street for weapons on a standard of reasonable and articulable suspicion.²⁵

That standard was considerably more lenient than the Fourth Amendment's express requirement of probable cause. There were, to be sure, the usual grumblings that the Court's *Terry* decision was nothing more than an attempt to deflect criticism in the run-up to the 1968 election. It remains the case, however, that the decision was broadly supportive of the interest in public safety. The Court noted that "it would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate" the suspect's behavior further.²⁶ Moreover, "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded."²⁷

A decision of this magnitude was anything but inevitable. As Justice William O. Douglas wrote in dissent, the Court's dilution of the probable cause standard gave the police "greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action."²⁸ But just as *Miranda* has become part of the fabric of our law, so has *Terry*. In fact, I would venture to say that *Terry* has assisted the legitimate efforts of law enforcement to a much greater degree than *Miranda* has hindered them. It is among the ironies of the judicial process that this boost to police work came from a Supreme Court whose oversimplified image was one of undue sympathy for criminals.

The oversimplification of the Warren Court extended to the work of individual Justices. For example, Justice Black was generally supposed to be a part of the prevailing liberal block on the Court. By contrast, Justice John Marshall Harlan was supposed to align himself with the dissenting conservatives. Once again, however, the picture is oversimplified. In fact, it ignores the important questions surrounding the debate on privacy. In *Spinelli v.*



Although the Warren Court is known for having expanded the rights of criminals, in *Terry v. Ohio* it upheld the right of police officers to stop and frisk suspects on the street for weapons on a standard of reasonable and articulable suspicion.

United States, Justice Harlan wrote an opinion for the Court holding that an informant's tip was not sufficient to provide probable cause that a crime was being committed because it did not provide an adequate basis for assessing the informant's reliability and did not set forth the underlying circumstances from which the informant's conclusions had been formed.²⁹ Justice Black dissented, noting that the Court had gone too far toward elevating the standards for issuance of a search warrant to the evidentiary standards governing "a full-fledged trial."³⁰

The Fourth Amendment, therefore, often showed the supposedly conservative Justice Harlan to be more solicitous of privacy interests than the supposedly liberal Justice Black. Matters really came to a head, however, in *Griswold v. Connecticut*, where Justice Harlan wrote an opinion concurring in the judgment

of the Court that struck down a Connecticut statute criminalizing the use of contraceptives and the abetting of such use.³¹ In Justice Harlan's view, the Connecticut statute violated the Due Process Clause of the Fourteenth Amendment because it transgressed "basic values 'implicit in the concept of ordered liberty.'"³² Justice Black, in dissent, would have nothing to do with Justice Harlan's view that a general liberty or privacy right existed independently of the particular provisions of the Bill of Rights.³³ For Black, "the evil qualities" that his colleagues perceived in the Connecticut law would not make it unconstitutional.³⁴

In the face of such basic differences in such important cases, it becomes more difficult to pin an ideological label on either Justice Black or Justice Harlan. The oversimplification of such characterizations ignores the fact



Although Justice Harlan was considered conservative and Justice Black liberal, in *Griswold v. Connecticut*, Harlan showed that he was the more solicitous of the right to privacy. The case involved a challenge to an 1879 law that forbade the use or prescription of contraceptives, even to married couples.

that the two Justices were actually applying a set of neutral principles that understandably led to politically diverse results.

It can be treacherous, in fact, to seek to tether even a seemingly absolutist Justice to a predictable point of view. Even in the most monochromatic careers, there can be surprises. For example, James McReynolds was a Justice whose lack of open-mindedness was legendary.³⁵ Yet in *Meyer v. Nebraska*, Justice McReynolds offered a paean to the teaching of modern languages, counteracting the xenophobic tendencies of the day.³⁶ And in *Pierce v. Society of Sisters*, Justice McReynolds broadly supported the right of parents to send their children to private and parochial schools, thereby enhancing the diversity of educational offerings in our society.³⁷

Justice Douglas was often thought to be a liberal's liberal, and it is true that the characterization generally stands up in his case.

Yet in *Village of Belle Terre v. Boraas*, Justice Douglas wrote an opinion upholding, over the dissents of Justices Brennan and Marshall, a New York zoning ordinance with a definite preference for family groups over unrelated ones.³⁸ Justice Douglas has often been thought to be an indefatigable champion of the dispossessed. Yet in *Village of Belle Terre*, sustaining the land-use restriction, the Justice offers what can only be termed an ode to the most affluent neighborhoods in our society:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings

of quiet seclusion and clean air makes the area a sanctuary for people.³⁹

I had a personal brush with oversimplification when I came to clerk for Justice Lewis Powell in the beginning of 1972. The Court was undergoing dramatic change. Several of its giants had only recently departed, and there had been searing confirmation battles over their successors. President Nixon eventually succeeded in placing four Justices on the Court: Warren Burger, Harry Blackmun, Powell, and William H. Rehnquist. Before coming to clerk, I had always supposed the term “Four Horsemen” applied to Notre Dame football. What was meant to be a term of respect on the gridiron had become a convenient means of disparagement for Justices. The term was now dusted off from the 1930s and applied to the four Nixon appointees. It was meant to suggest that Nixon was out to remake the Court in his own image and that the four Justices were prepared to move in lock-step to do his bidding.

As we all know, this particular stereotype came crashing down. In *United States v. Nixon*, the Court, including three of President Nixon’s own appointees, rejected sweeping claims of executive privilege and required the President to turn over certain Watergate documents and tapes.⁴⁰ But quite beyond that, the supposed Four Horsemen all proceeded to gallop off in different directions. In fact, Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist often conducted themselves on the Court as if very different Presidents had appointed them.

I think, at this point, I should not proceed into more recent history. We lack the perspective on it. We can be sure, however, that today’s Supreme Court and today’s Justices are being oversimplified at this very minute, just as their predecessors have been. In some cases (the Four Horsemen, for example), the oversimplifications have proved wildly inaccurate. In others (the New Deal and Warren Courts), the oversimplification has been in need of



Three of President Nixon’s appointees to the Court rejected sweeping claims of executive privilege and required the President to turn over certain Watergate documents and tapes.

major caveats or qualifications. But if history proves anything, the tendency to oversimplify the Supreme Court is probably here to stay. This oversimplification of the Court's work persists despite the presence of the Supreme Court press corps, which is among the most informed and insightful in all of journalism.

So why is the need to oversimplify the Court's work so strong? Part of the reason, I suspect, is that our democracy feels the need to explain the Court in its own political terms. Thus, the most common descriptions of the Court's work all have political parallels. We feel the need to give the Court the name of the Chief Justice, just as we give an administration the name of a President. If there is a Johnson administration, why, there must be a Warren Court. If there is a Nixon administration, there must be a Burger Court. Never mind the fact that, unlike the President, the Chief Justice is no more than one among equals, and the other members of the Court are not accountable to him. Never mind the fact that, unlike an administration, the Court will not undergo a complete makeover after four or eight years. And while we are at this business of political characterization, let us just call the Justices liberals and conservatives, since we have pinned those labels to our political figures. The Justices ought to be thankful, I suppose, that they are not generally called Democrats, or Republicans, or Federalists, or Whigs, or Bullmoosers, or whatever, although there is unfortunately no guarantee that they shall forever escape that fate.

But it is not only the need to draw political parallels that explains the oversimplification of the Supreme Court's work. Courts are, above all, public institutions. They are not the private preserve of judges and practitioners, and they simply must be explained to American citizens in understandable terms. Yet translating law into lay terms is a ruthlessly reductionist enterprise. There simply is not the time in a speech, or a talk show, or the proverbial soundbite to convey the subtlety of the Court's work. When Thomas Jefferson, Franklin Roosevelt,

and Richard Nixon sought to express dissatisfaction with the Court, they knew distinctly that their audience was a lay, not a legal, one. The Lincoln-Douglas debates are perhaps the best exposition of a legal issue that has ever reached a broader public audience. In 1858, throngs of people crowded into parks all across the state of Illinois just to hear those two men debate legal issues for over three hours at a time.⁴¹ This, however, is probably the exception that proves the rule.

As a non-democratic institution in a democratic society, and as a professional institution with public responsibilities that extend far beyond the profession, the Court is almost uniquely vulnerable to oversimplification and mischaracterization. But we still have an important question to ask. Is all this oversimplification a bad thing?

In one sense, it surely is an undesirable phenomenon. The oversimplification means that many millions of Americans never receive a fully true and accurate description of the Supreme Court and its work. And oversimplification can be intensely unfair to those Justices whose honest professional labors are distorted and mischaracterized. So in one sense, oversimplification is truly a shame.

But I want to advance a counterintuitive argument today: I would contend that oversimplification has its desirable aspects. To begin with, depiction of the Court's work serves a useful purpose, even when it lacks the appropriate subtlety and nuance. We can appreciate this by looking at our own standing vis-à-vis the medical profession. Would we rather, as lay persons, have a less-than-perfect discussion of prescription drugs, surgical procedures, and the medical profession in general, than to have no information at all? Those of us who are outside of highly specialized professions still benefit from information, even if it is not of the more refined variety that fellow professionals desire.

I have never completely subscribed to the maxim that less than total knowledge is a dangerous thing. Rather, some knowledge seems

better to me than no knowledge. Every citizen is better off knowing *something*, even if not everything, about the Supreme Court. And although this may be heresy, even crude and oversimplified explanations of the Court's work product have the salutary tendency to emphasize that no one is above criticism. The Court's work has profound consequences for the lives of all Americans. Not only are citizens entitled to express their displeasure in whatever terms are meaningful to them, but they should be encouraged to do so. In particular, if the Court is perceived to intrude on democratic prerogatives, then democracy is entitled to bark back in the vernacular of the street and soap-box, not the salon.

Are all the popular slogans and labels too crude, too simple, and/or just plain wrong? Well, so what? I think we are entitled, as a country, to take some satisfaction in the fact that the work of our Supreme Court cannot be accurately grasped in political terms or accurately summarized in some pithy phrase or two. We should take reassurance from the fact that oversimplifications are often just that. Imagine, for example, if the full reality of the Court could be easily and rather effortlessly captured. If that were the case, it would be a work product bereft of the neutral principles that should attend the very highest levels of the practice of law.

Perhaps there is an analogy between the work of the Supreme Court and that of a symphony orchestra. Both do, and should, elude definitive description. A great symphony eludes simplification because it operates on multiple levels and because its sounds have endless permutations. Perhaps a great Court eludes easy characterization because the relationships between its players are not always easy to pin down.

But a court's work should elude simplification for somewhat different reasons. The human dilemmas that law was intended to resolve are not in themselves simple. And the doctoral precepts of the law often stand in conflict to

one another. Most fundamentally, however, a court is an institution whose paradoxical purpose is to transcend politics even as it draws its strength and sustenance from democratic soil. The fact that simplified descriptions of the Supreme Court's work have not been possible means only that the Court is doing its job.

So, our greatest worry should not be that the Supreme Court has been oversimplified throughout American history. Our greatest worry should be that one day these same simplified descriptions might just become accurate. If they do, it will mean that the Court has cast its lot with the political branches of government and forsaken its allegiance to the rule of law. A Court devoted to law will always prove elusive to a democracy. A Court that truly sees law as an apolitical art will never prove easy to categorize.

Will we one day be able to pin some adjective to this Court, or that Justice, and respond, "Yes, that description is absolutely true and right?" What an unfortunate moment that will be. For just as we understand the needs of a democracy to oversimplify the Supreme Court, we must respect the need of the Supreme Court to resist the attempt. A judge's allegiance is not to temptations of policy and politics, but to the constraints of law. On the day when simplification ceases to be oversimplification, the Supreme Court will have surrendered the essence of its craft.

*This article was delivered as a Supreme Court Historical Society Annual Lecture in the Supreme Court on June 6, 2005.

ENDNOTES

¹22 U.S. (9 Wheat.) 1 (1824).

²17 U.S. (4 Wheat.) 316, 324–25 (1819).

³*Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 675 (1819).

⁴William H. Rehnquist, *The Supreme Court* 40 (Alfred Knopf, Random House 2001) (1987).

⁵32 U.S. 243, 247 (1833).

⁶*Id.* at 250.

- ⁷*Id.* at 248.
- ⁸*See, e.g.*, 2 William Winslow Crosskey, **Politics and the Constitution in the History of the United States** 1049–82 (1953).
- ⁹*See, e.g.*, G. Edward White, **The Constitution and the New Deal** 303 (Harvard University Press 2000) (“[C]ontributors to the conventional account have anticipated that early twentieth-century Supreme Court Justices, being a species of political actors, would respond to external political pressures on their institution, and that their response would take the form of altered interpretations of the Constitution.”)
- ¹⁰*See generally* Barry Cushman, **Rethinking the New Deal Court** 3–4 (Oxford University Press 1998).
- ¹¹*Id.* at 45.
- ¹²298 U.S. 587 (1936).
- ¹³300 U.S. 379, 391 (1937).
- ¹⁴Cushman, *supra* note 10.
- ¹⁵*Id.* at 45.
- ¹⁶291 U.S. 502, 510 (1934). *See also* Cushman, *supra* note 10, at 45.
- ¹⁷*See generally* Cushman, *supra* note 10.
- ¹⁸*Id.* at 104–05; *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).
- ¹⁹*Id.* at 105.
- ²⁰367 U.S. 643 (1961).
- ²¹372 U.S. 335 (1963).
- ²²384 U.S. 436 (1966).
- ²³*Id.* at 542.
- ²⁴392 U.S. 1 (1968).
- ²⁵*Id.* at 20–21.
- ²⁶*Id.* at 23.
- ²⁷*Id.*
- ²⁸*Id.* at 36.
- ²⁹393 U.S. 410 (1969).
- ³⁰*Id.* at 429.
- ³¹381 U.S. 479, 499–502 (1965).
- ³²*Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).
- ³³*Id.* at 507–27.
- ³⁴*Id.* at 507.
- ³⁵*See* Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** 132–35 (rev. ed. 1999).
- ³⁶262 U.S. 390 (1923).
- ³⁷268 U.S. 510 (1925).
- ³⁸416 U.S. 1 (1974).
- ³⁹*Id.* at 9.
- ⁴⁰418 U.S. 683 (1974).
- ⁴¹Jamin B. Raskin, “The Debate Gerrymander,” 77 *Tex. L. Rev.* 1943, 1944–45 (1999).

Failing Justice: Charles Evans Whittaker of the Supreme Court, **by Craig Alan Smith**

REVIEWED BY ALAN C. KOHN

Is there any value in judicial biographies? Is not the time of educators better spent writing on other matters, cutting edge issues which can have a significant impact on important questions of the day?

Some time ago, Judge Richard A. Posner apparently espoused that view.¹ Judges decide cases and write opinions. It is the responsibility of lawyers and judges to read those opinions carefully and then decide whether issues raised by the facts of the matter before them are ruled by those opinions. Biographical information about the writer of an opinion is irrelevant. It makes no difference whether the opinion's author is an immigrant who came over on a boat in 1882 or whether the author's ancestors came over on a boat in 1620. Either way, the opinion has the same value.

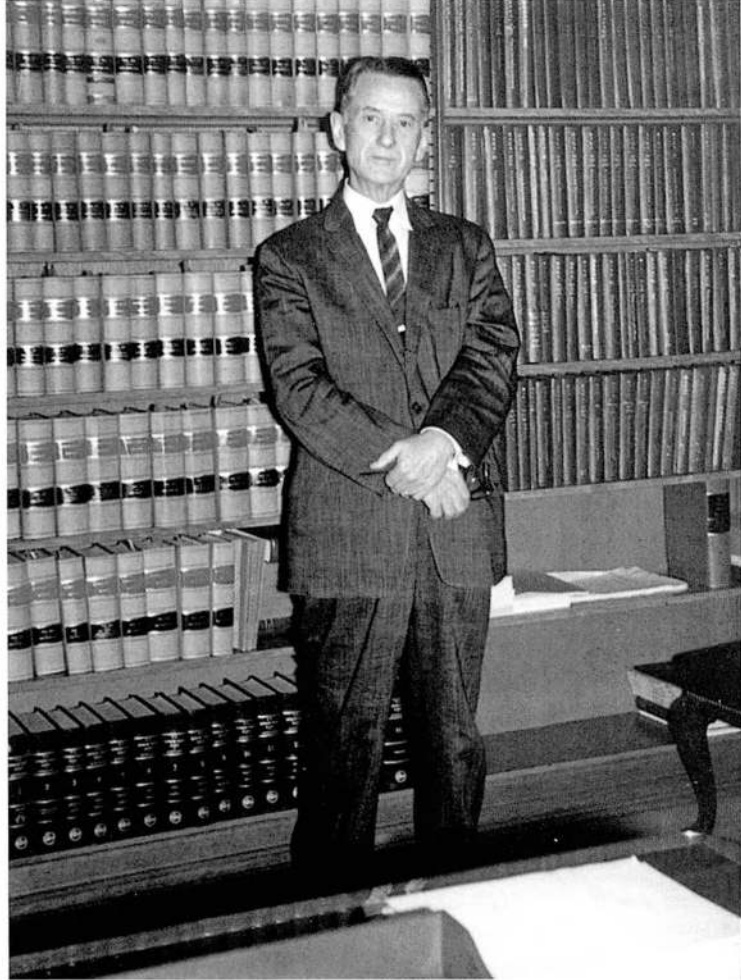
By analogy, do we need to know about Frank Lloyd Wright's personal life to know that his prairie and Usonian houses are architectural masterpieces? Is it necessary to read Mozart's biography to appreciate his Jupiter Symphony? Do we need to know who really wrote Shakespeare's plays to appreciate the

fact that Hamlet is a great play worthy of study and enjoyment? Judicial opinions, like architecture, music and theatre, are the result of a creative process and should be taken at face value. Biography is beside the point.

Professor Melvin I. Urofsky has taken a different view.² He argues that judicial biography, especially of Supreme Court Justices, enables us to understand better the judicial process and the Supreme Court and its role as one of three branches of government.

As a lawyer, I tend to agree with Judge Posner, but I doubt he would disagree with the law of supply and demand. Remarkably, there have been only 110 Justices in the 217 years of the country's existence, and the citizenry is curious about them, especially as it more fully realizes that some opinions of the Court can have a definite and immediate influence on their lives. Add to that the need to "publish

Justice Charles Whittaker's forte was "finding the law": applying the facts of the case to that law and then coming up with a reasoned and fair decision. Unfortunately, Whittaker (pictured in his chambers), who lacked a liberal arts education, had great difficulty deciding cases where there was no existing applicable law.



or perish," which affects educators every day. The net result is that an academic, if he can find a publisher who believes there is money to be made, cannot be faulted for trying to enhance his career and also make a little extra cash by writing the biography of a Justice of the Supreme Court.

If such a biography is to be written, should it not be written about a Justice who belongs in the Pantheon of Supreme Court Justices? In the last fifty years, Chief Justice Earl Warren and Justices Hugo L. Black, William J. Brennan, William O. Douglas, Felix Frankfurter and John Marshall Harlan are good candidates for biography. They are the relatively recent, highly regarded Justices who have caught the attention of the public and of constitutional

scholars alike. But the biographies of Pantheon Justices have either already been written or are about to be written and published.

That brings us to **Failing Justice: Charles Evans Whittaker of the Supreme Court**, by Craig Alan Smith.³ Justice Whittaker is not well known, and he has been trivialized and demeaned by many constitutional scholars. Who will buy such a book? The publisher is undoubtedly hoping for quite a few sales. I am sure the author has the same hope. Supreme Court cognoscenti, many Missouri lawyers and judges, and libraries will probably want a copy.

Is this a book worth reading? If so, why? Justice Whittaker's Horatio Alger story is remarkable and interesting. An impoverished

Kansas farm boy, at age twenty, quits plowing the fields and trapping small animals and heads for Kansas City, Missouri. He simultaneously goes to high school, attends law school, and serves as an office boy at the law firm of Watson, Gage and Ess. Upon graduation in 1924, he becomes an associate at the Watson firm, and through ability, incredibly hard work, and perseverance, he becomes a senior partner of substantial wealth and great respect. Then, one telephone call to his friend and client, Roy Roberts, publisher and manager of the *Kansas City Star*, is all that is needed to propel Whittaker, in two years and nine months, from the federal district court to the Eighth Circuit Court of Appeals to the Supreme Court of the United States. Breathtaking, to be sure, but that is a short story and is generally known.

What is also generally known is that Justice Whittaker had served on the Supreme Court for only five years when, at age sixty-one, a nervous breakdown forced him into premature retirement. Since that time, constitutional lawyers, professors, and other academicians, led by a few outspoken critics, have evaluated the Justice as a failure, a “terrible” Justice, one of the ten worst—or even the absolute worst—Justice of the twentieth century. A major value of this book is that it contains a detailed analysis of the criticism of the Justice, and of the Justice’s actual record with the Supreme Court, and finds that these evaluations are generally unwarranted and grossly exaggerated.

One criticism of the Justice has been inconsistency. For example, he voted with the liberal Justices in holding that a young, uneducated black man had not knowingly waived his right to counsel,⁴ yet he joined the conservative Justices to uphold the conviction of two defendants who claimed their confessions were coerced because they feared for their lives.⁵ The author gives other, similar examples. Obviously, however, whether a confession is coerced or a defendant is denied a right to counsel are constitutional *fact* questions. A Justice may reasonably reach different conclusions based

on different facts. Being consistently liberal or conservative in constitutional fact cases is not necessarily a virtue.

Another, weightier criticism is that in the “big” cases—those involving landmark decisions, constitutional questions, and civil liberties—opinions by Justice Whittaker are few and far between. Whittaker had great difficulty even in casting a vote in these types of cases. His forte was “finding the law,” applying the facts of the case to that law, and then coming up with a reasoned and fair decision. Unfortunately, sometimes the law is nowhere to be found. Can Congress deprive a person of his citizenship if he votes in a foreign election? The facts are simple, but there is no applicable law to apply. It was that kind of case that Whittaker, who lacked a liberal arts education, had great difficulty in deciding.

The author concludes, however, that Justice Whittaker wrote opinions which influenced other Justices or had significant precedential value in criminal procedure, tax law, federal tort claims, patent law, and other examples of the “bread and butter” litigation that constitutes a majority of the Court’s docket. By the 1959 Term—his third full Term on the Court—Whittaker, contrary to the views of his detractors, was writing opinions up to the average level of other Justices, and his total opinion output (majority, dissenting, and concurring) was above the average.

A number of opinions are cited. In one tax case, *Flora v. United States*,⁶ the Court (with Chief Justice Warren writing for the Court) voted 8–1 (Whittaker dissenting) to uphold the government view. After a rehearing was granted, Warren could command only five votes, with Whittaker getting three others to join his dissent.⁷ In *Florida Lime & Avocado Growers v. Jacobsen*,⁸ a majority of the Court, in an opinion by Justice Frankfurter, held that the district court lacked federal jurisdiction. Whittaker circulated a dissent which caused five Justices to join him, and the Whittaker dissent became a majority opinion. In the tax case of *United States v. Kaiser*,⁹ Whittaker’s

dissent, stressing the importance of motive in determining what constitutes a gift, ultimately influenced Tax Court decisions in later cases more than the majority opinion did.¹⁰ In *Lawn v. United States*,¹¹ Whittaker wrote an opinion in which the Court held that prejudicial arguments made by the government in closing were provoked by defendants' counsel. For at least thirty-seven years, the Supreme Court relied on Whittaker's "invited response" rule.¹² In *United States v. F & M Schafer Brewing*,¹³ with Whittaker writing for a majority and Frankfurter and Harlan dissenting, the Court held that the time for appeal ran from the time a judgment specifies a dollar amount. Thirty years later, the Second Circuit relied on *Schafer* in rendering a decision in a similar case.¹⁴ In *United States v. Neustadt*,¹⁵ Whittaker wrote for the Court that the Federal Tort Claims Act does not cover suits against the United States for misrepresentation. That decision was cited as authority over thirty years later.¹⁶ Finally, in *Draper v. United States*,¹⁷ Whittaker wrote an opinion for the Court finding that hearsay information from a reliable informer was sufficient to establish probable cause for an arrest without a warrant. The opinion is considered a "classic case" and has continued to have vitality.¹⁸ The author cites other instances of important and enduring opinions by Justice Whittaker.¹⁹

It is doubtful whether many of the scholars with whom Whittaker has fared so poorly have read opinions of this type, much less appreciated them. Generally, these opinions were not constitutional, civil-rights, or landmark decisions, and therefore they fell below the Plimsoll mark of decisions scholars usually consider in evaluating Justices of the Supreme Court.

Another reason Whittaker has been the subject of ridicule and claims of inadequacy as a Justice is the contention by Justice Douglas²⁰ that he wrote Whittaker's majority opinion in *Meyer v. United States*²¹ and then also wrote the dissent. The author's analysis casts great doubt on the accuracy of this anecdote. It ap-

parently has no support other than Justice Douglas's personal recollection recounted in the second volume of his autobiography, a book published after Douglas's mind was deteriorating from a second stroke. Justice Abe Fortas once opined that Justice Douglas was a very sick man by then and that the second volume never should have been published.²² More likely, at least to this writer, is that a very ill Justice Douglas was thinking of *United States v. Hvass*,²³ which was decided shortly after Whittaker came to the Court. Whittaker was unable to draft to his satisfaction two key sentences in his majority opinion. When Douglas dropped by Whittaker's office, Douglas offered to help and Whittaker accepted. Shortly thereafter, Douglas sent his version of how the two sentences should read. Whittaker adopted those sentences. The decision came down, 8-1, with Douglas dissenting without opinion.

Whittaker's detractors also point to the fact that he lasted only five years and that his resignation in 1972 was occasioned by his inability to cast a vote in *Baker v. Carr*²⁴ or to write the Court's opinion in *Brown Shoe v. United States*.²⁵ This criticism is probably the unkindest cut of all. Whittaker suffered from chronic, clinical depression his entire life. When he was seventeen, his mother died, and the depression that ensued prevented him from continuing his education. He dropped out of high school and became a full-time farmer for three years. Later, as a lawyer in Kansas City, he had difficulty withstanding the stress of trial work, and on at least one—and perhaps several—occasions he went into deep depression. In 1937, when he was thirty-six, a forced one-month vacation in Arizona was necessary to overcome his illness. It may well have forced him out of trial practice and into corporate work and have led to his decision to seek a judgeship.

Whittaker's two years as a district court judge were the happiest years of his life. He could control his docket and participate in trial work without the stress of trial preparation and the fear of failure. He said on more than one

occasion that he should have remained on the trial bench. But he became a victim of the Peter Principle. His excellent work was rewarded with promotion after promotion to an even higher level of success until he finally was promoted to the level of his greatest inability: Associate Justice of the Supreme Court of the United States.

There is some evidence that he sensed impending doom. When appointed to the Court of Appeals, he said, "I have never ceased praying to God. I will never cease praying. He'll always see me through."²⁶

His first year and a half on the Supreme Court was a nightmare; he kept working even though he was experiencing, or on the verge of experiencing, a nervous breakdown. Then, fortunately, two occurrences gave him new life. Justice Potter Stewart replaced Justice Harold Burton. Also, Whittaker developed an abiding affection for Justice Harlan and found himself most comfortable with the conservatives on the Court—Harlan, Tom Clark, and Frankfurter—even though Frankfurter constantly made him feel inferior. Generally, Whittaker became the fourth conservative. He was no longer in the middle between the conservatives and the liberal four—Warren, Black, Douglas and Brennan. It became Stewart's turn to be caught in the middle.

Whittaker's move to the right eased his stress and enabled him to be a productive and competent Justice during the 1958, 1959, and 1960 Terms. During the October Term 1961, however, along came *Baker v. Carr*, a landmark case. Justice Frankfurter wanted to preserve *Colegrove v. Green*²⁷ and hold that legislative reapportionment was a "political thicket" that the Court should avoid. He needed both Stewart's vote and Whittaker's, but talk of abstention and political thickets were foreign to Whittaker's understanding of the law. If an injustice has occurred, should not the Supreme Court have the power to correct it? Importuned by both sides of the Court and relentlessly badgered by Frankfurter, Whittaker could no

longer deal with a question the answer to which could not be determined simply by reading the applicable cases and finding the law. He collapsed. His doctors told him he had to resign or he would not survive. He probably knew this without a medical opinion. On March 11, 1972, his oldest son, Keith, talked him out of committing suicide. His disability retirement occurred on March 31, 1972, almost five years to the day after his elevation to the High Court.

What is amazing about Whittaker's career is that he not only overcame poverty but that he almost overcame the much more stubborn obstacle of chronic debilitating illness. He met with success after success after success. Then, he knowingly risked it all and attempted an even greater achievement. That attempt was unsuccessful, but the effort was more an example of courage than of failure.

I suggest that this biography should be read and studied. It is not thematic or an apology. It contains the good, the bad, and the ugly.²⁸ While I doubt its publication will change the minds of the current generation of constitutional law professors and academics who feel obliged periodically to rate the Justices, it may be that future generations will read the book before casting their ballots. If they do, I am hopeful that they will give Justice Whittaker higher marks than their predecessors did, and that they will not sentence him to purgatory for mental illness.

ENDNOTES

¹Melvin I. Urofsky, "Beyond the Bottom Line: The Value of Judicial Biography," 2 *Journal of Supreme Court History* 143, 145–48 (1998).

²*Id.* at 148–54.

³McFarland & Company, Inc., 2005, 262 pages. The author is a teacher who earned his PhD. in history and political science from the University of Missouri, Kansas City.

⁴*Moore v. Michigan*, 355 U.S. 155 (1957).

⁵*Thomas v. Arizona*, 356 U.S. 390 (1958) and *Crooker v. California*, 357 U.S. 433 (1958).

⁶357 U.S. 63 (1958).

7362 U.S. 630 (1960).

8362 U.S. 73 (1960).

9363 U.S. 299, 327 (1960).

¹⁰See *Colwell v. Commissioner of Internal Revenue*, 64 T.C. 584, 588 (1975), and *Stone v. Commissioner of Internal Revenue*, 50 TCM 1345, 1347–48 (1985).

¹¹355 U.S. 339 (1958).

¹²*United States v. Young*, 470 U.S. 1, 11 (1985).

¹³356 U.S. 227 (1958).

¹⁴*Fiatarudo v. United States*, 8 F.3d 930, 936–37 (2d Cir. 1993).

¹⁵366 U.S. 696 (1961).

¹⁶See cases cited in *Failing Justice*, 173 n.154.

¹⁷358 U.S. 307 (1959).

¹⁸See *United States v. Miller*, 925 F.2d 695, 698–99 (4th Cir. 1991); *United States v. Sinclair*, 983 F.2d 598, 601 (4th Cir. 1993).

¹⁹*Failing Justice*, 160–61, 166, 168–69.

²⁰*Failing Justice*, 184–90.

²¹364 U.S. 410 (1960).

²²*Failing Justice*, 186.

²³355 U.S. 570 (1958).

²⁴369 U.S. 186 (1962).

²⁵370 U.S. 294 (1962).

²⁶*Failing Justice*, 78.

²⁷328 U.S. 549 (1946).

²⁸The editor of *Failing Justice* could have done a better job. There are a few grammatical, spelling, and typographical errors that should have been caught. A good, stiff, final editing was in order. Also, I am still wondering whether Justice Whittaker's given middle name was "Edgar" (p. 7) or "Ernest" (p. 126). When Justice Whittaker applied to law school, he started using the name Charles "Evans" Whittaker. *Failing Justice*, 14–15.

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Errata: In the previous issue the retirement date of Justice Charles E. Whittaker was incorrect in former clerk Alan Kohn's review of the new Whittaker biography. The year was 1962. On page 14 of that issue the reference to the 1988 Inauguration is also incorrect. The election took place in 1988 but the inauguration occurred in 1989.

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