Introduction

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When Mark Twain and Charles Dudley Warner first wrote about the "Gilded Age" in 1883, they certainly did not mean the phrase to be laudatory. The two men saw the latter part of the nineteenth century as the expression of all the worst traits in the nation's character, and that view has remained with the public ever since. There is no question that in the decades after the Civil War, America's industrialization came accompanied by horrid working conditions for laborers in mines and factories, exploitation of women and children, and conspicuous consumption by the captains of industry that appalled many people besides Twain and Warner.

While historians have not denied the truth of the "Gilded Age" charges, they have found the era to be far more complex. The completion of thousands of miles of railroad track helped to tie the various states into a Union, to make men and women wherever they lived see themselves as "Americans" rather than "Kansans" or "Georgians." While so-called robber barons such as John D. Rockefeller, Andrew Carnegie, and J. P. Morgan grew phenomenally wealthy, the industries they created helped to make the American standard of living the highest in the world. The depredations of industrialization also laid the basis for the Populist and Progressive movements and the birth of the modern political order. And an age that produced the writings of Mark Twain, Emily Dickinson, William Dean Howells, Henry James, and Stephen Crane cannot be characterized as a cultural wasteland.

In terms of constitutional history, for too long the jurisprudence of the postwar period has been characterized simply as laissez-faire, with the Court erecting the Constitution into a protective wall for property rights. In recent years we have begun to understand that while the Court, like the rest of the country, believed in the protection of property, there were other currents running through this classical jurisprudence. Of course, some have since been outmoded by changes in our economy and society, but if we wish to understand the great jurisprudential changes that took place in the twentieth century, we have to start in the latter part of the nineteenth.

This is what the contributors to this issue have done, in papers originally given as

part of a lecture series on the Court and the Gilded Age. Other than people interested in the Court's history, few will even recognize the names of Samuel Miller, Stephen Field, Stanley Matthews, and David Brewer, but as you will discover on reading these articles, they played an important role in shaping the Court's response to the new America. And that response, of course, is what progressive reformers like Holmes and Brandeis attacked in their turn.

In addition, we have an article by Ross Davies regarding an incident mentioned in the best-selling book about the Court, **The Brethren**. It is the type of article that results when a careful reader is suddenly pulled up short by something he or she reads and says "That can't be true!" In this case the question came out of a baseball case decided by the Court and written by Harry A. Blackmun, whom everyone knew was a rabid baseball fan. Could he have deliberately overlooked important African-American players, as Bob Woodward and Scott Armstrong charged? The opening of the Blackmun Papers gave Professor Davies a chance to find out the truth.

Finally, as always, we are grateful to Grier Stephenson for keeping us up to date on the important books appearing about the Court.

The Gilded Age and the Supreme Court: An Overview

JAMES O'HARA

I. The Era

In 1873, Mark Twain wrote his first novel, **The Gilded Age**, in collaboration with a neighbor, newspaper editor and critic Charles Dudley Warner. The title of the book became the name of an era that embraced roughly fifty years, from the end of the Civil War to the presidency of Theodore Roosevelt. From the perspective of Supreme Court history, the era can be more precisely timed. It begins with the appointment of Chief Justice Salmon Portland Chase in late 1864, and ends with the death of Chief Justice Melville Weston Fuller in 1910. That fits nicely with the remaining lectures in this year's series. Justices Samuel F. Miller and Stephen J. Field joined this Bench only slightly before Chase, and Justice David J. Brewer died the same year as Fuller.

The Court does not exist in a vacuum; it is always a creature of its own day, and it should be. Before looking in more detail at the Court, the Justices, and the cases from 1865 to 1910, it will be useful to look at the context of its work: the era itself and its political climate.

In one sense, the name "Gilded Age" is unfair. Usually, historical periods are defined by great events ("The Reformation") or by commanding figures ("The Victorian Age"). The Gilded Age is an exception. It has been labeled, and thus defined, by its detractors.

The dictionary defines "to gild" as "to give an attractive but often deceptive appearance to." So the word itself implies deception, hypocrisy, dishonesty. It conjures a vision of pleasant appearances hiding the ugliness underneath. The heavy caricature of Twain's novel was expanded by Thomas Nast's cartoons and multiplied by the writers Theodore Roosevelt called "Muckrakers." We think of the obscene wealth of a few and the vicious, grinding poverty of the many. The rich dance their minuets in 200-room mansions in

The Gilded Age was the era of rapid industrialization and the arrival of streams of immigrants. This 1892 photo of New York City shows the beginning of congested streets.

Newport; the poor waste away in the hovels, jobless and hungry. We think of greedy politicians on the take from plutocrats with fat cigars and diamond studs. Like all caricatures, the picture is overdrawn and tells only a partial truth. No historical period of fifty years' duration can possibly be summarized in a single adjective. Dishonest politicians, blurred social conscience, greed, sex scandals, hypocrisy, bribery, inept bureaucracy, and stupidity are found in every age, and every age tries to cover them up.

A more balanced picture would reveal enormous, fast-paced change. The United States was industrialized almost overnight. Before the Civil War, manufacturing and distribution was almost completely local. Yet in less than a single lifetime, the railroads and the telegraph changed everything. By 1870, new industrial corporations could move raw materials and fuel from great distances, then ship finished products to equally distant markets. Communication, once limited to the speed of a horse, now was measured by the speed of light.

Entrepreneurs and inventors flourished; a few were rewarded with fabulous wealth. We still remember the names, more than a century later: McCormick and Deere in agricultural machinery; Vanderbilt, Hill, Harriman, Gould, Stanford, and Pullman in railroads; Armour and Swift in meat packing; Guggenheim in copper; Reynolds and Duke in tobacco; Carnegie and Frick in steel; Dupont in chemicals; Rockefeller in oil; Westinghouse in electrical equipment; Morgan, Cooke, and Belmont in finance. By the end of the era, Ford was producing his first car, Bell had invented the telephone, and Edison was inventing everything else! Hundreds of daily newspapers

Cornelius Vanderbilt, who made his fortune in railroads and shipping, owned a mansion in New York (pictured) and an even more extravagant summer home in Newport, Rhode Island. He grew up poor on Staten Island and became one of the most influential industrialists of his day.

fueled public fascination with the great engineering feats of the day. The Atlantic Cable and the great transcontinental railroad marked the beginning of the era; the Brooklyn Bridge was the great story of the 1880s; and the Panama Canal was completed shortly after the era ended.

Industrial growth was matched by population growth. Immigration was, of course, the driving force. The Census of 1860 counted thirty million inhabitants; the Census of 1910 counted ninety million. The process was a huge cycle. Immigrants came because there were jobs; the jobs multiplied because there was an inexhaustible supply of willing workers. And the immigrants were absorbed into the economy. They had to be fed, and they were. They had to be housed, and they were. They had to be schooled, and a remarkably fine system of public schools met the challenge.

The jobs did involve long hours at low pay, and social critics did not hesitate to call the workers' situation exploitation. Yet the waves of immigration continued unabated, because life in the new world was almost infinitely better than the life left behind.

The population was moving west. California had already become a state prior to the Civil War. Ten more states were admitted to the Union during the Gilded Age, and they were almost all in the distant West. But railroads had made the nation smaller: There were 240,000 miles of track by 1910.

In literature, this was a golden age. Melville and Longfellow died early in the era. But Ralph Waldo Emerson and Louisa Mae Alcott and Horatio Alger and Stephen Crane and Henry James and Oliver Wendell Holmes and Emily Dickenson and O. Henry and Bret Harte and Walt Whitman and Joel

The birth of industry and the enormous profits that followed created a much wider gap between the haves and the have-nots. This 1902 cartoon criticizes one infant industry—the electric trust—but Thomas A. Edison's invention of a remarkable number of electrical devices helped the United States become a leader in applied technology.

Chandler Harris and Twain were all being read. The sophisticated could subscribe to *Harpers*, the *Atlantic Monthly*, the *Nation*, or *Saturday Review*, laugh at the political wit of "Mr. Dooley" and admire the pessimistic insights of Henry Adams, who contrasted the unity and sense of purpose of the twelfth century with the chaos of the nineteenth.

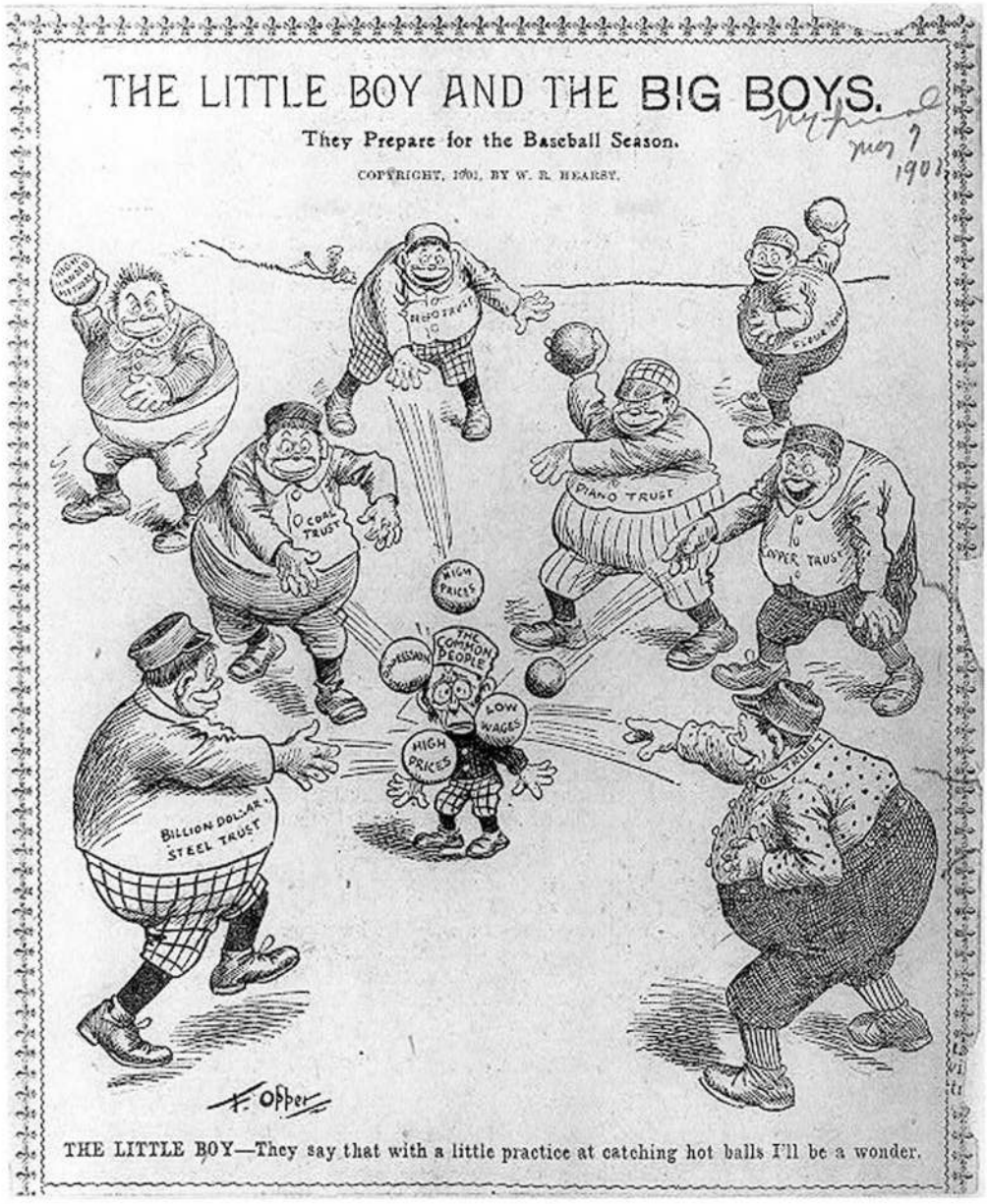
Higher education flourished. The land-grant colleges grew in numbers and influence, and they were joined by literally hundreds of colleges founded by religious denominations. Indeed, the great plutocrats played a significant role here. Their legacies live on in great universities: Cornell, Vanderbilt, Duke, Carnegie-Mellon, Johns Hopkins and Stanford.

It was a heady time! If, as an age, it was gilded and glitzy, it was also one of remarkable accomplishment, wrought by hard work and hope.

II. The Political Climate

Politically, the era was insecure. The casualties of the Civil War had been devastating, and both North and South reeled with grief and seethed with anger and bitterness. In the South, there was the additional humiliation and economic low. The newly freed slaves were left mainly to fend for themselves. They had no savings, no marketable skills. For the most part, they could not read or write.

The presidency was weak. From Abraham Lincoln to William Howard Taft, there were eleven Presidents; only Ulysses S. Grant served two full consecutive terms. In less than forty years, three Presidents were murdered. Two were succeeded by Vice Presidents who had no political power base. Andrew Johnson was impeached and almost removed from office. Chester Arthur was not even able to secure renomination by his own political party.



This 1900 cartoon satirizes the common man being overpowered by the big trusts. Modern labor unions emerged out of the Gilded Age.

He watched helplessly as he was ditched. Both the presidency and the Congress tended to be Republican, although Grover Cleveland was twice elected and the Democrats occasionally controlled the House. But the Republicans were usually fractionalized by geographic division. The distant West did not share New England's priorities. The maritime interests did not coincide with those of the railroads. Bankers feared the easy money demands of the silver mining states. The Democratic party controlled the "solid South," and that, coupled with the immigrant votes from Northern cities, guaranteed significant opposition.

The ethical standards of the day were more supple and flexible than those demanded of later generations. Laws were lax and often unenforced. Senators were elected by legislatures, not by popular vote. In some states, high offices were for sale. Political cynicism was widespread. After all, Roscoe Conkling and William Marcy Tweed were Senators, and Conkling almost became a Supreme Court Justice. One wag suggested that Conkling turned down the honor because the bribes for a Senator were too attractive and Justices could not be bought.

But most public figures were honest, and some were motivated by high altruism. Any era could be proud of William Seward, John Sherman, Robert Todd Lincoln, or John Hay.

But the weaknesses in the presidency and division in the Congress took its toll. There were important and recurrent issues. Not all were addressed forthrightly:

1. *The aftermath of the Civil War* with its many subplots: readmission of states to the Union; grant of votes in Congress to the states of the Confederacy; military occupation and military courts; punishment or trials for Confederate civil and military leaders; passage of the Civil War Amendments and their ratification and implementation; the impeachment of President Johnson; the plight of the former slaves; their education and economic assimilation; amnesty for Confederate troops; appointment of former Confederates to the Cabinet and the Supreme Court; Civil War claims against foreign governments.
2. *Financial questions*, including: the legality of paper money; the gold standard and the silver issues; the constitutionality of the income tax; financial panics and recessions; the perennially vexing question of the protective tariff; the appropriate level of protection.
3. *Industrialization*, and the rising political, financial and social power of large corporations; regulation of corporations; the role of the incipient labor unions; dealing with often-violent strikes and labor riots; the problem of trusts and interlocking corporate boards; price-setting by government, particularly of railroad rates; monopolies; price-fixing; excessive profits.
4. *Foreign policy*, principally: protection of American interests abroad; the Open Door Policy; the Monroe Doctrine and its application; the annexation of Hawaii; and, after, the Spanish-American War, what to do with Puerto Rico, Cuba and the Philippines.
5. *Immigration*: the admission, status, and assimilation of the huge influx of new residents; the vexing questions posed by immigrants who spoke no English or, on the West Coast, who were from Asia; the biases and bigotry that often accompany immigration.

These were not easy issues. Some are still with us, in modern clothing. Many, as we will see, found their way to the Supreme Court.

III. The Court

Changes in the Supreme Court during the Gilded Age almost matched the pace of economic and cultural change outside it. The Court after the Civil War was very different from its antebellum predecessor, even as it is different from the present Court. Some of the change was superficial, but not unimportant.

There was, first of all, a new Courtroom. Since 1810, except for a few years after the British burned the Capital in 1814, the Court had met in a basement room under the old Senate Chamber. The room had a certain elegance, but it was damp, cold, dark, and smoky from the oil lamps. It was noisy, located near a major entrance to the building. It was also small, with accommodations for only a limited number of spectators other than the participants. There was no private room for conferences, and the robing room was a few wooden pegs by the door.

When the Senate moved to its present chamber in 1860, the Supreme Court inherited

its old chamber, a much brighter and larger space. The Court also got a conference room, and the old courtroom became a small law library. But the Justices still did not have offices; they worked from their homes.

That was another change. Prior to the Civil War, most of the Justices did not live in Washington. Since they were expected to travel extensively to perform circuit duties, they lived in their home states, coming to Washington once or twice a year for a term of six to eight weeks. But after the Civil War, residence in Washington became the norm, and the Justices exchanged information or drafts by messenger.

The Justices had no staff. Opinions were written in longhand—a challenge and cause for chagrin to the Court's Reporter. There were no clerks until 1882, when Justice Horace Gray hired a recent law-school graduate and paid him out of his own pocket. Four years later, Congress institutionalized the practice by appropriating salary funds.

During this period, the Court had little control over its own docket. The Circuit Courts of Appeals were not established until 1891, so appeals—many of them, at least—came to the Supreme Court even if the issues presented were of little national consequence. By the 1880s, there was a backlog of over fifteen hundred cases, and the Court was four years behind. Yet the Justices still were expected to go on circuit for several months each year. The arduous and time-consuming travel was physically exhausting, even with railroads. Justice Field, for example, was expected to go to California by rail when he was no longer young.

While private law cases continued to dominate the docket, the sheer volume brought an increasing number of constitutional cases. The Supreme Court was evolving into a true constitutional court, becoming the ultimate and authoritative interpreter of constitutional meaning. This new role is well exemplified by a statistical comparison. In the first seventy-five years of its existence, only twice did the Court strike down an Act of Congress as unconstitutional. In the next forty-five years, it did so thirty times.

In 1865, when our story begins, Justices were paid $6,000 annually; in 1910, it was $12,500. The Chief Justice was always paid $500 more. These amounts were large when compared to the wages of a common laborer. Then, as now, Justices earned far less than able attorneys in private practice.

Justices of the late nineteenth century had their personal judicial philosophies and often sharply disagreed, but there was an opportunity for the Court, as a Court, to develop an approach of its own. While modern critics may disagree in hindsight on the "right of contract" developed by the Court, or on its use of economic or substantive due process, no one can dispute that this was a time when the Supreme Court of the United States grew in stature, in maturity, and in self-assurance. The Court had paid a great price in public esteem as the result of the decision in *Dred Scott v. Sanford* right before the Civil War. But during the Gilded Age, the Court slowly inched its way back, not only to respect, but even to affection. The year 1889 was the Centennial of the constitutional government in America. When Congress met in joint session to celebrate on the 100th anniversary of Washington's inauguration, the invited speaker was not the President: it was Chief Justice Fuller.

IV. The Justices

Three Chief Justices and twenty-nine Associate Justices served from 1865 to 1910. Discounting four who died or retired early in the period, and four who joined the Court only at its end, a total of twenty-four Justices served. Unfortunately, it is a neglected era of the Court's work. Most of the Justices have been forgotten; there are adequate modern biographies of only nine.

The three Chief Justices present a contrast. One was one of the best-known political figures of his day; the names of the other two

were completely unrecognizable to the general public when their appointments were announced. Chief Justice Chase is now remembered as Abraham Lincoln's Secretary of the Treasury. Born in New Hampshire, he went to Ohio to practice law. He was very bright, tireless, and strong-willed. His passionate opposition to slavery and his natural talents quickly brought him to political prominence. He was elected to the Senate, then Governor. He was a founder of the Republican party, and by 1860, a credible candidate for the party's presidential nomination. Lincoln won instead, and Chase joined the Cabinet, but he was never able to shake the belief that he was a better man than Lincoln. In 1864, he even conspired to wrest the second-term nomination from the President, while still in the Cabinet! Chase had two flaws. First, his vanity was legendary. Observers noted that he was a pious Christian, but that his Trinity was composed of four persons. His second flaw was ambition. Desire for the presidency became a consuming passion. Even as Chief Justice, he angled for a nomination, and it mattered not which party might offer it. As late as 1870, after suffering a series of debilitating strokes, he was still plotting to run in the election of 1872.

When Chase died in 1873, after nine years in office, President Grant made a series of blunders in an effort to find a successor. An offer was dangled before at least five potential nominees, some of them hopelessly unqualified and even corrupt. Two nominations were actually sent to the Senate and had to be withdrawn when their defeat became obvious. Finally, seven months after Chase's death, the President named Morrison Remick Waite, an able lawyer from Toledo, Ohio, utterly unknown nationally. He had no judicial experience, and his only political office had been one term in the Ohio legislature twenty years before. But he had a reputation for honesty and quiet competence, so the Senate confirmed him. Chief Justice Waite served for fourteen years with great honor. He had the almost impossible task of keeping the work of the Court moving smoothly during the time of the four-year backlog of more than a thousand cases. When he died in 1888—of, some said, exhaustion and overwork—there was genuine dismay and grief.

Waite's replacement was Fuller, a Chicago lawyer also unknown to the general public. But Fuller was a distinguished specialist in appellate practice, highly respected in legal circles and a veteran of many arguments before the Supreme Court. If a single word could be used to describe the new Chief Justice, it might be "lovable." He had a perpetual twinkle in his eye, a gentle sense of humor, and an endearing charm. His hobby was writing very bad poetry. It was Fuller who introduced the tradition of the Justices' exchange of handshakes before official meetings. The amiable exterior marked a first-rate legal mind and real leadership talent. Oliver Wendell Holmes thought of him as his favorite and most efficient Chief Justice—and Holmes served also with Taft and Hughes, both formidable leaders themselves. Fuller was a commanding figure on the Bench. He was short of stature, with shoulder-length white hair and a long white moustache. And he was Chief for a long time—twenty-two years—longer than any other of the sixteen to date except for John Marshall and Roger Taney.

But, as is sometimes the case, the intellectual leadership did not come from the center chair. Four Associate Justices stand out. The dominant figures were Miller and Field, both Lincoln appointees; Joseph P. Bradley, appointed by Grant; and John Marshall Harlan, appointed by Rutherford B. Hayes.

The adjectives "conservative" and "liberal" are often applied to Supreme Court Justices. It is notoriously difficult to apply labels accurately to judges. That difficulty is compounded when twenty-first-century labels are attached to nineteenth-century Justices.

Justice Miller is a case in point. Born, like Lincoln, in Kentucky, he went west, like Lincoln, but to Iowa. His political outlook was also like Lincoln's. By nature, he was not doctrinaire. He was moderate in speech and manner

and philosophically moderate also. As a Justice, he was reluctant to urge sudden or major change. Like Holmes after him, he was deferential to the actions of Congress and legislatures, and where there was a conflict between so-called states' rights and national direction, he favored the national. He was cautious, and suspicious of what lawyers call substantive due process. He was deeply respected by his fellow Justices—except by Field.

But then, Justice Field was cut from a different cloth. He loved controversy and provoked a substantial amount of it. Field was argumentative, irascible, and vindictive. "When Field hated," said a contemporary, "he hated." And he never forgave or forgot. Philosophically, he was a Jeffersonian. He was intensely a believer in states' rights, hostile to regulations, and suspicious of the federal government, and he believed that property rights were the only real guarantee of personal liberty. Some of his colleagues seemed afraid of him. Yet the power of his intellect and the passion of his personality gave him a real influence. It would not be entirely anachronistic to call him a libertarian.

Justice Bradley exhibited a different kind of leadership. He was very learned and methodical; as a young man, he had been an actuary. His hobby was working mathematical puzzles. No other Justice was so well read in economics. His knowledge of technical matters made him an ideal spokesman for the Court in patent cases, or in cases involving railroad rates or investment returns. He was something of a loner, and seemed always to be annoyed and preoccupied at the same time. Of all the Justices, he was the most politically naïve.

Finally, there was Harlan, surely the most remembered of the late nineteenth century Justices. Harlan was unpredictable and inconsistent, and his judgments were highly personal. He seemed to judge by gut feeling, but his instincts were uncanny. He was often in dissent, yet his dissents in the *Civil Rights Cases* and in *Plessy v. Ferguson* were the starting points for Thurgood Marshall's arguments in *Brown vs. Board of Education*. He held—long before Hugo Black did—that the Fourteenth Amendment had effectively applied the Bill of Rights to the states. Harlan's prescience was unrecognized by his peers; he was regarded by his contemporaries as an eccentric maverick. History thinks better of him.

The influence of these four Justices was magnified by their lengths of service: Bradley served twenty-two years, Miller twenty-eight, and Field and Harlan thirty-four.

The twenty-four Justices of the Gilded Age came from sixteen states. Like so many other Americans, a large number were born on the East Coast but moved west, to Ohio or Illinois or even California. More than half had extensive judicial experience prior to their appointment. Some also had experience in elective office as Senators, Congressman, mayors, or state legislators. Only one was born to an immigrant family. There were no Jewish Justices, only two Catholics, no women, and no African-Americans.

Some trivia notes: Justice Miller was a physician. Justice Field was the brother of Cyrus Field of Atlantic Cable fame. He was also the uncle of Justice Brewer, with whom he served. Justice Stanley Matthews was the father-in-law of Justice Gray, with whom he served. Six Justices were veterans of the Civil War; Justice William Woods was actually a Union general. And one of the Justices surely had the most colorful name in all of American politics: Lucius Quintus Cincinnatus Lamar!

V. Issues and Cases

In the forty-five years of the Chase, Waite, and Fuller Courts, thousands of cases were decided. The vast majority have no modern importance. Even those properly regarded as major have often had their effects modified or even reversed over time by later cases, by legislation, or by constitutional amendment.

Types of cases can be classified for purpose of historical analysis. During the earlier part of the era, a number of decisions dealt

with the immediate aftermath of the Civil War, particularly with reconstruction and with the treatment of those who had risen in rebellion. A second category of cases, later in the period, were those involved with the scope and application of the Civil War Amendments, particularly the Fourteenth. Indeed, Fourteenth Amendment jurisprudence has been a recurring, even perennial, theme of United States law even to the present. A third major area of the Court's interest, later still, dealt with government regulation of business. The 1880s and 1890s had seen the first efforts by Congress to wrestle with the problems created by the vast network of railroads and the new phenomenon of large corporations. The Interstate Commerce Commission and the Sherman Anti-Trust Act were the first of these attempts by Congress to come under judicial scrutiny. Finally, the late-nineteenth-century Justices, like those before and after, grappled with the elusive question of drawing the line at which state sovereign authority ended and federal sovereign authority began.

Historians generally have not been friendly to the post–Civil War Courts. One observer calls the Court under Chief Justice Fuller "the worst in history." In the light of the later era of President Franklin Delano Roosevelt's appointees or of the time of the Warren Court, the Court of the Gilded Age seems timid, and its opinions are sometimes jarring to the modern mind. The Supreme Court of the 1880s and 1890s was reluctant not only to experiment on its own, but also to be open to experimentation by state legislatures or by Congress. For example, in the so-called *Slaughter-House Cases* (cases then had more colorful names than they do now!,) the Court saw no application of the new Fourteenth Amendment to citizens generally, narrowly interpreting its scope to the former slaves. In *Lochner v. New York*, the Court struck down progressive legislation passed in New York limiting bakery workers to a sixty-hour week. Twice the Court found income taxes in peacetime unconstitutional. It actually took a constitutional amendment to change that decision. In a case with humorous overtones, the Court briefly struck down the issuance of paper money. The humor arose because the opinion against paper currency was written by Chief Justice Chase—the same man who, as Secretary of the Treasury Chase, had issued the paper notes in the first place. The Court negated the public-access and accommodations portions of the Civil Rights Act of 1875, thus rendering it ineffective, after it had earlier severely restricted the application of the Civil Rights Act of 1866 and the Civil Rights Act of 1870–71. In *Plessy v. Ferguson*, the Court gave constitutional protection to the "separate but equal" formula, which held sway until it was finally buried sixty years later in *Brown v. Board of Education*. The Sherman Anti-Trust Act was approved by the Court, but it was narrowly applied to corporations, yet extended to include labor unions. So the hostility of many historians can easily be understood.

At least superficially, the Court of the Gilded Age seems pro-business and anti-labor, pro-bigot and anti-civil-rights, pro-rich and anti-poor, pro-status-quo and anti-reform, pro-establishment and anti-progressive. The Court, in this view, is always "not getting it," and its Justices are elitist, cowardly, or intellectually dishonest—or perhaps all three!

This portrait is overdrawn, of course. The Justices of this era were not an isolated group of ideologues. They were appointed over a forty-year span by ten Presidents. They came from both parties and represented a broad spectrum of political ideas and approaches.

There is no question that the Chase, Waite, and Fuller Courts were, in fact, reluctant to "rock the boat." But there are quite rational explanations of why this was so. First, the Justices labored under the shadow of *Dred Scott*. They harbored in their own memories the recollection of the time the Court had decided too much, and this in and of itself was an impetus to compensate on the side of caution. Second, the nation was still reeling from the effects of a disastrous Civil War, an added

incentive for timidity. Third, the full impact of the Fourteenth Amendment was hardly obvious in an innocent early reading of its words. If even now, almost a hundred fifty years after its ratification, its applications are still the subject of debate, we can forgive the Justices of that day if their insights seem almost naively simplistic. Fourth, Congress had never before attempted to regulate business at all, not to mention on so grand a scale. The legal categories of the past seemed—and were—inadequate to the legal issues of their present. The law always lags behind: It did then, it does now.

But it is surely a mistake to judge the Court of the Gilded Age as if it had the advantages of all that has happened since. Some of its critics are really saying, "Why couldn't they act like twentieth- or twenty-first-century Justices? Why didn't they have the vision of Brandeis and Holmes, the legal skills of Black, the fairness of Warren, the sophistication of Brennan, the passion of Thurgood Marshall, the writing skills of Jackson, and the erudition of Frankfurter?"

And that is just plain silly. These Justices saw things the way they saw them because they were who they were: a group of nineteenth-century jurists trying to be honest in looking at the issues of their own day when the light was not always bright, trying to chart a course when the destination was not clear: trying to help a free nation find its way, as this Court has always done.

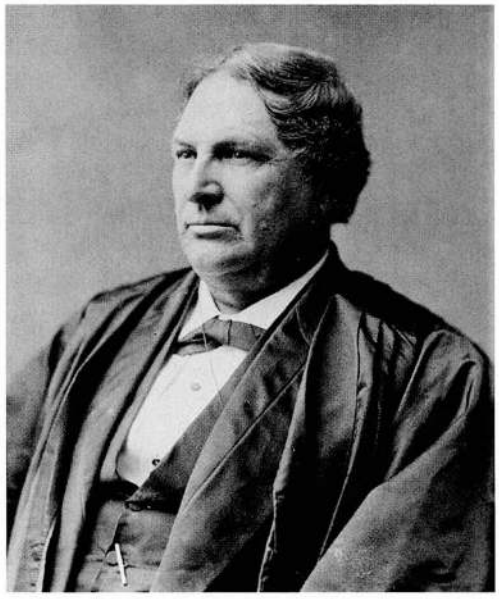
Melancholy Justice: Samuel Freeman Miller and the Supreme Court during the Gilded Age

MICHAEL A. ROSS

In the late 1880s, after serving for almost three decades on the United States Supreme Court, Justice Samuel Freeman Miller was a melancholy man. He was in his early seventies, and both his personal and professional life pained him. His wife and daughter no longer spoke to one another, his son-in-law had recently died from alcoholism, and he was broke and feared that if he died his wife would be left destitute. On the Court he felt isolated, surrounded by younger Justices who gravitated to the formalistic doctrines of his ideological rival Justice Stephen J. Field. And despite his having written over 600 majority opinions, it remained unclear what his judicial legacy would be.[1]

Miller knew that he might be remembered for his majority opinion in the famous *Slaughter-House Cases*—but that decision had already had effects that he did not intend. And on many other issues that mattered to him, particularly those that impacted the indebted river towns of the Trans-Mississippi West, he had failed to convince his fellow Justices as to the merits of his arguments. All he had to show for his labors in those cases were a string of poignant but bitter dissents.[2]

Like many other Americans who witnessed the jarring economic transformations of the Gilded Age, Miller also feared for the future of his country. Although he recognized that the Industrial Revolution had resulted in great benefits for society, he worried that the nation had become dangerously divided between the haves and the have-nots. In America's large metropolises, he wrote in 1888, "the palaces of the rich are surrounded by the hovels of the poor; the glaring lights of gas and electric lamps illuminating for the wealthy their hours of hilarity and festivity shine down upon the tenements of the lowly and the poverty stricken, and while the more favored few have all that is best in life . . . , another much larger class of beings a few hundred yards away, or across the street, may be languishing in misery, burdened by poverty, and tortured by disease



Although an optimist in his youth, Samuel Miller grew more melancholy with age. Toward the end of his life he felt isolated on the Court, his wife and daughter did not speak, and he had serious money worries. His biggest concern, however, was for the future of the country.

for which they have not the means to provide the remedy."[3] It was, Miller believed, an explosive situation.

Miller's late-life malaise was particularly striking because as a young man he had been irrepressibly optimistic about America. Born in 1816 on a hard scrabble Kentucky farm, Miller came of age in the era of self-made men and women. He grew up in the shadow of the illustrious Kentucky Whig politician Henry Clay—the great champion of an American system that allowed men to rise in life, no matter how humble their beginnings. It was Clay who first coined the term "self-made man." Miller shared Clay's vision and believed that the United States was the most democratic, socially fluid, and economically progressive nation on earth. It was a society that guaranteed the right to rise. As evidence, Miller only had to look to his own ascent in life. As a teenager, he rejected the hard farming life of his parents, went to medical school at Transylvania University, worked for a time as a doctor in the Kentucky hill country town of Barbourville, and then abandoned medicine for law, which he correctly saw as a faster route to financial and social prominence. He studied law books owned by Silas Woodson, a lawyer with whom he shared an office, and was admitted to the Kentucky bar in 1846. In 1849, he moved to Keokuk, Iowa, which was then a steamboat boomtown, and quickly became one of the most prominent lawyers in the state.[4]

During the antebellum period, the one glaring flaw Miller saw in the American system was slavery, the retrograde institution that denied the right to rise to millions. Miller had briefly been a slaveowner in the 1840s, when his first wife, Lucy Ballinger, brought four slaves to their marriage. He soon freed those slaves, however, and one reason that he and Lucy moved to Iowa in 1849 was that an emancipation movement led by abolitionist Cassius Clay failed in Kentucky that year. In the 1850s, Miller helped organize the Republican party in Iowa, a party founded on opposition to the expansion of slavery. During a campaign for the Iowa state senate in 1856, Miller called slavery "the most stupendous wrong, and the most prolific source of human misery, both to the master and slave, that the sun shines upon in his daily circuit around the globe."[5]

In 1860, Miller campaigned vigorously for Abraham Lincoln, whose moderate antislavery position he shared. Both men argued that slavery denied blacks and nonslaveholding whites the right to rise, and both hoped that the peculiar institution could be contained in the states where it already existed and thereby be put on a course to ultimate extinction. When the Kansas-Nebraska Act of 1854 threatened to bring slavery to what had been free soil, Lincoln and Miller vehemently opposed it. And when the act irreparably split the Whig party along sectional lines, they left that party and joined the Republicans. During the 1860 presidential election, Miller, who had a reputation as one of his state's best political orators, crisscrossed Iowa and southwestern Illinois giving pro-Lincoln speeches

at Republican barbecues, parades, and mass meetings.

In 1862, with the Civil War under way, President Lincoln chose Miller to fill one of the three empty seats on the United States Supreme Court. Lincoln had never met Miller, but when Iowa's congressional delegation described Miller's background to Lincoln, they told a story that Lincoln certainly would have recognized. Miller shared Lincoln's rural Kentucky roots, Whig background, and moderate Republican antislavery views. Both were lawyers who had moved west to free soil to pursue legal careers. Miller was also an adamant Unionist who opposed compromises with the seceding South and helped to raise Iowa regiments after Fort Sumter. Lincoln wanted Justices who would sanction his controversial war measures, and Miller fit the mold.[6]

Of all of Lincoln's appointees (he eventually filled five seats on the Court), Miller proved the most steadfast in his support of the President's war policies. During the conflict, Miller joined opinions that upheld Lincoln's unilateral decision to blockade Southern ports and his position that the Confederacy was not a sovereign nation.[7] Many cases involving Lincoln's wartime measures did not reach the Court until after Appomattox, and with hostilities ended, Justices David Davis, Salmon P. Chase, and Stephen J. Field—Lincoln appointees all—allowed peacetime sensibilities to dictate their views. In famous cases such as *Hepburn v. Griswold, Ex parte Milligan,* and *Cummings v. State of Missouri*, some of Lincoln's Justices held that his wartime measures had been unconstitutional. Miller, however, unswervingly concluded that the Chief Executive's actions were constitutionally justified by the national crisis.[8]

Miller also embraced Lincoln's wartime decision to issue the Emancipation Proclamation. Like Lincoln, Miller had not been an abolitionist before Fort Sumter. In Kentucky, he had instead supported proposals for gradual emancipation. In Iowa, he dedicated his energies to stopping the spread of slavery, rather than calling for an immediate end to the peculiar institution in the South. The high financial and human costs of the war changed his mind. Everyone recognized, Miller later wrote, that slavery caused the war, dividing the nation between "those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation." He asserted forcefully that "[w]hatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery." As the war turned into a protracted and bloody struggle, limiting Northern objectives solely to restoring the Union no longer made sense. Slavery, Miller felt, "perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel." A year and a half of catastrophic warfare had changed him from a moderate Free Soiler to a full-blown immediate emancipationist.[9]

As the Civil War came to a close, Miller was briefly ebullient. The war, after all, had led to his appointment to the Supreme Court. Having risen from his humble farming background to the nation's highest court, he was living proof that the American system worked. And with the Emancipation Proclamation and the Thirteenth Amendment, slavery had been destroyed as well. It seemed that Miller's youthful optimism about America might finally be fully realized.

Miller's optimism did not last long, however. During Reconstruction and the Gilded Age, Miller came to believe that sinister forces in the North and the South were undermining America's core values. In the North, Miller feared the growing power of the capitalists, whom he believed were using their newfound wealth to bribe legislators, corrupt the courts, and distort the economy in a way that destroyed the right to rise for many others. "I have met with but few things of a character affecting the public good of the whole country," Miller

wrote in the 1870s, "that has shaken my faith in human nature as much as the united, vigorous, and selfish efforts of the capitalists."[10]

When he referred to capitalists, Miller did not usually mean men like Rockefeller, Carnegie, Vanderbilt, or the industrialists some labeled "robber barons." He acknowledged the benefits corporations provided to society. Instead, he directed his ire at the growing class of men who traded in capital: Wall Street financiers, speculators, and bondholders, whom he saw as little different from the plantation owners of the old South. To Miller, bondholders were economic parasites who lived off the labor of others. "They engage in no commerce, no trade, no manufactures, no agriculture," Miller charged. "They *produce nothing*."[11]

Much of Miller's anger at the capitalists was driven by a series of cases involving municipal bonds that the Supreme Court heard during the second half of the nineteenth century. The municipal-bond cases began in the 1850s, when public officials across the country recognized that the future prosperity of their towns or cities depended upon railroads. Fearing that their towns would be left behind if they did not secure a railroad line, small-town mayors and city councilmen feverishly courted railroad corporations. Increasingly, they made the fateful decision to invest public monies in private railroad companies. Towns sold municipal bonds to investors and then used those funds to buy stock in railroad corporations that promised to build lines to their municipality.

Miller's disgust with Wall Street financiers and speculators, whom he thought were economic parasites who lived off the labor of others, is reflected in his opinions during the Gilded Age. Pictured is a panic on Wall Street in 1884.

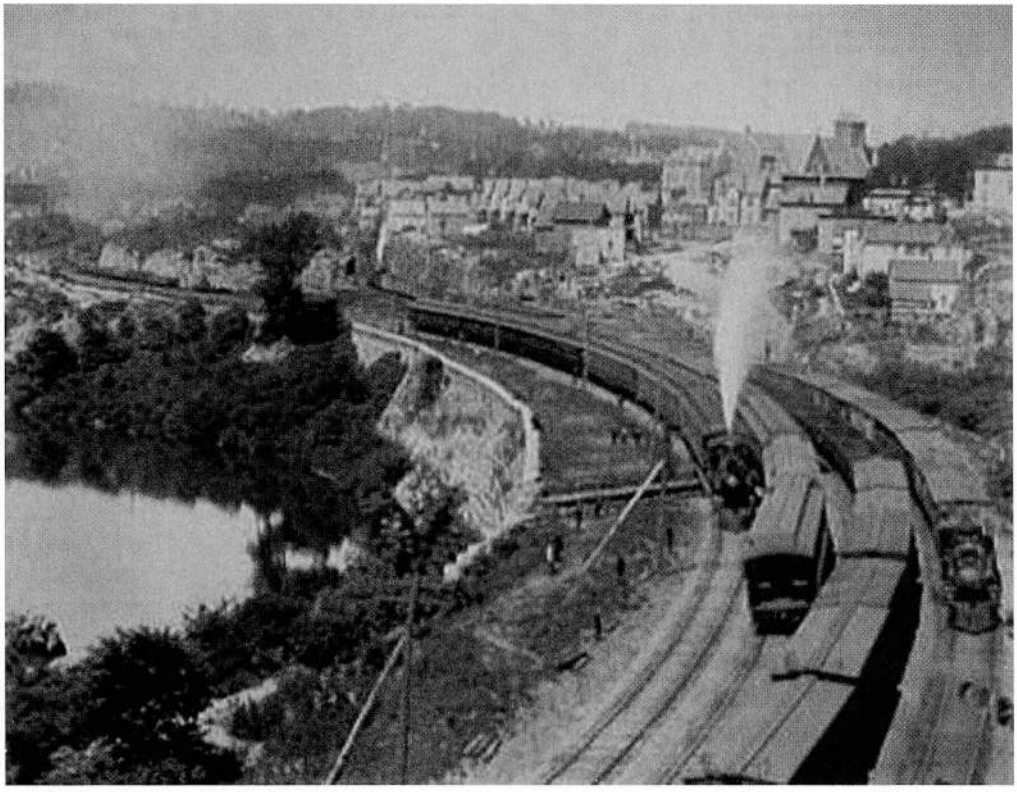
Sometimes the issuance of these municipal bonds was perfectly legitimate and legal. Elsewhere, however, officials caught in the mad scramble to lure railroads failed to follow the letter of the law. In some cases they ignored state constitutions and municipal charters that prohibited local governments from investing in private corporations. In other cases, they failed to put bond initiatives to a popular vote or exceeded statutory debt limitations.

When the great economic Panic of 1857 bankrupted many of the railroad companies that had promised to lay the tracks, towns and cities found themselves with massive debts and little to show for it. Outraged taxpayers now claimed that they were being forced to pay the debt on bonds their public officials had issued illegally or without their consent. Meanwhile, investors in New York and elsewhere who had purchased the bonds demanded to be paid, even when, as was often the case, they had bought the bonds at 25 percent of par value knowing that they might have been issued with dubious authority. In hard-pressed towns and cities across the country, citizens held angry, torch-lit, anti-bondholder mass meetings and launched the lawsuits that would fill the Supreme Court's docket for the next two decades.[12]

When municipal-bond cases reached the Supreme Court, the Court's majority almost always sided with the bondholders. Two Justices in particular—Lincoln appointees Field and Noah Swayne—became the great champions of the rights of the capitalists. Whereas Miller saw the increasing disparities between rich and poor as a dangerous development, Field believed the enormous wealth and ornate mansions of the Gilded Age served as incentives for others to work, and he became a zealous defender of property rights. Field feared that the envious masses might try to use their state legislatures or the federal government to do what a mob might otherwise do: take from the rich and give to the poor. For Field, the Court was the last line of defense against the grasping majority. The efforts being made by Western towns to escape their debts to bondholders, Field believed, were an example of this dangerous mobocratic instinct. Any decision that failed to uphold the sanctity of the bonds would both undermine the fluidity of national capital markets and unleash a plague of "repudiation" that would sweep across the land.[13]

Miller thought otherwise. In a long series of angry and usually lone dissents, he accused his Brethren of ignoring justice in order to serve the bondholders. In the famous case *Gelpcke v. Dubuque*, for example, the Court disregarded its own rule that it should defer to state courts' interpretations of state statutes and constitutional provisions. The majority in *Gelpcke* ignored a ruling by Iowa's Supreme Court that bonds issued to fund private railroads violated state law and were therefore invalid. In upholding the validity of Dubuque's bonds, Justice Swayne declared for the majority, "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice."[14]

Miller was livid, calling the majority opinion "unsuited to the dispassionate dignity of the Court."[15] For him, the Court's position that municipal bonds had to be paid, no matter what, even if their issuance violated state and municipal constitutions and charters, opened the floodgates to corruption. The Court's position, Miller later wrote, was "worthy of admiration of all who wish to profit from the frauds of municipal officers."[16] Miller thought it was not unreasonable to expect investors to determine through the public record whether bonds had been issued legitimately before they purchased them, even if they had to send emissaries to Western towns to do so. Otherwise, the citizens of those towns could wake up one morning to find that their public officials had bound them to pay millions of dollars in debts to fund boondoggle investments in private companies they had never approved. "It makes every man's property," Miller said in another case, "within the limits of the city, the common property of the community, and

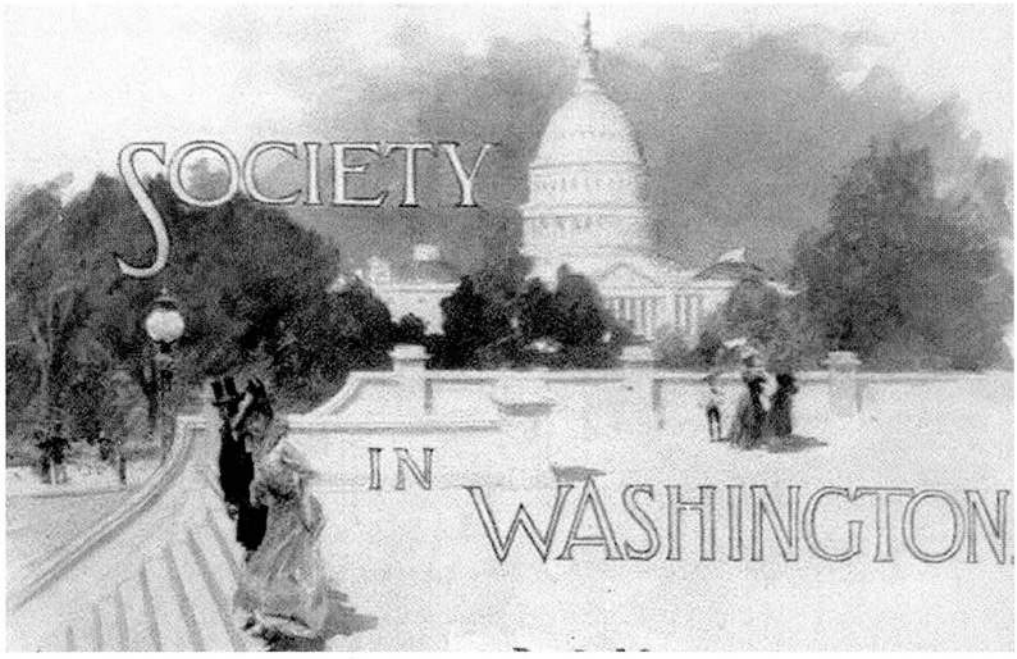


While his Brethren sided with capitalists during the Gilded Age, Miller grew increasingly concerned about the gap between rich and poor. He was particularly annoyed that the Court kept ruling in favor of the validity of municipal railroad bonds even though they did not pay off for many towns.

converts the citizen, against his will, into a member of one of those Shaker or French communities into which the individual merges his rights into those of the association."[17]

As he issued one bitter dissent after another in bond cases, Miller wondered why the Court kept hearing such cases when the result was always a forgone conclusion. "Our Court or a majority of it," Miller wrote, "are if not monomaniacs, as much bigots and fanatics on this subject as is the most unhesitating Mahemodan in regard to his religion."[18] Privately, he even alleged that the bondholders had bribed some of his fellow Justices. "Certain members of the Supreme Court," he wrote, "are *always* in favor of enforcing bonds, at the expense of all other rights. The bondholders have personal access to certain judges, whose influence on the bench is predominant. The capitalists understand beyond all men I have ever known the art of influencing men. They have unlimited means for they are worth fifty millions of dollars, and they are not illiberal in the use of them." In the end, he lamented, "all that they think worth fighting for they will win."[19]

Throughout the 1870s, as the Court repeatedly upheld the validity of municipal railroad bonds, Miller grew increasingly disheartened. "It is in vain to contend with judges who have been at the bar advocates for forty years of railroad companies, and of associated capital," he observed in 1875, "when they are called upon to decide cases where such interests are in contest . . . All their training, all their feelings are from the start in favor of those who need no such influence."[20] Tired of writing the same dissenting opinions over and over again, Miller eventually adopted the practice of dissenting without writing an opinion. His fellow Justices knew his position even before he put pen



Miller's wife, Eliza, relished her role as a Justice's wife in the 1860s because she found herself on top of the social hierarchy. But by the 1870s, when Washington society began featuring the newly wealthy, the Millers had a hard time reciprocating invitations on a judicial paycheck.

to paper. As a result, in important cases such as *Railroad Company v. County of Otoe* and *Olcott v. the Supervisors*, in which the Court again held bonds to be valid that a state court had held invalid, Miller dissented silently. "It is the most painful matter concerned with my judicial life," Miller wrote privately about the bond cases, "that I am compelled to take part in a farce whose result is invariably the same, namely to give more to those who have already, and to take away from those who have little the little they have."[21]

Part of Miller's distaste for bondholders stemmed from the fact that he hailed from Keokuk, an Iowa town saddled with massive railroad-bond debts. As a private attorney, Miller had handled suits launched by Iowa citizens challenging the bonds. To a certain extent, he also blamed the bondholders for destroying his own capitalist dreams. Miller had moved to Keokuk from Kentucky in the belief that, one day, it would become a great city rivaling Chicago and St. Louis. With this in mind, he invested much of the money he earned in private practice in Keokuk real estate. But after the great Panic of 1857, the city's bonded debts impeded that progress; Keokuk began to slip into obscurity, and the value of Miller's holdings plummeted.

Also adding to Miller's distaste for the capitalists was his own status anxiety. When Miller first arrived in Washington in the 1860s, Supreme Court Justices and their wives stood near the top of the Capital's social pyramid, and Miller's second wife Eliza enjoyed the social prominence Miller's position brought them.[22] Eliza was considered the expert among Justices' wives on the social etiquette and protocols of the Court. On each Monday, for example, she instructed the wives of the other Justice's to be home in "street costume" so that Washington's elite could call. The Millers threw stylish dinner parties attended by Senators, Cabinet officials, and famous men such as Civil War General William Sherman.

In the 1870s, however, things began to change in Washington, as the city finally shed its image as a slovenly backwater. After

Congress initiated a series of improvements to the city's infrastructure, Washington became glamorous. Newly rich capitalists, who liked the fact that the city did not have a closed upper class, came to town, built mansions, and threw extravagant soirees. Miller despised these parvenus, who, he said, "came to Washington with nothing but money to commend them, showering expensive gifts on their friends and taking place only by virtue of wealth."[23] The capitalists' homes dwarfed the Millers' Massachusetts Avenue townhouse, their parties made Samuel and Eliza's efforts look pedestrian, and on a Justice's salary of $10,000 a year, the Millers could not keep up with the capitalist Joneses. In fact, the Millers spent most of the second half of their lives deeply in debt.[24]

Northern capitalists were not the only threat to American values that Miller saw. In the South, Miller loathed the unrepentent ex-Confederates who unleashed a wave of reactionary violence against the former slaves and their white Republican allies. Miller had hoped the Civil War and the Thirteenth, Fourteenth, and Fifteenth amendments would usher in a new economic, political, and legal order in the South, one that would protect the freedmen's right to rise. Instead, he watched with anger as the Ku Klux Klan, the Knights of the White Camellia, and other violent groups helped restore total white supremacy in one Southern state after another. Southern whites, Miller wrote, with their "fiendish hatred for the negroes," proved themselves to be "men incapable of forgiving or learning."[25]

Miller was particularly angry about events that transpired during Reconstruction in New Orleans, the South's largest and most cosmopolitan city. In July 1866, an armed white mob in New Orleans attacked a state constitutional convention that had been called by the Reconstruction Governor. The convention's delegates were both black and white, a fact that infuriated ex-Confederates. The mob, which included many New Orleans police officers who had been Confederate soldiers, surrounded the meeting hall, broke down the doors, and killed the black and white delegates hiding inside. Thirty-four blacks and three whites died. The New Orleans Riot, as it was called, and a similar riot in Memphis twelve weeks earlier galvanized Miller and many other Northerners against President Andrew Johnson's lenient Reconstruction policies and helped bring about military Reconstruction directed by Congress.[26]

In his private correspondence, Miller lashed out at his ex-Confederate brother-in-law, Texas lawyer William Pitt Ballinger, who claimed that the New Orleans riot was the work of thugs and that the gentlemen of the South repudiated such attacks. Miller challenged Ballinger to offer a shred of evidence that leading Southerners opposed the widespread violence against blacks and white Unionists. "Show me how you disapprove of it," he demanded. "Show me a single white man that has been punished in a State for murdering a negro or a Union man. Show me any public meeting that has been had to express indignation at such conduct. Show me that you or any of the best men of the South have gone ten steps to prevent the recurrence of such things. Show me the first public address or meeting of Southern men in which the massacres of New Orleans or Memphis have been condemned." Miller knew that no such evidence existed. "You may say that there are two sides to the stories of Memphis and New Orleans," he concluded. "There may be two sides to the stories, but there was but one side in the party that suffered at both places, and the single truth is undenied that not a rebel or secessionist was hurt in either case, while from thirty to fifty negroes and Union white men were shot down precludes all doubt as to who did it and why it was done."[27]

Miller was also angered by the obstructionist legal campaign white lawyers in New Orleans launched against the state's biracial government. After military reconstruction began, Conservative lawyers in the city used the courts to thwart the Reconstruction government's ability to bring social and economic

change to Louisiana. Ex-Confederate attorneys who had benefitted from President Johnson's liberal pardons launched numerous lawsuits challenging the Reconstruction government's efforts to tax, repair levees, build railroads, improve sanitation, and borrow money.

John Archibald Campbell, a man Miller loathed, led the ex-Confederates' "rule or ruin" legal campaign. Originally from Alabama, Campbell had been an Associate Justice of the United States Supreme Court until he resigned his position in 1861 to join the Confederacy, where he served as Jefferson Davis's Assistant Secretary of War. By 1869, Campbell was an embittered man who remained indignant that he had been imprisoned for five months at the end of the war because it was thought he was part of the Lincoln assassination plot. After the war, he moved to New Orleans, where he made opposing the Republican state government the central theme of his career. Campbell filed one lawsuit after another to stop the legislature's economic development projects, the integration of the public schools, public accommodations laws, and public health measures.[28]

Miller despised Campbell for resigning from the Court to join the Confederacy and for refusing to give up the fight after the war. "I have neither seen nor heard of any action of Judge Campbell's since the rebellion which was aimed at healing the breach he contributed so much to make," Miller wrote privately. "He has made himself an active leader of the worst branch of the New Orleans democracy. Writing their pronunciamentos, arguing their cases in our Court, and showing all the evidences of a disconcerted and bitter old man, filled with the disappointments of an unsuccessful partisan politician." He felt that Campbell's lack of repentance should be punished. " I think no man that has survived the rebellion is more saturated today with its spirit . . . he deserves all the punishment he . . . can receive, not so much for joining the rebellion as for the persistency with which he continues the fight."[29]

Particularly galling to Miller was Campbell's attempt to use the new Fourteenth Amendment to undermine the efforts of Louisiana's biracial state government. Although the amendment's framers had intended that it protect the freedmen and women from racist white state governments, such as those that President Johnson had allowed to operate after the war, in Campbell's hands the language of equal protection, privileges and immunities, and due process became weapons with which to attack Republican legislation. In a case litigated in state court, for example, Campbell argued that a Louisiana law requiring integrated seating in theaters denied New Orleans theater owners the right to run their businesses unfettered by government intrusion—a right Campbell claimed was protected from state laws by the Fourteenth Amendment's Privileges or Immunities Clause.[30]

In the famous *Slaughter-House Cases*, Campbell made a similar argument in federal court in litigation that ultimately resulted in Miller's most important—and sometimes misunderstood—majority opinion. The *Slaughter-House Cases* were born out of Campbell's opposition to an act passed by Louisiana's biracial legislature in 1869 that was designed to regulate the noxious slaughterhouses of New Orleans. Modeled on similar laws that had been passed in New York, Philadelphia, and other cities, the act required all of New Orleans's butchers to cross the Mississippi River and to pay a small fee to slaughter their animals in a new, privately owned, state-of-the-art slaughterhouse. Their butchered meat then had to be inspected before it could be sold in the city's market stalls. Such regulation was long overdue in a metropolis infamous for its squalor. Previously, the slaughterhouses had operated in crowded neighborhoods, and the mass of gory waste they generated was thrown directly into the streets or into the Mississippi River, where it clogged the giant pipes from which New Orleans drew its water supply. Many health officials blamed the slaughterhouses for the cholera and yellow fever that plagued New Orleans almost every summer. In 1853 alone,

yellow fever and cholera killed 10,000 New Orleans residents.[31]

New Orleanians would normally have cheered the passage of the law. Repeated efforts had been made over the years to move the slaughterhouses across the river. Moreover, the butchers had never been a well-liked group. They had long conspired to keep prices high and to prevent competitors from entering the trade. But in 1869, when the butchers went to court to challenge the new slaughterhouse law, they became heroes to many whites who opposed any law, no matter how beneficial, that had been passed by a state legislature that included blacks and Yankees.

In his lawsuits on behalf of the butchers, Campbell portrayed his clients as patriot citizens and lovers of liberty oppressed by a heavy-handed legislature. He likened the slaughterhouse legislation to the onerous regulations of seventeenth-century European monarchies that colonists had come to America to escape. The "right to exercise a trade" unfettered by government intrusion, Campbell claimed, was one of the fundamental rights that the Founding Fathers later fought and died for in the Revolution. Now, he asserted, the Fourteenth Amendment's Privileges or Immunities Clause definitively protected this fundamental right from autocratic state statutes such as the slaughterhouse law. He even went as far as to suggest that the true purpose of the Fourteenth Amendment was to protect white citizens from laws passed by legislatures that included former slaves who "were liberated without preparation for any political or civil life." The white press in New Orleans cheered Campbell on as he used the hated Fourteenth Amendment to fight the equally hated biracial legislature by utilizing the amendment, they said, as "one would use one poison as an antidote to another."[32]

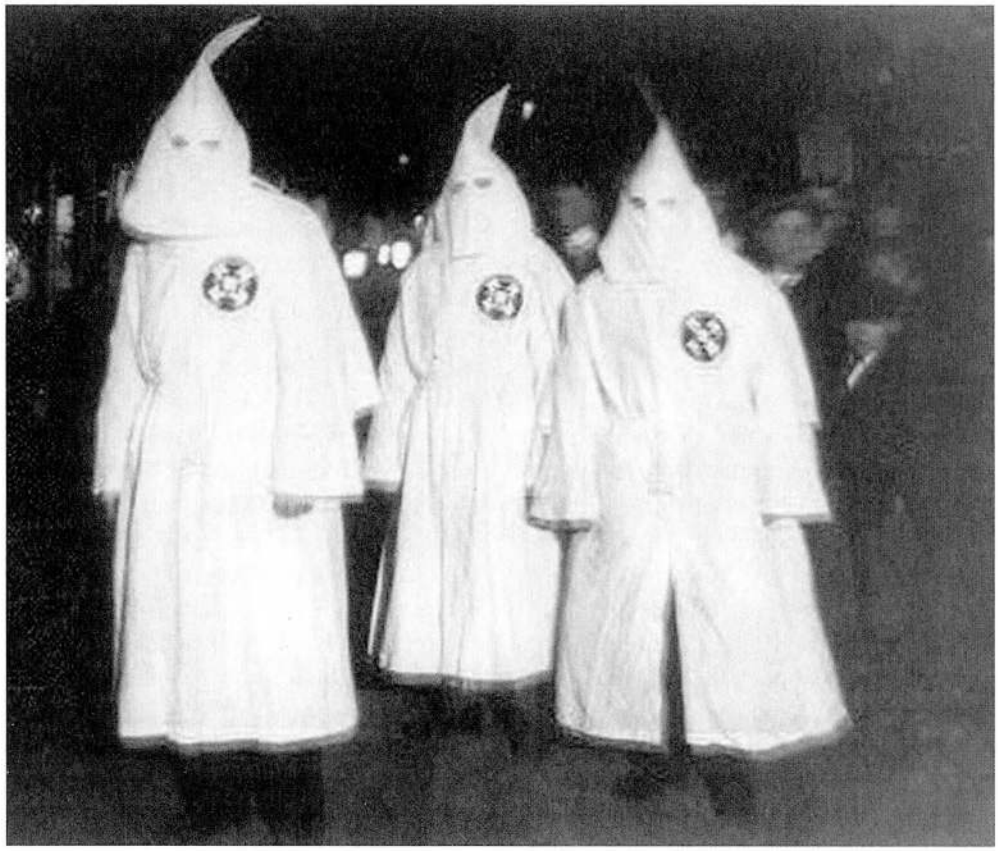
When the *Slaughter-House Cases* reached the Supreme Court in 1873, however, Campbell did not find a receptive audience in Justice Miller. Miller, a former doctor who recognized the need for public-health measures such as the slaughterhouse law, had closely followed events in Louisiana, knew exactly what Campbell was up to, and did not buy Campbell's claims that he was fighting for individual, Jacksonian-style liberty. Miller found it inexplicable that the Fourteenth Amendment, which he considered a means of protecting African Americans in the South, might be used to strike down a sanitation law with such obvious social benefits. Even with "the most casual examination," Miller argued in his majority opinion, "no one can fail to be impressed with the one pervading purpose of" the Fourteenth Amendment. "[W]e mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The Fourteenth Amendment was not, Miller concluded, designed to thwart a valuable health measure that removed slaughterhouses from a crowded city.[33]

But in one of the great ironies of constitutional history, Miller's repudiation of Campbell's arguments in *Slaughter-House* inadvertently gave Campbell his greatest victory. Campbell had purposefully placed the Republican Justices of the Supreme Court in a difficult position. If the Justices sided with Campbell and accepted his expansive reading of the Fourteenth Amendment, they would humiliate the biracial legislature of Louisiana and arm critics of that legislature who alleged that blacks were too ignorant and corrupt to adopt legislation that could pass constitutional muster. If, however, they ruled against Campbell, they would constrict the meaning of the Fourteenth Amendment in the process.

In order to defeat Campbell's arguments and validate Louisiana's Republican legislators, Miller's majority opinion limited the meaning of the Fourteenth Amendment's "privileges or immunities" clause by arguing that the one pervading purpose of Section One of the amendment was to protect African Americans from discriminatory state laws. It did not, the Court concluded, protect

basic rights—both those enumerated in the Bill of Rights and other fundamental rights, such as the white butchers' right to pursue an occupation—from infringement by state governments. For protection of those rights, citizens would still have to look to their state constitutions. By so deciding, Miller hoped to preserve the federal system while providing protection for black civil rights. He wanted to protect the biracial Reconstruction government in Louisiana from Campbell's legal assaults and to uphold the ability of states to adopt economic and health regulations that affected private property. Four years after *Slaughter-House*, however, the Compromise of 1877 brought Reconstruction to an end and restored racist Southern Democrats to power. These new but reactionary governments turned Miller's *Slaughter-House* opinion against itself by using it as a defense of states' rights, segregation, and white supremacy. So, while Campbell lost the battle, he won his retrogressive war.[34]

Miller's majority opinion in the *Slaughter-House Cases* has received withering criticism over the years. Some scholars have even argued that the case was a deliberate attempt by Miller and the Court's majority to *undermine* African-Americans' rights by constricting the meaning of the Fourteenth Amendment. The *Slaughter-House Cases,* such scholars believe, comprised the purposeful first step in the Court's infamous retreat from Reconstruction that culminated in 1896 with *Plessy v. Ferguson*, the "doctrine of separate but equal," and the advent of the Jim Crow era.[35]



In the 1883 *Yarbrough* case, Miller and the Court held that a Klansman who had beaten a black man for voting in the 1882 election could in fact be prosecuted as a private citizen. This ruling did not hold up in later cases.

Miller's critics also point out that in addition to authoring the majority opinion in the *Slaughter-House Cases*, he also joined the majority opinion in the *Civil Rights Cases* (1883). In that decision, the Supreme Court declared unconstitutional a federal law that made it a misdemeanor for private individuals to deny others access to restaurants, theaters, and other public accommodations because of their race. Miller joined all of the other Justices except John Harlan in holding that the Thirteenth and Fourteenth Amendments and their enforcement clauses could not reach discrimination by private citizens. Those amendments, the Court decided, only reached state laws and actions.[36]

From a twenty-first century perspective, it is difficult to defend Miller's vote in the *Civil Rights Cases*. If he was truly the staunch advocate of the rights of African Americans that he believed he was, he would have joined Harlan's famous and courageous dissent. Miller was a moderate Republican—never a radical like Charles Sumner or Thaddeus Stevens—and his concurrence in the *Civil Rights Cases* reflected his limitations on racial issues as well his commitment to dual citizenship that he outlined in the *Slaughter-House* opinion.

Miller's concurrence in the *Civil Rights Cases* did not, however, mean that he had abandoned his commitment to defending African Americans' economic and political rights. Miller believed strongly that if the federal government protected African Americans' *right to vote*, African Americans would be able to protect many of their other rights themselves using their political strength, rather than the courts. One year after the *Civil Rights Cases*, in the often-overlooked *Ex parte Yarbrough*, Miller made this point explicitly. The case involved a Georgia Ku Klux Klansmen named Jasper Yarbrough who belonged to a Klan organization known as the Pop and Go Club. Yarbrough and his cronies had ridden in disguise to the home of an African American named Berry Saunders whom they beat senseless as punishment for his having voted in the 1882 election. The Justice Department successfully prosecuted Yarbrough in federal court, and he was sentenced to two years in prison. Yarbrough's attorneys filed an application for a writ of habeas corpus and, pointing to the recent precedent in the *Civil Rights Cases*, claimed that the Fifteenth Amendment, like the Fourteenth Amendment, did not give the federal government power to punish private citizens for voting-rights violations. The federal government could prosecute state officials, but not Klansmen such as Yarbrough.

Justice Miller and a unanimous Court disagreed. In *Yarbrough*, Miller gave a broad interpretation to Article I, Section 4 of the Constitution, which provides Congress with the authority to make regulations for the "times, places, and manner of holding elections for senators and representatives." Laws that protected voters from violent intimidation even by private citizens, he reasoned, determined the "manner" of an election. Miller also rejected Yarbrough's contention that the Fifteenth Amendment gave no affirmative right to African Americans to vote. The Fifteenth Amendment, he argued, "does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."[37]

Miller's broad interpretation in *Yarbrough* of Article 1, Section 4 and of the Fifteenth Amendment stood in contrast to the conservative construction he gave the Fourteenth Amendment in the *Slaughter-House Cases*. The difference between the two cases stemmed from his concern that the Fourteenth Amendment, broadly interpreted, had the potential to alter dramatically the federal system. Because, he believed, the purpose of the Amendment was to protect African Americans almost exclusively, the amendment's language had to be interpreted strictly or it could lead to all manner of judicial mischief. He feared giving Justice Field and the other conservatives on the Court the ability to strike down valuable state regulatory laws that had nothing to do with race in order to protect rights that had their basis in laissez-faire ideology and natural law. The

Fifteenth Amendment carried no such risks, as its language explicitly limited its effects to matters involving race and voting rights. Thus, in *Yarbrough*, Miller was able to give expression and effect to his genuine concern for African Americans' voting rights without dramatically altering the Constitution.[38]

In *Yarbrough*, Miller went on to describe the dire threat that both white supremacists in the South *and* wealthy capitalists in the North posed to American democracy. "If the recurrence of such (violent) acts as these prisoners stand convicted of are too common in one quarter of the country and give omen of danger from lawless violence," Miller wrote, "the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety." "No lover of his country," he warned, "can shut his eyes to the future danger from both sources."[39]

In his private correspondence, Miller expressed his hope that the *Yarbrough* decision would convince white Southerners to accept black voting rights as a permanent feature of political life in the South, and that white politicians, in turn, would begin to court black votes. Once Democratic politicians appealed to black voters, Miller believed, black citizens would quickly be assimilated into the polity and differ little from any other interest group. The politics of race that defined the Democratic party and the South would fall away. Until that time, he wrote in 1884, the nation was left "at the mercy of the combination of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."[40]

Considered together, Miller's *Yarbrough* opinion and his concurring vote in the *Civil Rights Cases* reflect his belief that if the government protected African Americans' voting rights, black citizens would be able to protect their other civil rights using the ballot rather than the federal courts. Miller put his faith for achieving equality in the political process. In retrospect, it is clear that he relied too much on the national government's ability and continued willingness to protect black voters and on his fellow Justices' commitment to African-American suffrage. Although the Justice Department continued to prosecute voting rights cases in the 1880s, few resulted in convictions. In the 1890s those efforts dwindled, as Northerners grew increasingly tired of the "Southern question." Despite his forceful conclusions about the need to save the republic from Northern corruption and Southern violence, Miller's opinion in *Yarbrough* was later disregarded. In 1903, thirteen years after his death, the Supreme Court in *James v. Bowman* simply ignored *Yarbrough* and held that Congress had no constitutional authority to punish private individuals for violent crimes against black voters. Miller had hoped that with their voting rights protected, black voters might someday be embraced by the leaders of both parties. By the end of the nineteenth century, however, few African Americans voted at all.[41]

Although Miller continued to serve on the Court until the end of his life, his mood grew increasingly gloomy. Even though he held a position of prominence, Miller had not become rich, as he had once thought he surely would. Instead, he struggled to pay his creditors and, for a time, he had to rent his Massachusetts Avenue townhouse and all of its furnishings to a wealthy Congressman from New York while he moved to an inexpensive hotel. Despite these efforts, Miller remained broke, and he knew that if he died, he would leave his wife penniless. His wife and his daughter fought incessantly over family matters, and his hard-drinking son-in-law George Corkhill died of a stomach hemorrhage, leaving his family with doubts and debts.

In his final years, Miller also watched forlornly as Justice Field, the great defender of the capitalists, became the most influential jurist on the Court. It would be Field's vision for the Fourteenth Amendment, not Miller's, that the Court would later embrace in *Lochner v. New York.* And Miller's beloved Republican party also seemed to have changed for the worse. Originally committed to economic mobility for all, its purpose now seemed to be protection

of the gains made by the few. His only solace came from his belief that he had been the judicial voice of the common man, particularly Westerners burdened by rapacious bondholders and black voters besieged by violence in the South. Even though by 1890 it was clear to Miller that his antagonists had won, he believed that during his twenty-eight years on the Bench, he had fought the good fight. Today, many of Miller's admonitions seem prophetic. Lawless violence did play a critical role in the disenfranchisement of black voters that lasted until the 1960s. And many Americans continue to share Miller's concern that the free use of money in elections undermines the democratic process.[42]

On October 10, 1890, Miller suffered a stroke while walking home from the Court. He lived, partially paralyzed, for a few more days. When a doctor urged him not to try not to speak so as not to strain his brain, Miller joked that that was "a compliment for you must think that when I talk I use my brains." His condition worsened, and he died on October 13. As he had feared, he died leaving no income to support his wife. His cash assets consisted of the sale of his law books and the balance due on his salary. After his death, an appeal appeared in the *American Law Review* seeking donations for Eliza. Chief Justice Melville Fuller accompanied Miller's casket back to Keokuk, where he is buried in Oakland Cemetery.[43]

ENDNOTES

[1]Much of this article is adapted from my book **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era** (Baton Rouge: Louisiana State University Press, 2003). I have footnoted my own work only where I think a reference might be of interest to the reader.

[2]*Slaughter-House Cases*, 83 U.S. 36 (1873).

[3]Samuel Freeman Miller, "The Conflict in the Country Between Socialism and Organized Society," reprinted in the appendix of Charles Noble Gregory, *Samuel Freeman Miller* (Iowa City, Iowa, 1907), 165–67.

[4]As a member of Barbourville's Debating Society, for example, Miller argued forcefully that the American economic system did not unfairly favor the wealthy and that talent was more important than wealth in achieving success. For a more detailed description of this portion of Miller's life, see Michael A. Ross, "Hill-Country Doctor: The Early Life and Career of Supreme Court Justice Samuel F. Miller in Kentucky, 1816–1849," *Filson Club History Quarterly* 71 (October 1997): 430–62.

[5]Miller quote from speech reported in the Keokuk *Gate City*, July 17, 1856.

[6]For a much more detailed description of Miller's appointment to the Supreme Court, see Michael A. Ross, "Justice for Iowa: Samuel Freeman Miller's Appointment to the United States Supreme Court During the Civil War," *Annals of Iowa* 60 (Spring 2001): 111–38.

[7]*The Prize Cases*, 67 U.S. 665 (1863); *The Cornelius*, 3 Wallace 214 (1865).

[8]*See, e.g., Hepburn v. Griswold*, 75 U.S. 603 (1870); *Knox v. Lee*, 79 U.S. 457 (1871); *Ex parte Milligan*, 71 Wallace 2 (1866); *Cummings v. State of Missouri*, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. 333 (1866); *Ex parte McCardle*, 74 U.S. 506 (1869).

[9]The best analysis of Miller's views as to the causes of the war can be found in his lengthy discussion of the matter in the *Slaughter-House Cases*, 83 U.S. 36, 68 (1873).

[10]Miller to William Pitt Ballinger, April 28, 1878, box 2, folder 3, Samuel Freeman Miller Papers, Library of Congress.

[11]*Ibid* (emphasis in original).

[12]For a more detailed discussion of these events, see Michael A. Ross, "Cases of Shattered Dreams: Justice Samuel Freeman Miller and the Rise and Fall of a Mississippi River Town," *Annals of Iowa* 57 (Summer 1998): 201–39.

[13]The best analysis of Stephen J. Field's judicial and political ideology can be found in Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Lawrence, Kans., 1997).

[14]*Gelpcke v. Dubuque*, 68 U.S. 175, 205 (1864).

[15]68 U.S. at 206.

[16]*Humboldt Township v. Long*, 92 U.S. 642, 648 (1876).

[17]*Meyer v. City of Muscatine*, 68 U.S. 384, 395–96 (1864).

[18]Miller to William Pitt Ballinger, January 13, 1878, box 2, folder 3, Samuel Freeman Miller Papers, Library of Congress.

[19]Miller to William Pitt Ballinger, August 27, 1868, box 1, folder 5, Samuel Freeman Miller Papers, Library of Congress.

[20]Miller to William Pitt Ballinger, December 5, 1875, box 1, folder 11, Samuel Freeman Miller Papers, Library of Congress.

[21]Miller to William Pitt Ballinger, January 13, 1877, box 2, folder 1, Samuel Freeman Miller Papers, Library of Congress; *Railroad Company v. County of Otoe*, 83 U.S. 667 (1873); *Olcott v. the Supervisors*, 83 U.S. 678 (1873).

[22]Miller's first wife died of consumption in 1854.

[23]Miller quoted in Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (Cambridge, Mass., 1939), 427.

[24]For good descriptions of Washington society during the Gilded Age and the Millers' role in it, see Kathryn Allamong Jacob, **Capital Elites: High Society in Washington, D.C., After the Civil War** (Washington, D.C., 1995), 69, 218; Madeline Dahlgren, **Etiquette of Social Life in Washington** (Lancaster, PA., 1873), 121; Randolph Keim, **Society in Washington: Its Noted Men, Accomplished Women, Established Customs, and Notable Events** (Harrisburg, Pa., 1887), 122–24, 217; E. N. Chapin, **American Court Gossip; or, Life at the National Capitol** (Marshalltown, Iowa, 1887), 249; Ben Perley Poore, **Perley's Reminiscences of Sixty Years in the National Metropolis**, vol. 2 (Philadelphia, 1886), 94, 261–63, 269, 299.

[25]Miller to William Pitt Ballinger, August 29, 1869, folder 6, box 1, Samuel Freeman Miller Papers, Library of Congress.

[26]For a good account of these events, see James G. Hollandsworth, **An Absolute Massacre: The New Orleans Race Riot of July 30, 1866** (Baton Rouge, La., 2001).

[27]Miller to William Pitt Ballinger, February 6, 1867, box 1, folder 4, Samuel Freeman Miller Papers, Library of Congress.

[28]For a detailed discussion of Campbell's obstructionist legal campaign, see Michael A. Ross, "Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868–1873," *Civil War History*, 49 (September 2003): 235–53; Michael A. Ross, "Resisting the New South: Commercial Crisis and Decline in New Orleans, 1865–85," *American Nineteenth Century History* , 4 (Spring 2003): 59–76; Jonathan Lurie, "Ex-Justice Campbell: The Case of the Creative Advocate," *Journal of Supreme Court History* 30 (2005): 17–30.

[29]Miller to William Pitt Ballinger, October 15, 1877, box 2, folder 2, Samuel Freeman Miller Papers, Library of Congress.

[30]Campbell made this argument in 1869 in the Fourth District Court in Orleans Parish. The case later became *Joseph v. Bidwell*, 18 La. Ann. 383 (1876). By then, Campbell was no longer handling the case. *See* Ross, "Obstructing Reconstruction," 249–50.

[31]For a more detailed discussion of the context of the case, see Michael A. Ross, "Justice Miller's Reconstruction: The *Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans, 1861–1873," *Journal of Southern History* 64 (November 1998): 649–76. *See also* Ronald M. Labbe and Jonathan Lurie, **The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment** (Lawrence, Kans., 2003).

[32]Ross, "Justice Miller's Reconstruction," 666; Ross, "Obstructing Reconstruction," 250; *The Slaughter-House Cases*, 83 U.S. 36,45, 48, 60 (1873).

[33]83 U.S. at 64, 71; Ross, "Justice Miller's Reconstruction," 667–68.

[34]Ross, "Obstructing Reconstruction," 251–53; Lurie, "Ex-Justice Campbell: The Case of the Creative Advocate," 17–30.

[35]*Plessy v. Ferguson*, 163 U.S. 537 (1896). *See, e.g.,* Richard L. Aynes, "Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the *Slaughter-House Cases*," *Chicago-Kent Law Review*, 70 (1994): 627–88; Robert J. Kaczorowski, **The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866–1876** (New York, 1985), 143, 149.

[36]*The Civil Rights Cases*, 109 U.S. 3 (1883).

[37]*Ex parte Yarbrough*, 110 U.S. 651, 651–56, 658 (1883).

[38]For a more detailed discussion of this point, see Ross, **Justice of Shattered Dreams**, 247–51.

[39]110 U.S. at 657, 666–67.

[40]Miller to William Pitt Ballinger, November 23, 1884, box 2, folder 9, Samuel Freeman Miller Papers, Library of Congress.

[41]*James v. Bowman*, 190 U.S. 127 (1903). *See also* Ross, **Justice of Shattered Dreams**, 250; Robert M. Goldman, **Reconstruction and Black Suffrage: Losing the Vote in *Reese* and *Cruikshank*** (Lawrence, Kans., 2001), 123, 134.

[42]*Lochner v. New York*, 198 U.S. 45 (1905). *See also* Paul Kens, **Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*** (Lawrence, Kans., 1990).

[43]Ross, **Justice of Shattered Dreams**, 256.

Justice Stephen Field of California

PAUL KENS

Stephen Field sat on the U.S. Supreme Court for thirty-four years, from 1863 to 1897. He outlasted eight President and three Chief Justices. His time on the Court ran from the Civil War through the Gilded Age and came within a breath of the twentieth century. There is a lot to say about Stephen Field, but I will limit my comments to just two things.

First, I would like to summarize Field's experiences in California. Field was a true pioneer. As a young adult, he joined the wave of people who came to California during the Gold Rush of 1849. His experiences in the California frontier left an indelible impression.

The second thing I would like to do is explore a few ways in which his experiences in early California shaped his thinking about the law and the Constitution.[1] Field is usually thought of as an arch conservative, but I would like to suggest that the ideas to which he subscribed, especially his ideas about economic liberty, were actually revolutionary in the sense that they rejected tradition and gave an entirely new shape to the way we think about our government and our social order.

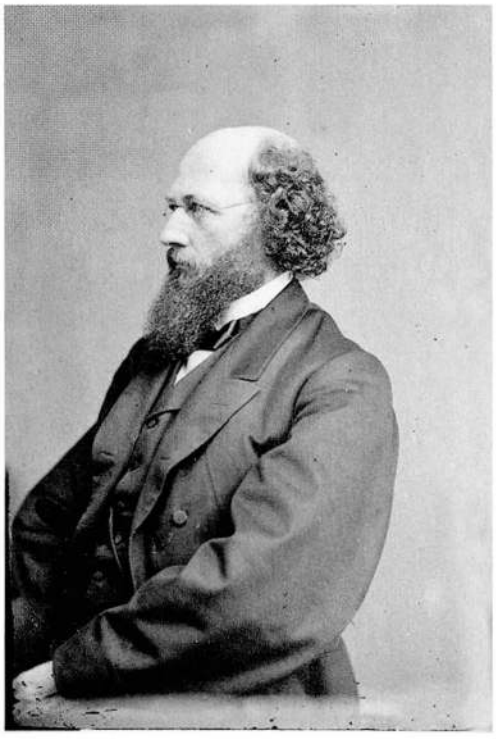
I. Field's Early Days in California

Some time ago, while digging through old documents in the Bancroft library, I ran across a memoir of a California pioneer named William Moses. It was really more a story than a memoir. In fact, it was really more a tall tale. But I would like to tell it anyway.

Moses recalled that he was working a mining claim in the mountains near Marysville, California. One time, when Moses was visiting the nearest mining camp, he was tapped to sit on a jury. On one side of the dispute was an old miner who, after being stricken with scurvy, staked his claim according to traditional mining code and went back to the mining camp for treatment. On the other side was a group of accused claim-jumpers.

The trial took place in a saloon and gambling house called the Striped Tent. When it began, the justice of the peace ordered the gambling to cease and opened court at a big gambling table in the middle of the establishment. Each side presented its case, and then the gambling resumed while the jury went into another room to deliberate. It didn't take the jury long find in favor of the old miner.

But that didn't end the dispute. Hearing the verdict, the claim-jumpers' lawyer leaped



Field graduated from Williams College in 1837 and then studied law in New York with his brother David Dudley. He joined his brother's practice after passing the bar, but then was drawn by the Gold Rush and left for California in 1849.

from his seat, shouting that he would advise his clients to resist the verdict to the hilt of a knife. The jury foreman reacted by pulling a revolver out of its holster and asking the judge whether he intended to protect the jury or if the jury must protect itself. In an instant, Moses recalled, there were a least twenty revolvers and other pistols of various kinds drawn. But the thing about the incident that most impressed Moses was the judge's reaction. Let me read how Moses describes it:

> The judge said he would not allow such language by the attorney and would Himself protect the Jury. And—doing what I never saw before—drew from his pocket an eight-inch Bowie knife, placing it back between his teeth. Then from his holster he drew a Navy Colts revolver, cocked it, and placed its muzzle at the lawyer's head—and Hissed at him, the command, "Eat those words, or I will send you to Hell." The claim jumpers' attorney meekly said "I eat my words" and everyone returned his pistol to his holster. The judge then turned to the claim jumpers and told them "If you or your lawyer are here at here at sunrise tomorrow morning, you will never leave this camp again.—Court is closed."

That justice of the peace, Moses tells us, was Stephen J. Field.

Tall though the tale may or may not be, it captures the moment—and perhaps the self-image—of California's pioneers. It is also not much different from accounts that Field himself tells in his memoirs.

His story starts in 1849, when he left the security of his brother's law practice in New York City and joined thousands in the rush to California's gold country. After landing in San Francisco, Field made his way to a settlement at the confluence of the Feather and Yuba rivers, near the northern gold fields. Field and the other settlers who first arrived in the area organized a town and named it Marysville. Since California still operated under Mexican law, they elected Field as *Alcalde*, a Mexican office that had characteristics of both mayor and judge. He later became justice of peace and, for a short time, was literally the only law northwest of the Yuba.

As Alcalde, Field introduced United States notions of procedural justice into his courtrooms. He called grand juries, impaneled juries, and appointed lawyers for defendants. Yet he also administered justice and discipline with an innovation and flair that could have only taken place in an untamed environment like Gold Rush California. For example, he sometimes ordered that convicted thieves be banished or publicly whipped. He explained that, "because jails were not available, It was the only way they could be saved

from lynching." Yet Field also seemed to take some pride in it. "There is something so degrading about a public whipping, he said, that I have never known a man thus whipped to have stayed in town longer than he could help."

According to his own recollections, Field's brand of justice also included a strong dose of mercy. When a man was charged with stealing a cow, Field ruled that there were mitigating circumstances because the man was hungry. He ordered the thief to pay for the cow and dismissed the case. He told stories of how he convinced a couple seeking a divorce to get back together and how his impassioned speech to a mob saved a man from a lynching.

The important point is that he was able to apply his own brand of justice. The circumstances of the frontier allowed—and perhaps even required—judges to be freewheeling in their interpretations of the law. And, at least in Field's case, those circumstances reinforced an incredibly strong attitude of self-righteousness.

The young pioneer Field may have reveled in his freewheeling, self-righteous application of the law, but he also understood the power that resides in controlling the formal institutions of law. One of his important accomplishments as Alcalde was setting up a system for recording deeds in Marysville. As we will see, land titles were the source of many disputes in early California. Field understood that a recording system lends legal formality to the transfer of property.

It is impossible to overstate the chaos that was Gold Rush California. Easterners brought with them familiar social, political, and legal values, but institutions for applying those values were not in place. They did not come to a land that had banks, shops, homes, courthouses, or jails. They had to build those things from scratch. Besides, the '49ers also brought a strong sense of free-spiritedness. They saw the Gold Rush as history's greatest opportunity to break shackles and traditions that held them back. This may have produced a certain euphoria in the early days, when a man or woman could simply pack a shovel and pan and set off to the gold fields. But the euphoria did not last for long. By the mid-1850s, gold had begun to play out, at least the easy pickings that could be panned from the streams and creeks. The free-spirited prospector was becoming a rarity. There was still plenty of room for speculation and profit in the state, but more people were pinning their hopes and dreams on farming and small business, and even more were giving up their dreams and going to work for someone else. In this new environment, Californians soon became involved in bitter battles over how the wealth of this vast territory would be divided. The battles were intense and sometimes violent. They involved struggles for power and wealth, but they often were also ideological. And Stephen Field was in the thick of it.

Following his stint as Alcalde in Marysville, Field quickly rose in prominence. After spending a short time in private practice, he was elected to the California legislature in 1852 and then to the California supreme court in 1857. The Supreme Court Historical Society has published Field's memoirs, where you will find stories that are tales right out of Western novels. Field recalls how he stared down a rival, Judge William Turner, who had threatened to "cut off his ear and shoot him down on the spot." He challenges a fellow legislator to a duel, is saved from an attack in a saloon, and is bushwhacked while unarmed.[2]

I am going to skip those stories today, however, and talk about one Gold Rush–era dispute in which Field was not a protagonist but, as a justice of the California Supreme Court, had the final word. The dispute led to the 1859 case called *Biddle Boggs v. Merced Mining Company*.[3] The caption of the case is a bit misleading, because it is really a dispute between famous explorer John Frémont and small mining companies, independent prospectors, and settlers.

To explain the *Biddle Boggs* dispute, it is first necessary to consider the 1846 treaty of

Field was elected *Alcalde* of the town of Marysville (pictured), giving him almost limitless powers as a magistrate. He settled disputes and tried to preserve the public order.

Guadalupe Hildago, which ended the war with Mexico and ceded California to the United States. As part of the agreement, the United States promised that all grants of land previously made by the Mexican government were to be respected as valid to the same extent as they would have been valid if California had remained under Mexican rule. But any land not previously granted to individuals by the Mexican government was considered to be public domain of the United States and thus available for homesteading and prospecting.

In 1844, the Mexican government gave Juan Alvarado the rights to a land grant called Las Mariposas. This was an enormous floating grant, which was common under Mexican rule. It gave Alvarado the exclusive right to carve out a seventy-square-mile rancho from a much larger area estimated to be 900 square miles. That 900-square-mile area essentially rested in limbo, unavailable to anyone else until the grantee made his choice.

This particular grant did include some explicit conditions. Most striking to me was that Alvarado was prohibited from selling the property. He was also required to inhabit it within one year, survey it, place landmarks, and file a map called a *deseno*.

Despite the prohibition on sale, in 1847, Alvarado sold his right under the grant to Frémont. In 1852, Frémont filed a claim asking the U.S. Land Commission to recognize his rights to the land. At that time, however, neither he nor Alvarado had satisfied any of the conditions of the grant, and the sale had obviously broken one.

The floating characteristic of the grant and the tenuousness of Frémont's claim comprised a recipe for conflict. The 900 square miles from which Frémont would eventually

choose his land included prime agricultural lands and, more importantly, a large part of rich gold fields in the foothills of the Sierra Nevada Mountains. During the Gold Rush, people had poured into the area. They staked claims, made homesteads, built towns, started businesses, and panned the rivers and streams. Many of these people might have been unaware of Frémont's claim. Some might simply have chosen to ignore it. Others might have thought it was invalid. Certainly most would have thought it *should* be invalid. These people were raised in an era that idealized homesteading. For many of them, the idea that one man had a right to tie up an area of land the size of a small state, much less own a block of land the size of a country, was un-American and outrageous.

The dispute over ownership of the land was settled before Field came into the picture. In 1854, in *Frémont v. United States,* the U.S. Supreme Court ignored the formalities of Mexican law and turned to informal "Mexican customs and usages" to determine that Frémont's claim was valid.[4] What was not settled, however, was the ownership of the rights to minerals, for under Mexican law, a land grant did not include mineral rights. Unlike U.S. law, which gave those rights to the owner of the surface, Mexican law reserved them to the state.

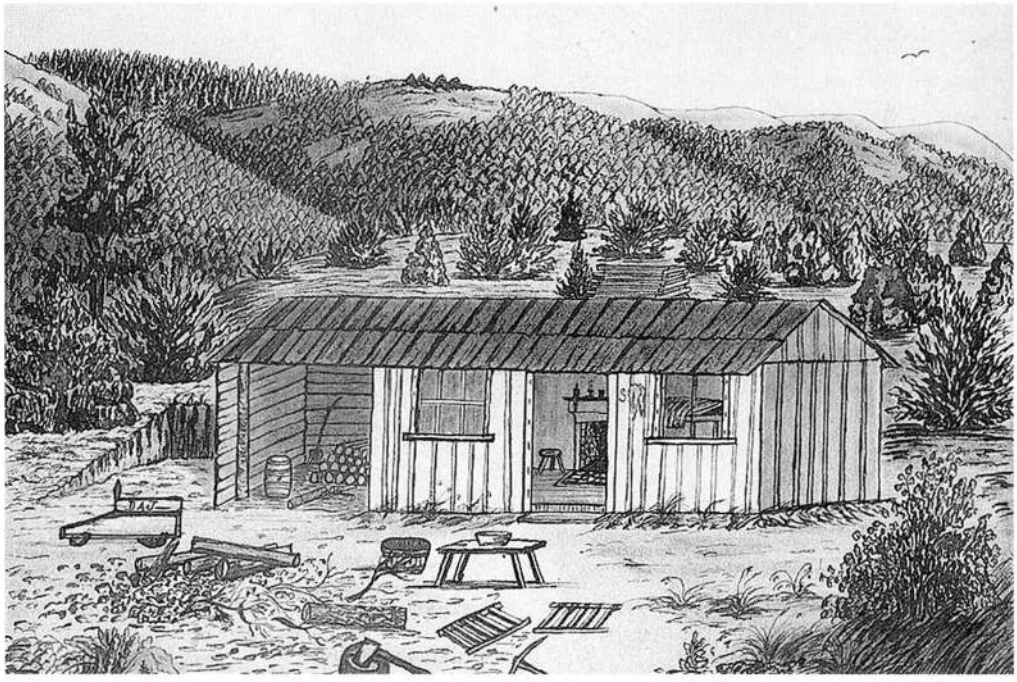
Independent prospectors and small mining companies such as the Merced Mining Company that had been working the gold fields for years insisted that the formal Mexican law regarding the grants should be followed, and that this meant the minerals on Mexican land grants now belonged to the United States—and were available for prospecting and independent mining. This is where *Biddle Boggs v. Merced Mining Company* comes in.

I want to emphasize two things about this case. First, the case itself—that is, the conflict in the courts—does not really capture the intensity of the battle that raged around this dispute. While the case was making its way through the courts and Frémont's ownership of the minerals was in question, Frémont employees, Merced miners, and independent prospectors were all working claims in this gold-rich area. The rivalry grew in intensity until a group of about 100 armed "Miners and Settlers" surrounded Frémont men working a mine called the "Black Draft Tunnel" and refused to let them leave. The San Francisco weekly *Bulletin* reported that the intense siege that followed "threatened a terrible slaughter." Fortunately, it broke up in about a week, when rumors spread that the Governor was sending in the state militia.

Second, it is especially significant that the legal dispute itself took place in two stages. In the first, the majority of the California supreme court ruled that the only rights that passed to Frémont under the Treaty of Guadalupe Hidalgo were the rights granted under formal Mexican law. The mineral rights therefore belonged to the United States and were available to independent miners and prospectors. Justice Peter Hart Burnett wrote the opinion. Field, who had joined the court in 1857, dissented.

Frémont kept the case alive with a motion for rehearing. The motion lay dormant until the general election about a year later. In that election, one of Frémont's lead attorneys, Joseph Baldwin, was elected to replace Burnett. At the time, the California supreme court was a three-member elected body, so Frémont's forces must have been heartened by the election. They were encouraged even more when, in September 1859, their other antagonist, Justice David Terry, killed Senator David Broderick in a duel and resigned from the Court.

Field took the lead in this newly constituted Court. He granted Frémont's motion for rehearing and, within a year, wrote two opinions that reversed the Court's first decision.[5] The new Field-led court established a rule that, once the United States recognized the validity of a Mexican land grant, the rights to the minerals passed to the holder of the grant. The cases gave Frémont complete control of about



Under Field's leadership, the California Supreme Court ruled that the rights to minerals under large Mexican land grants belonged to the grant holders and were thus not available to prospectors like the one who built this shack in Long Gulch, California.

seventy square miles of California's richest mineral wealth, most of what now is Mariposa County.

Field's rationale for rejecting Mexican law was a masterpiece of legal tactics. He reasoned that the Mexican rule—that ownership of minerals remained with the state—was based on the archaic theory of *jura regalia*, under which ownership of a nation's valuable resources was reserved for the king. In so reasoning, he put his opponents in the awkward position of having to base their claim on a theory of sovereignty that Americans were likely to find distasteful.

Lawyers might have been impressed by Field's legal skills, but California's miners and settlers were not. To them, Field's opinion was antidemocratic. As one complained, "American public use, custom, and opinion had not done away with Mexican Mining law. America's written law had not repealed it. To the contrary the people had adopted it. Yet Judge Field had ignored them."

This complaint—that Field was legislating from the bench—was not the only reason his critics thought the opinion was antidemocratic. Perhaps more importantly, they worried that the practical effect of the opinion posed a threat to democracy. Many early Californians saw the California frontier as an opportunity for the homesteader, prospector, and small-business owner, and they feared anything that smacked of privilege or landed aristocracy. As one critic put it, a decision such as *Biddle Boggs* threatened democracy by concentrating power in the hands of a few. It had turned Frémont's Las Mariposas claim into a small principality.

The *Biddle Boggs* case provided a rough but useful insight into how competing sides in California politics were shaping up, and a pretty accurate prediction of how Stephen Field would fit in.

Field left the California supreme court in 1863, when President Lincoln appointed him to the U.S. Supreme Court. But he did not leave

California's political scene. This was an era when Supreme Court Justices still rode circuit. As the Justice assigned to the area, Field was the highest federal judicial officer in California and the Pacific Coast. In that role, he remained at the center of California politics almost until his death. Looking back over that time, one sees a theme. In virtually every dispute—the squatter riots in Sacramento, battles over ownership of San Francisco's valuable waterfront property, any number of disputes involving the Southern Pacific Railroad—Field lined up with an emerging business elite.

California's miners, settlers, and laborers took notice. When Field ran for the Democratic nomination for President in 1879, the *San Francisco Examiner* wrote, "In any case where the people or the state, or a private citizen, has been a party on one side, and a rich corporation the opposing party, Field has always pronounced opinion or given judgment in favor of the corporation."

Throughout Field's career, his opponents charged him with unethical conduct, taking bribes, or simply being in the pocket of the rich and powerful. But you do not need to find a nefarious plot to explain Field's tendencies. Certainly Field did associate with California's economic elite. He socialized with Leland Stanford and Collis P. Huntington of the Southern Pacific, Lloyd Tevis, the president of Wells Fargo, and other members of what some called "the Pacific Club set." He was one of them and shared their sentiments. These men were the winners in the struggle to divide up the wealth of California. It was natural for them to believe that their rise to the top was a product of their foresight, intelligence, and drive, and that the entire state was better off as a result. They thought of themselves as men of destiny. Field explained this when he articulated why he decided to go to California: "There was a smack of adventure to it, he wrote; "the going to a country comparatively unknown and taking part in fashioning its institutions, was an attractive subject of contemplation." It is reasonable to conclude that Field's view of the world and attitude toward the law were guided in part by a belief that such men of destiny should have a great deal of free play to guide the economic growth of the nation and to allow them to reap the rewards of their efforts.

Historians and legal scholars have written numerous books and articles debating Field's philosophy and doctrine. I have referred to his "view of the world" because it indicates something less structured and formal than philosophy or doctrine. Today, I would simply like to explain why I believe Field's experiences in California—his confidence in men of destiny, men like himself—influenced his decision-making. And I would like to use two of his Supreme Court opinions, his dissents in the *Slaughter-House Cases*[6] and *Munn v. Illinois*,[7] to illustrate.

II. Field's Impact on Constitutional Thought

Justice Field is typically thought of as the godfather of laissez-faire constitutionalism. Much of his legacy lies in promoting a doctrine of economic liberty that would significantly limit the government's role in regulating the economy. The Fourteenth Amendment's guarantee that "no state shall deny any person of life, liberty or property without due process of law" was a key element of the doctrine, as was the theory of liberty of contract, which protected the right of individuals to enter into private agreement free of government interference. And the embryo of liberty of contract is said to be Field's dissent in the *Slaughter-House Cases*, in which he argued that a Louisiana law requiring all New Orleans butchers to practice their trade in a central slaughterhouse interfered with the butchers' "right to pursue a lawful calling."

Something of the freewheeling spirit of Field's pioneer days is reflected in the fact that he was not the least bit troubled that the Constitution does not expressly guarantee such a right. He argued that the right to

pursue a lawful calling was a natural and inalienable right that belonged to the citizens of all free governments. The Fourteenth Amendment's protection of liberty merely provided him with the vehicle for giving it constitutional status.

But there was another, even more obvious link to Field's early days in California. This idea of a right to pursue a lawful calling was nothing new to Field. He had used it when his own professional life was threatened. In 1850, his rival, Judge William Turner, disbarred him. Field argued to the California supreme court that he had a right to pursue a lawful calling and could not be arbitrarily deprived of that right without being given notice or a hearing. And he won.[8]

After he became a Justice on the U.S. Supreme Court, he used the doctrine again in an 1867 case, *Cummings v. Missouri*.[9] In that case, he wrote an opinion overruling a law that prohibited people from practicing certain professions unless they took an oath swearing they had never given aid to the Confederacy.

I should point out that Field's commitment to the right to pursue a lawful profession was not unconditional. On the same day that he dissented in the *Slaughter-House Cases*, he agreed with the majority of the Court that the State of Illinois had the right to prohibit a woman from practicing law.[10]

Field's dissent in the *Slaughter-House Cases* provides a pretty explicit example of how his experiences in California influenced his thinking. The link provided by his dissent in *Munn v. Illinois* is a little more subtle. It begins with the observation that, if society was best guided by men of destiny, as Field believed, then collective action—including popular democracy—was at best a nuisance and at worst a dire threat.

The problem with this idea, of course, is that there is a deep tradition of collective action in United States history. It is expressed not only as popular democracy but also in the broader and less well-defined concept of the "rights of the people" or "rights of the community."

Concern for the rights of the community was a significant theme of antebellum constitutional doctrine. The most famous expression of the principle is found in Chief Justice Roger Brooke Taney's opinion for the majority in the 1837 case of *Charles River Bridge v. Warran Bridge*. Responding to the Charles River Bridge Company's claim that its charter implied an exclusive right to operate a bridge. Taney observed that "[t]he objective of all government is to promote the happiness and prosperity of the community by which it is established." This led him to the conclusion that "it can never be presumed that the government intended to diminish its power to accomplish that objective."[11] Taney established this presumption in favor of the state in order to achieve the goal of finding a proper balance between property rights and the rights of the community. "While the rights of private property are to be sacredly guarded," he observed, "we must never forget that the community also have rights, and that the happiness and well being of every citizen depends on their enforcement."[12]

This paradigm of balancing individual rights against the rights of the community—both being laudable ends—was largely replaced after the 1890s in the era of laissez-faire constitutionalism. And Stephen Field was one of the earliest proponents of the change.

The new paradigm emphasized the balancing of individual rights against governmental power. It also had another element: the refusal to recognize that property rights are not absolute but rather are limited by the overriding claims of the community. Mary Ann Glendon calls this "the illusion of absoluteness."[13] It is unlikely that anybody believes that property rights or economic liberty are absolute. Certainly Field did not. But this phrase is wonderfully apt. It captures an attitude toward property rights that glorifies individualism and absolute dominion, one in which the rights of the community and regulation in the public interest are but grudging exceptions.

This shift did not occur immediately after the Civil War or the ratification of the

Field's dissent in the *Slaughter-House Cases* reflects the freewheeling spirit of his pioneer days. He argued that the Louisiana butchers had a right to freely practice their craft without interference despite the fact that the Constitution does not expressly guarantee such a right.

Fourteenth Amendment. In fact, the majority of the Court expressly rejected it, at least as late as *Munn v. Illinois* in 1877.[14]

Munn involved an Illinois statute that set maximum rates that could be charged for storing grain in Chicago's giant grain elevators. One of those grain elevators, the partnership of Munn & Scott, argued that the rate law deprived them of their property without due process of law.

Although Munn's attorneys lost their case, Chief Justice Waite's opinion for the majority is remembered today for giving a major concession to those who favored Field's brand of economic liberty. In giving his reason for rejecting Munn's claim, Chief Justice Waite said that

> down to the time of the adoption of the Fourteenth Amendment, it was not thought that statutes regulating the use, or even the price of the use, of private property necessarily deprived the owner of his property without due process of law. Under some circumstances they may, but not under all.[15]

The grain elevators were subject to regulation, according to Waite, because they were "businesses affected with a public interest."[16]

It is because of this concession that *Munn* is best known in constitutional history as a stepping-stone to the Court's eventual adoption of the doctrine of economic due process, the idea that the Due Process Clause of the

Fourteenth Amendment limited a state's ability to regulate economic matters. In this respect, the case was a window to the future. And Stephen Field's dissent provided the best view.

Field's dissent embodied the "illusion of absoluteness." He agreed with Munn's attorneys that "it was not only the title and possession of property that the Constitution was intended to protect, but also the control of the uses and income." Field's dissent also emphasized the need to balance individual liberty against government power. At the same time, it reflected some of that "view of the world" that grew out of Field's experiences in California: his distrust of democracy and his underlying sense that men of business, or men of destiny, should have a great deal of free play to guide the nation's growth. Criticizing Waite's test, Field complained:

> If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the protections of the Constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature.[17]

What is often forgotten about *Munn* is that it also provides a window to the past. Chief Justice Waite's opinion explicitly adopted the traditional view, borrowed from Contract Clause cases such as *Charles River Bridge*, that individual property rights are limited by the rights of the community. Waite said this in several ways:

- He observed that, "[w]hen one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations with others, he might retain."
- The result, he said, "'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'"
- He thus concluded that Government has the responsibility and authority to regulate "the manner in which each shall use his property, when such regulation becomes necessary for the public good."[18]

It is only a slight exaggeration to say that Waite's majority opinion in *Munn* was the last gasp for a long-held legal tradition that emphasized the rights of the community as a limit on private property. By the mid 1880s, the Court had begun to move towards Field's reasoning and toward a doctrine that idealized the absolutist right of property. Instead of balancing property rights against the rights of the community, it began to emphasize a tension between individual rights and governmental power. This was the predominant model that the Court adopted during the era of laissez-faire constitutionalism from 1890 to 1937.

Even though the Court reversed course in 1937 and rejected many of the principles of economic due process, the model Field advocated has persisted. It lies at the heart of the constitutional thought of many of today's political liberals who would balance legitimate government interest—that is, power—against an individual's freedom of speech or right of privacy.

More interestingly to me, it lies at the heart of the constitutional thought of a new breed of economic libertarians. These scholars maintain that the Constitution significantly restricts the state's power to interfere with an individual's liberty to use his or her property. They propose that cases involving economic regulation are a matter of balancing economic liberty against state power, and that courts should apply a presumption in favor of liberty.[19]

Although these modern economic libertarians sometimes claim that their ideas are rooted in the framing of the Constitution, I think it is more accurate to say they are the heirs of Stephen J. Field and the ideas he advocated during the last part of the 1800s.

As I mentioned in my opening remarks, Field is often described as conservative. But he was actually a revolutionary, in the sense that he rejected tradition and advocated a shift in the very way we think about the nature of our government and social order. Although in his lifetime Field had little success in getting other members of the Court to join him, we still feel the impact of his ideas today.

III. Conclusion

I would like to close with one of my favorite Field quotations. After reading hundreds of Field's opinions and countless public statements, comments to the media, and letters in scratchy, almost illegible handwriting, I have come to recognize Field as a man who possessed many virtues.

Humility was not one of them. Field's enormous ego is revealed in a letter he wrote to his friend Judge Matthew Deady in 1884. With characteristic confidence and self-righteousness, he told Deady that "[t]he good people of California generally are furious the first year at my decisions, and about the third year afterwards they begin to approve of them."

ENDNOTES

[1]The following description of Field's experiences in early California is adapted from my own work: Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (1997). References can be found there. I have modified some quotations to make them easier to follow in an oral presentation.

[2]The Supreme Court Historical Society has published Field's memoirs in two parts: Stephen J. Field, "Personal Reminiscences of Early Days in California," *Journal of Supreme Court History* 29 (2004) 22–119; George C. Gorham, "The Story of the Attempted Assassination of Justice Field by a Former Associate of the Supreme Bench of California," *Journal of Supreme Court History* 29 (2005) 105–94.

[3]*Biddle Boggs v. Merced Mining Company II*, 14 Cal. 279 (1859).

[4]*Frémont v. United States*, 58 U.S. (17 How.) 542 (1854).

[5]The other opinion was in the combined cases of *Moore v. Smaw and Frémont v. Flower*, 17 Cal. 199 (1861).

[6]83 U.S. 36, 83 (1873).

[7]94 U.S. 113, 136 (1877).

[8]*People ex rel. Field v. Turner*, 1 Cal. 152 (1850); *Ex parte Field*, 1 Cal. 187 (1850); *People ex rel. Field v. Turner*, 1 Cal. 188 (1850) motion for attachment (refused); *People ex rel Field v. Turner*, 1 Cal. 190 (1850) writ of mandamus.

[9]71 U.S. (4 Wall.) 277 (1867).

[10]*Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

[11]*Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547 (1837).

[12]36 U.S. at 547.

[13]Mary Ann Glendon, **Rights Talk: The Impoverishment of Political Discourse** (1991) 18–46.

[14]94 U.S. 113 (1877).

[15]94 U.S. at 125.

[16]94 U.S. at 126.

[17]94 U.S. at 140 (Field, J. dissenting).

[18]94 U.S. at 124–25.

[19]Randy Barnett, **Restoring the Lost Constitution: The Presumption of Liberty** (2004), provides an excellent example.

Stanley Matthews: A Case Portrait of Gilded Age High Court Jurisprudence

JONATHAN LURIE

Introduction

Why present a paper dealing with Stanley Matthews? Numerous readers, one suspects, will not be familiar with him. Yet his career includes several unusual aspects that warrant some attention, as was also true of the two Justices discussed in my earlier essays: John A. Campbell was the only member of the Supreme Court to resign from the Court when his state seceded and to be confined in a federal prison at the conclusion of the Civil War in 1865[1] ; and William Howard Taft was the only member of the Supreme Court who served as President, Solicitor General, and circuit judge as well as Chief Justice.[2] What is unusual about Justice Stanley Matthews? Three points may be noted: (a) He was the only Justice to be appointed by, not one, but two Presidents; (b) he appears to have been the only Justice to be confirmed by the narrowest possible margin, a single vote;[3] and (c) I believe he is the only Justice whose daughter married one of her father's judicial colleagues, in this case Justice Horace Gray. Matthews was a devoted Republican, nominated by two Republican Presidents, yet his selection by Rutherford Hayes in 1880 stirred unusual opposition—and this in an era when it was routine for politics to reflect rancor, enmity, and personal recrimination. While such opposition was not to be unexpected, in Matthews' case it came from his own party. Indeed, it was not Republican votes but more than a dozen from the Democrats that secured his ultimate confirmation.

I

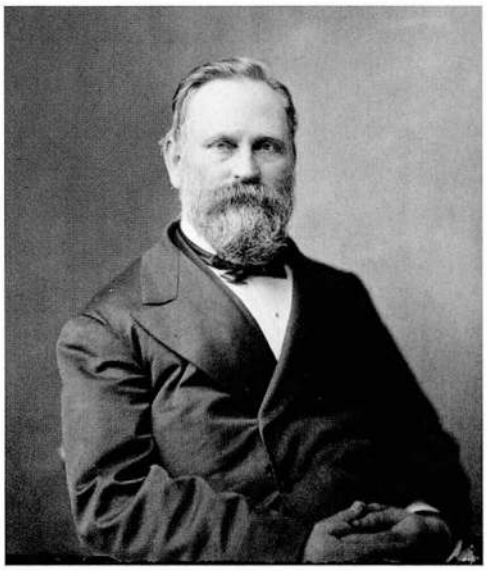
Stanley Matthews was born in 1824 in Lexington, Kentucky, where his father held a professorship at Transylvania University, at which another future Supreme Court Justice—Samuel Miller—later studied, not law, but medicine. In 1832, Thomas Matthews moved his family to Cincinnati and became the first headmaster of Woodward High School, from which William Howard Taft would later graduate in 1870. The oldest of eleven children from his father's second marriage (there were also five from his first), Stanley Matthews must have possessed considerable intellect, as he entered Kenyon College as a junior at the age of fifteen. At Kenyon, he became close friends with another student from Ohio, Rutherford Hayes. This friendship had lasting political repercussions for both young men. Indeed, Hayes appears to have calmed some impetuosity on Matthews' part concerning a disagreement between several students and the college administrators. Apparently, the altercation almost cost Matthews his degree, but he was able to graduate in 1840.[4] He was not yet eighteen.

Too young to gain admission to the Ohio Bar, Matthews studied law on his own in Cincinnati and relocated for a brief period to Tennessee, where he taught school, married, and practiced law. He returned to Cincinnati in 1844 and the next year, when he turned twenty-one, was admitted to the Ohio bar. Here again Hayes encountered Matthews, as he served on the committee to examine the young applicant. Hayes recalled that Matthews was "beyond dispute a better lawyer than any of the examining committee."[5] Mixing legal practice with local politics, Matthews became involved with the Free Soil Democrats, served a term in the Ohio Senate, and was mentored by Salmon P. Chase, future Chief Justice of the Supreme Court. Still an anti-slavery Democrat, he accepted an appointment from President James Buchanan as U.S. Attorney for the Southern District of Ohio. In this capacity, he had to prosecute individuals accused of violating the Fugitive Slave Act, actions that brought him substantial abuse from the abolitionist press.

Unfortunately, additional, personal, and much more severe tribulation came upon Matthews. Happily married and with a growing family, husband and wife suffered a terrible loss in 1859 when a scarlet fever epidemic killed four of their six children. He and his wife found solace in their Presbyterian faith, and, ironically, the strength of his religious beliefs later contributed to one of the greatest cases of his career as an attorney. In the meantime, Hayes and Matthews went off to war. They both survived (otherwise this would be a very short essay) and returned to law and politics in Ohio.

In 1869, faced with an increasingly diverse student body, the Cincinnati school board voted to discontinue what had been the customary public school practice of reading from the Bible before the start of each school day. Outraged parents filed suit, and Matthews agreed to defend the school board's policy. Rebuffed in the trial court over a dissent by Alphonso Taft, he won a unanimous reversal from the Ohio supreme court.[6] Although the case appeared to be inconsistent with his dynamic devotion to Presbyterianism, in fact Matthews' faith was rooted in his emphatic comment: "Toleration—I hate that word."[7] What did he mean?

Here, Matthews dismissed the idea of toleration as a kindness, a privilege, or a favor given by those in power to those without it. To the contrary, a person's religious faith was too intimate, too personal, too intense a matter for state involvement. Deeply devout though he was, Matthews correctly understood the real source for the outrage against the school board's action: it was less a regard for religious education than "solicitude for the name of Protestant Supremacy." "The sting," he added, "consists in having to haul down the Protestant flag without thinking whether they had any business to be flaunting it in their neighbors' faces" in the first place.[8] Equally important was the issue of court intervention. Matthews asked the Court "[W]ill your Honors pick up



Stanley Matthews (left, as a Justice) and Rutherford Hayes (right, as a young man) became lifelong friends as undergraduates at Kenyon College in the 1860s. When Hayes was a lame-duck President in 1881, he tried to appoint Matthews to the Supreme Court. Hayes's successor, James Garfield, successfully reappointed Matthews to the Court after Congress stalled the nomination.

something floating loose in the community because it happens to be the passing public opinion, and put it into the Constitution? Will your Honors usurp the authority of the School Board?"[9]

As was also true of his fellow Ohio attorney, Alphonso Taft, Matthews received some public censure for his views in support of the school board, and indeed he seems to have demonstrated a real streak of political independence, although always as a Republican. He flirted with the liberal Republicans in 1872, but ultimately returned to the fold and supported Grant for a second term.[10] Four years later, he failed in an effort to win a congressional seat. He strongly supported his old friend and classmate Hayes. Indeed the two were now distantly related, as one of Matthews' sisters had married one of Hayes's brothers-in-law. As events in the contested presidential election of 1876 unfolded, Matthews aided and advised Hayes; his counsel and assistance were invaluable.

For the first time in twenty years, the Democrats sensed the real prospect of victory. After eight years of President Ulysses Grant, of whom Henry Adams noted that the process of evolution from George Washington to Grant would have been enough to upset even Darwin, in 1874 they gained control of the House of Representatives.[11] Two years later, both parties selected as their nominees lawyers with reputations for personal integrity: Rutherford Hayes and Samuel Tilden.

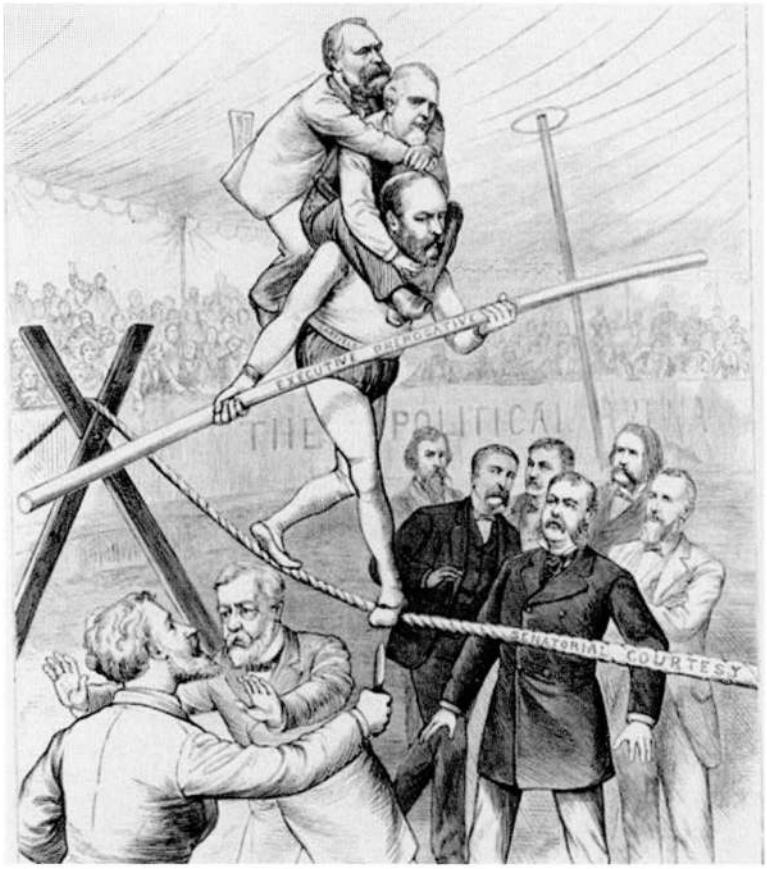
As is well known, Hayes lost the popular vote to Democrat Tilden, and he needed the disputed electoral votes of Florida, South Carolina, Louisiana, and Oregon in order to carry the electoral college. Congress deadlocked over the issue of who should count the electoral votes: the House (controlled by Democrats) or the Senate (controlled by Republicans). Ultimately, it created an electoral commission consisting of five Congressmen, five Senators, and five Supreme Court Justices, of whom one member would presumably be a true independent, Justice David Davis. Possibly with a deep sigh of relief, however, before the Commission could act Davis resigned from the Court to become an Illinois senator. The Republicans around Hayes had not

Matthews was one of the lawyers who argued Hayes's case before the Electoral Commission of 1876 (pictured). Matthews also represented Hayes in delicate and strictly unofficial negotiations with Southern Democrats wherein he promised that Hayes, if awarded the presidency, would withdraw the last remaining federal troops from the South and appoint a Southerner to his Cabinet.

supported the commission bill at first, but when it was announced that a good Republican jurist—Joseph Bradley of New Jersey—would replace Davis, giving the Republicans an 8–7 margin, they acquiesced. It fell to Matthews, along with several others, to argue the case for Hayes before the commission. By a one-vote margin, the commission awarded all the disputed electoral votes to Hayes.[12]

Matthews further aided his old friend by representing him in delicate and strictly unofficial negotiations with Southern Democrats. He helped draft a letter confirming that among the steps Hayes would take if officially elected President—which could not happen unless the Democratic majority in the House agreed to permit a vote on the acceptance of the electoral commission's findings—would be the withdrawal of the last remaining federal troops from the South and the appointment of a Southerner to his Cabinet. While Hayes did what was expected, whether or not there was in fact some sort of quid pro quo compromise in this context has been a fruitful source of historical controversy.[13] There was no doubt, however, that Matthews had been of immense assistance to the new President.

In 1877, Hayes "persuaded" the Ohio legislature to elect Matthews to fill the unexpired Senate term of John Sherman, who became Secretary of the Treasury. And in the waning days of his administration, Hayes nominated Matthews to the Supreme Court, replacing Noah Swayne, who had been Lincoln's first High Court appointment in 1862. In failing health, obvious to all except apparently Swayne himself, the Ohio jurist stubbornly declined to retire until he had extracted a commitment from Hayes to select his old friend Matthews as his replacement. Hayes promptly acquiesced, but the nomination unleashed extensive and enduring criticism that lasted until after Hayes had left the presidency. How can it be explained?



This cartoon satirizes the tough time President James Garfield had in getting enough Republican votes from the Senate to approve his renomination of Matthews (top) in 1880. Matthew's squeaked by with a vote of 24–23, a historically close margin, especially given that he should have been afforded senatorial courtesy.

A number of factors may be mentioned. In the first place, any High Court appointment made in the last days of an incumbent's presidency usually produces controversy. At that point, the President has minimal powers of both patronage and persuasion, a condition well understood by the Senate. Moreover, Matthews' past brought back a number of unfavorable memories to more than just a few Senators. He had made enemies when he prosecuted anti-slavery proponents in the 1850s. He had played an important role in the process that, according to some partisans, had robbed Samuel Tilden and the Democrats of the presidency. His views on the currency issues were not considered sound, as he supported greater use of silver than did conservative Republicans. He was a successful attorney for a number of railroads, yet as a sitting Justice would have to decide cases vital to their interests. Doubts were raised about his ability, if not his inclination, to be truly impartial. Finally, he was portrayed as an old crony of Hayes, who, it was said, should have known better.[14]

When President Hayes left the White House, his nomination of Matthews was still pending in the Senate Judiciary Committee. Hayes had obtained a promise from James Garfield, however, that the new President would resubmit Matthews' name as his own judicial appointment. Although his own control over party patronage matters was far from secure, and his personal regard for Matthews less than excessive, in March 1881 Garfield agreed—only to see the nomination stalled once again. Finally, on May 12, 1881, in spite of an unfavorable recommendation from the Senate Judiciary Committee (one in favor and

seven opposed), with a number of Republicans absent and with more than a dozen Democrats in support, Matthews received confirmation by a single vote, 24–23.[15] To paraphrase Winston Churchill, rarely had one waited so long to receive so little from so few.

II

A brief discussion of several of Matthews' decisions for the High Court affords tantalizing insights into an intriguing fluctuation between doctrinal creativity and contemporary expediency. This fluctuation has special relevance for an era known less for its outstanding jurisprudence than for its obvious excesses—social and economic, as well as political. By the time Matthews took his seat, the Supreme Court had already handed down a number of decisions limiting the scope of the Fourteenth Amendment, starting with the 1873 landmark holding in *The Slaughter-House Cases*.[16] Three years later, considering in *United States v. Cruikshank* the killing of more than one hundred black men by a white mob, the Justices unanimously declined to see any evidence that federal rights had been violated.[17] In 1883, with a silent concurrence by Matthews, Justice Joseph Bradley undercut both the 1873 federal Civil Rights Law and the reach of the Fourteenth Amendment, holding that only state action was covered by it and that private acts of discrimination were not.[18] It is not unfair to note that Matthews seemed comfortable in Bradley's exclusion of the amendment's coverage to those for whom it had been adopted. Perhaps Matthews saw in Bradley's opinion some hint of the "understandings" worked out during the negotiations leading up to Hayes's inauguration in 1877.

Yet if Matthews accepted the apparent distinction the Court seemed to be making between the narrower Fourteenth Amendment protection due the former slave and that afforded other complainants, he still found it a potent force against racial discrimination when applied to another race. Indeed, his most famous opinion in his eight-year tenure on the Supreme Court dealt with the efforts of San Francisco to restrict the rights of Chinese immigrants out of what can only described as blatant racial prejudice. The case involved an ordinance giving the local board of supervisors authority to license laundries. Failure to obtain such a document was costly: a thousand-dollar fine and up to six months in jail. Moreover, it was limited to wooden structures, which were invariably operated by Chinese people. The defendant in this case, Yick Wo, had been in the laundry trade for more than twenty years, and his latest site had been inspected and approved by the city as recently as 1884. Denied a license in 1885, he continued to operate his laundry, refused to pay the resulting fine, and was put in prison. Rebuffed in his quest for a writ of habeas corpus from the California Supreme Court, and seeking to have his conviction scrubbed, his lawyer appealed to the High Court. The defendant in the case was the sheriff who had arrested him.[19]

Speaking for a unanimous court, Matthews described the San Francisco ordinances as "applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment." Even more blatant, if possible, was the treatment meted out to Yick Wo and his co-petitioners:

> No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese

Matthews wrote the Courti's opinion in *Yick Wo v. Hopkins*, which struck down a fire ordinance that was enforced in a discriminatory way against Chinese laundry owners. The plaintiff's real name was Lee Wick; Yo Wick was the name of the shop.

subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is [guilty of both] a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.

Moreover, Matthews emphasized that "though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[20] While *Yick Wo* justifiably ranks as Matthews' most enduring decision, it must be remembered that

he spoke for the entire Court. Even arch-conservatives such as Field and Bradley joined his opinion, apparently concluding that the San Francisco ordinance was without any justification whatsoever.

In *Hurtado v. California*, decided a year earlier, Matthews upheld the practice in criminal prosecutions of substituting an information, "after examination by a magistrate," for the traditional indictment by a grand jury.[21] He found this procedure within the bounds of due process, and he eloquently emphasized the historical flexibility of our common law: "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." Such a process is ongoing, he added, and "we should expect that the new and various experiences of our own situation and system will mould and shape it into new and . . . useful forms." Sounding more like a legal realist of a forthcoming generation than a Gilded Age conservative, Matthews concluded that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."[22]

As was true for so many men of his generation, the Civil War and its enduring aftermath framed Matthews' world. During his tenure as a Supreme Court Justice, he fashioned a solution to a contentious legacy from the conflict. Ratification of the Fourteenth Amendment had insured that the federal government was in no way responsible for debts incurred by the Confederacy. Moreover, the Eleventh Amendment to the Constitution had made it virtually impossible to sue the states. But a number of Southern states refused to pay their debts, leaving the High Court "the uneasy responsibility of forcing states to respond to suits" without unduly "compromising their immunity" under that amendment.[23] Speaking for the Court in one such instance, Matthews drew a fundamental distinction between a state itself and an agent doing business on the state's behalf.

Drawing on the reasoning of the late Chief Justice Chase, Matthews cited Chase's decision in *Texas v. White* and concluded that Civil War had resulted from "the unlawful acts of usurping state governments and not the acts of the states themselves."[24] For Matthews, this distinction was of vital importance, and he wrote of it in a tone of emotional eloquence not found in the other cases just cited:

> This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the state to declare and decree that he is the state; to say "L'Etat, c'est moi." Of what avail are written constitutions, whose bills of right, for the security of individual liberty, have been written too often with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the

> instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, state and federal, protest against it.[25]

When an agent for the state acted illegally, Matthews argued, this individual could not hide behind the state's shield of immunity.

One final example from the opinions of Justice Matthews may be cited, illustrating that even his "toleration" for diverse religious preferences, mentioned earlier, had its limits. As part of its ongoing controversy with the Mormon church, Congress barred polygamists from voting in the Utah territory. Matthews upheld the statute and noted that

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.[26]

Widowed in 1885 after more than forty years of marriage, Matthews remarried in 1887, apparently against the wishes of his children. But his second marriage was destined to be brief, as he died in March 1889. In a tenure that lasted less than eight years, Matthews may be best remembered as a jurist very typical of his times. He acquiesced in the narrowing of Fourteenth Amendment protection for the African American, even as he extended—in at least one instance—such protection to another race, the Chinese. Yet neither Matthews nor his Brethren were able to build on the vision of the Fourteenth Amendment he delineated in *Yick Wo*. Although he did not live to see it, in the 1890s the High Court would demonstrate an even clearer tendency towards conservatism than in the immediate post–Civil War era, as the pressures for judicial awareness concerning the realities of industrialism mounted.[27] Less than a year after Matthews' death, on February 5, 1890, the *New York Morning Journal* printed a little jingle. Perhaps it can serve as fitting epilogue to Stanley Matthews and his Court:

> We are the dread Judicial Nine who rank high over all.
> We sit upon a narrow bench in a little stuffy hall.
> We tinker Constitutions and decisions we reverse.
> And when a muddle's very bad, we often make it worse.[28]

ENDNOTES

[1]Jonathan Lurie, "Ex-Justice Campbell: The Case of the Creative Advocate," in 30 *Journal of Supreme Court History* (2005), 17–30.

[2]Jonathan Lurie, "Chief Justice Taft and Dissents: Down with the Brandeis Briefs!," in 32 *Journal of Supreme Court History* (2007), 178–89.

[3]At least two other Justices have been confirmed by very narrow margins. Lucius Q. C. Lamar and, more recently, Clarence Thomas were both approved by a four-vote margin.

[4]Ari Hoogenboom, **Rutherford B. Hayes: Warrior & President** (Lawrence: University Press of Kansas, 1995), 29.

[5]*Ibid,* 55.

[6]*Minor v. Board of Education*, 23 Ohio St. 211 (1872). At early stages in their careers, Alphonso Taft, his son William, and Stanley Matthews were all judges of the Ohio Superior Court.

[7]Clare Cushman, ed., **The Supreme Court Justices** (Washington: Congressional Quarterly, 1993), 228.

[8]*Quoted in* Jonathan Lurie, "The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberties Cases, 1870–1890: A Preliminary Assessment," in XXVIII *American Journal of Legal History* (1984), 300–1.

[9]*Ibid.* Even though Matthews won his case on appeal, he might well have applauded the comment of *The Nation* that "we have never yet heard or read of a discourse on matters pertaining to religion, from the judicial bench, that was not calculated to make the judicious grieve and the scoffer laugh." XV *Nation* (August 15, 1872), 104. The writer probably had in mind the Superior Court verdict against the school board.

[10]Matthews may have hoped to receive a nomination from Grant to replace Chief Justice Salmon Chase, who died in 1873. Ultimately Grant did indeed select an Ohio attorney as the new Chief Justice, but it was not Matthews: he appointed Morrison R. Waite.

[11]Henry Adams, **The Education of Henry Adams**, (Boston: Massachusetts Historical Society, 1918), 266.

[12]For reasons that remain unclear, a number of Democrats, including those already on the Commission, assumed that Justice Bradley would support Tilden. When, to the contrary, he acted as the consistent Republican he was, the Justice from New Jersey received much criticism from the Democratic press. See Jonathan Lurie, "Mr. Justice Bradley: A Reassessment," XVI *Seton Hall Law Review* (1986), 353–55. For his part, Matthews questioned whether it was appropriate for Congress to question the legitimacy of electoral votes duly cast within the states.

[13]A very good summary, assessment, and critique of the "compromise view point" is found in Michael Les Benedict, "Southern Democrats in the Crisis of 1876–1877: A Reconsideration of *Reunion and Reaction*," XLVI *Journal of Southern History* (1980), 489–520.

[14]*See* Leon Friedman and Fred L. Israel, **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions** (New York: Chelsea House Publishers, 1969), vol. 2, 1356–57.

[15]Cushman, 228–29.

[16]83 U.S. 36 (1873).

[17]*United States v. Cruikshank*, 92 U.S. 542 (1876).

[18]*Civil Rights Cases*, 109 U. S. 3 (1883).

[19]*Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[20]118 U.S. at 373–74.

[21]*Hurtado v. California*, 110 U.S. 516 (1884).

[22]110 U.S. at 530–31, 537. With the sole exception of Justice John Marshall Harlan, every member of the Court agreed with Matthews.

[23]Friedman and Israel, 1359.

[24]*Texas v. White*, 74 U.S. 700 (1869).

[25]*Poindexter v. Greenhow*, 114 U.S. 270, 291 (1885).

[26]*Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

[27]*See, e.g., E.C. Knight Co., v. United States*, 156 U.S. 1 (1895) and *In re Debs*, 158 U.S. 564 (1895). *See also* William Wiecek's outstanding study, **The Lost World of Classical Legal Thought** (New York: Oxford University Press, 1998).

[28]Lurie, "Mr. Justice Bradley," 372.

Justice David J. Brewer and "the Constitution in Exile"

WILLIAM M. WIECEK

A decade ago, Judge Douglas Ginsburg roiled the waters of constitutional debate with his offhand reference to a "Constitution in Exile" in a book review that appeared in a limited-circulation journal of the libertarian Cato Society.[1] The metaphor was irresistible, conjuring up as it does romantic images of Stuart princes wandering about Europe, hoping for the return of the legitimate constitutional order, and either enjoying triumphant Restoration (Charles II) or being doomed to crushing disappointment (Bonnie Prince Charlie after Culloden). Or, on the opposite end of the ideological spectrum, images of Lenin being recalled from Swiss exile to his moment in history at the Finland Station, to inaugurate a new world order.

But this may be one of those instances where a metaphor is so vivid that it overpowers critical thought. Perhaps Judge Ginsburg did not intend his *bon mot* to be taken as seriously as it has been by liberals. David Bernstein and Randy Barnett, who ought to know, assure us that there is no "Constitution in Exile" movement among conservatives and libertarians.[2] The whole kerfuffle may be nothing more than a matter of liberal commentators becoming unduly alarmed by an idea and crying that the sky is falling,[3] much to the amusement of conservatives on the sidelines, who marvel at the power their thought has to rattle their opponents. But the notion of a "Constitution in Exile" has also attracted serious scholarly and journalistic attention,[4] so that whatever Judge Ginsburg may have meant by his playful metaphor, the idea has taken on a life of its own and deserves to be taken seriously as a focus for constitutional discourse.[5]

For the sake of understanding the jurisprudential outlook and constitutional influence of Justice David J. Brewer, an influential jurist who sat on this Court a century ago, let us treat the Constitution-in-exile idea seriously, as an intellectual construct that helps us understand our Constitution today and how it has evolved. (I think that is how Judge Ginsburg meant it to be taken.) The exile thesis goes like this: Until around 1937, an authentic and legitimate understanding of the American Constitution prevailed.[6] In this view, the powers of the state and federal governments to regulate

economic matters were sharply curtailed. The federal government had only enumerated and delegated powers. This was markedly true of its power to regulate interstate commerce, where its authority was circumscribed by two principal bounds: It could regulate only things that directly impacted the interstate movement of goods; and its authority did not extend to manufacturing or agriculture, but only to transportation. State sovereignty, affirmed by the Tenth Amendment, set further limits on federal power, reminding us that the state governments, unlike the federal, are governments of residuary power. On the current Court, Justice Clarence Thomas sometimes echoes these themes. He has contended that "[o]ur case law has drifted far from the original understanding of the Commerce Clause," taking a "wrong turn" in 1937 that was a "dramatic departure from a century and a half of precedent" involving congressional regulatory authority. The "Constitution . . . does not cede a police power to the Federal Government."[7]

But the states' powers to regulate, even though residuary, were not unbounded, either. The states could not deprive persons or corporations of property or liberty without due process of law. Substantive due process was as significant a constraint on state police-power authority as Commerce Clause limits were on federal. Under the pre-1937 Constitution, economic liberties were as prized as non-economic, if not more so. The idea of a non-economic right of privacy was almost unknown, being confined to speculations and dicta of Louis D. Brandeis.[8] The U.S. Supreme Court's activism was directed to protecting individual liberty from government regulation. Liberty of contract was the watchword of the era, assuring contracting parties that they could enter into any contractual relationship without government interference that would either prohibit the contract or modify its terms and enforceability. Such liberty was the consequence of substantive due process, a doctrine holding that the liberty and property interests protected by the Fifth and Fourteenth Amendments' Due Process clauses were substantive rights, to be protected by the judiciary from legislative meddling. *Lochner v. New York* (1905),[9] the eponymous case of the pre-1937 era, showcased all these ideas.

Thus the original, authentic, and legitimate Constitution. But with the New Deal, this old order was overthrown and the Constitution driven into intellectual exile, to be replaced by a usurper, a spurious new constitutional interpretation. The effects were most dramatically visible in the areas of Commerce Clause regulation by Congress. As a result of a series of decisions in a tumultuous five-year period,[10] Congress came to have an essentially unlimited power to regulate virtually anything under its commerce authority. This was compounded by the Supreme Court's willingness to accept an expansive congressional delegation of congressional powers to administrative and regulatory agencies, thus enabling the regulatory state in its statist form. The Court repudiated all its substantive-due-process precedents that impeded state regulatory power. Justice Hugo Black pronounced the obsequies of the old order in 1949, celebrating the demise of "the Allgeyer-Lochner-Adair-Coppage constitutional doctrine" and observing that his Court "has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases."[11]

In 1995, just as signs appeared that the Rehnquist Court might be rethinking this abandonment of the older order,[12] Judge Ginsburg sounded his clarion:

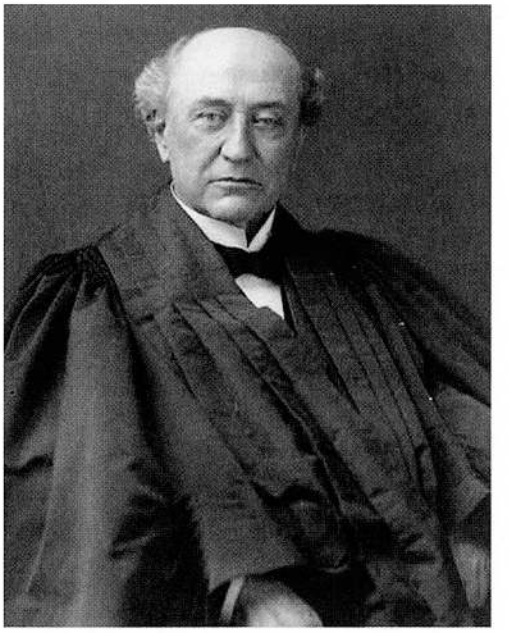
> So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government,

> is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.[13]

Let us use the career of Justice Brewer to evaluate the Constitution-in-exile thesis. A survey of Brewer's constitutional influence neither proves nor disproves the existence of a "Constitution over the water," to adapt the romantic Jacobite expression. But it will illuminate for us the contours of that idea, and it will demonstrate that no jurist, not even one who seems at first to be the ideal candidate for the assignment, perfectly embodies a school of thought. In Brewer's career, we see much that conforms to the model, but also much that is inconsistent with it. That should be reassuring: None of us truly fits a stereotype.

First, a sketch of David J. Brewer's life and career, to ground his constitutional thinking in the experience of his life as he lived it.[14] He was born in Smyrna (modern Izmir, Turkey) in1837 to Congregationalist missionary parents. He was related on his mother's side to the eminent Field brothers: David Dudley (New York attorney and foremost promoter of codification, being the sponsor of the Field Codes), Cyrus (who laid the trans-Atlantic cable), Henry (prominent Presbyterian clergyman and author), and above all Stephen J., who was to be Brewer's colleague on the Supreme Court. Brewer first attended Wesleyan College (Connecticut) but transferred to Yale, from which he graduated in 1856. He then spent a year clerking in the office of his uncle David Dudley Field in Albany, following this up with a brief stint at Albany Law School. From thence he migrated to Kansas, eventually settling in the former capital of Leavenworth in the northeast corner of the state in 1859. He struggled to establish a law practice on the frontier in parlous times.

When war broke out, Brewer accepted a commission in the Kansas militia and performed local guard duty in Leavenworth against the incursions of Confederate regulars under Sterling Price and irregular bushwhackers such as William Quantrill. Though Brewer earned an income adequate to support his growing family in practice and then on the bench, he never really prospered financially. Therefore he always welcomed the opportunity to eke out his judicial salary with fees from speaking engagements, a fortunate happenstance for historians because this left a large residue of printed speeches from which we can infer much about his social and jurisprudential thought. After activity in local Republican politics and service on a state district court, he was elected to the Kansas supreme court, where he served from 1871 to 1884. After that, he served as a judge of the Eighth Circuit Court of Appeals for the next five years.[15] Throughout his life, he remained a staunch Republican and an active, devout Congregationalist layman. He devoted countless hours to the causes of public education, libraries, Sunday school teaching, and even, in a modest way, advancing



In 1837 David Brewer (pictured) was born in modern-day Turkey, where his father served as a missionary for two and a half years. His mother's brother, Stephen J. Field, lived with them as well. Brewer and his uncle would serve on the Court together from 1890 to 1897.

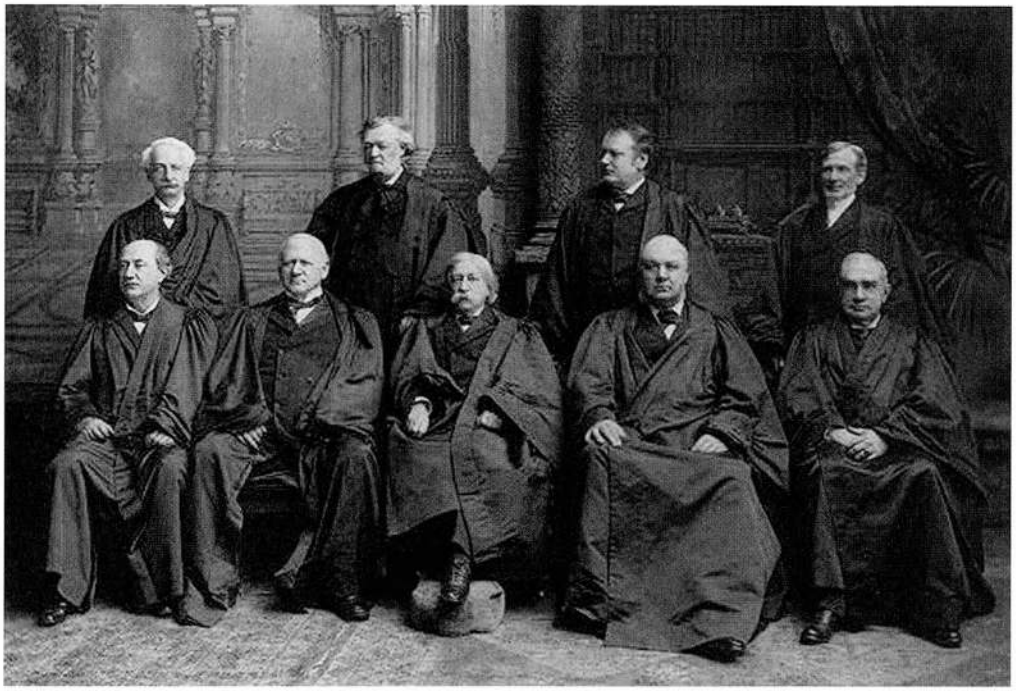
women's rights, insisting that they be allowed to serve on elective public bodies even if they had not yet been given the vote.[16] Even after appointment to the High Court, he devoted a great deal of time to a variety of reform efforts, including arbitration of international disputes, the anti-imperialist cause after 1898, and resistance to military and naval expenditures. He also taught as an adjunct at the predecessor of George Washington University Law School.

Brewer's opinions from his Kansas and Eighth Circuit years provide only a few hints of his later jurisprudential outlook. At first, while sitting on the Kansas bench, he upheld Kansas prohibition laws, though expressing unease that they went to the verge of the police power and threatened to take property without due process of law or constituted an uncompensated taking.[17] Once on the Eighth Circuit, such doubts congealed into his holding in *Kansas v. Walruff* (1886)[18] that prohibition deprived a brewer of property in a hitherto legitimate business (by reducing its value for other purposes) without due process. He firmly opposed the constitutionality of local communities pledging their credit to purchase railroad stock and bonds, even though the U.S. Supreme Court had expressed alarm in *Gelpcke v. Dubuque* (1864) at the inclination of local communities to repudiate such debts.[19]

Brewer was one of the cohort of federal judges in the late nineteenth century who encountered labor issues first-hand through their role supervising receiverships of railways. When railroad workers on such lines struck, picketed, or were involved in labor violence, they found themselves charged with contempt of court orders that kept the lines running. Like other judges, Brewer held that though an individual employee had a right to quit at any time and for any reason, and that this right might extend to a group of workers en masse,[20] no workers could interfere with the operation of railroads in receivership, as, for example, by inducing others to join the strike. But when striking workers took up his invitation to bring their labor grievances—including wage cuts, forced overtime, and unjustified firings—before him, rather than interfere with train operations by striking, he dismissed their complaints as "very trivial."[21] It is not that Brewer lacked sympathy for individual workers or wanted to thwart their efforts to organize. He extolled the hard-working, frugal individual and sometimes even acknowledged the benefits provided by labor unions, seeing them as "the needed and proper complement of capital organizations."[22] But his sympathies lay with property owners, whether they be industrialists or small entrepreneurs, and he instinctively sided with management in labor disputes.

Brewer opposed designating railroads as "businesses affected with a public interest," in the formula of *Munn v. Illinois* (1876),[23] because that enhanced the states' regulatory power over them. He vehemently resisted regulation of railroad rates and insisted that railroads were entitled to reasonable returns on their investment. Thus, state regulation could not limit railroad charges to a point where the lines were no longer profitable.[24] Because the Eighth Circuit included most of the Granger states, Brewer found ample opportunity to inveigh against such heavy-handed regulation.

Brewer's nomination to the Supreme Court by President Benjamin Harrison was not highly controversial. Temperance advocates complained about his prohibition opinions, and Grangers accused him of favoritism toward railroads, but none of this was sufficient to derail the nomination. Brewer was confirmed and took his seat in January 1890. He soon became the intellectual leader of a triumvirate of conservative Justices who collectively personified the classical tradition. The others were Chief Justice Melville Weston Fuller, who sat from 1888 to 1910 (nearly exactly overlapping Brewer's term of service), and Rufus W. Peckham, who served from 1895 to 1909. Of the three, Brewer was by far the best educated, the most thoughtful, and the ablest writer. Among them, they were responsible for giving the turn-of-the-century



When Brewer joined the Court in 1890, he became the intellectual leader of a triumvirate of conservative Justices, including Chief Justice Melville Weston Fuller, who sat from 1888 to 1910 (nearly exactly overlapping Brewer's term of service), and Rufus W. Peckham, who served from 1895 to 1909. Brewer is seated at left, Fuller is in the center chair, and Peckham is standing behind Brewer.

Court its reputation as a conservative bastion. They are the bêtes noires of traditional neo-Progressive historiography, which denounces them as "ultraconservatives" and exemplars of "right-wing laissez-faire conservatism."[25] Brewer has traditionally been singled out in this regard. He was supposedly an "outspoken and doctrinaire conservative" whose "strictly conservative, sometimes reactionary position" frustrated nearly all state and federal regulatory legislation. He was allegedly "dogmatic and ultraconservative," "highly materialistic and property-conscious, elitist in the Social Darwinian sense, and fearful of the social challenges accompanying the growth of industrialism."[26] He even *looked* stodgy: As he aged, he became less and less photogenic, so that photographs taken of him at the peak of his influence seem to portray a grumpy old curmudgeon, harrumphing about in top hat or judicial robes, the very image of a reactionary judge.

This conservative reputation has endured as tenaciously as it has because Brewer was with the majority, and sometimes wrote the opinion, in all the major Fuller Court cases that repelled government power in the name of protecting private property and liberty of contract. The roll of these cases, all discussed below, is enough to convert anyone to the neo-Progressive view: *Knight,* the *Income Tax Cases, Debs, Smyth v. Ames,* the *Milwaukee Road Case, Lochner, Adair*. Yet as I hope will be evident below, the content of his conservatism was more complex and less monolithic than "right-wing laissez-faire" labels allow.[27]

Foremost in the hierarchy of Brewer's values was the almost sacred character of private property. Early in his tenure on the U. S. Supreme Court, Brewer delivered a widely noted commencement address at Yale Law School, subsequently reprinted as "Protection to Private Property from Public Attack,"[28] in which he intoned: "[T]he demands of absolute

and eternal justice forbid that any private property, legally acquired and legally held, should be spoliated or destroyed in the interests of public health, morals, or welfare without compensation." Property owners enjoyed "a sacred and indestructible right of compensation" for any exercise of the police power that diminished the value of their property. Private property could be threatened in one of three ways in a republic: through taxation, expropriation (takings), or regulation. Brewer vigilantly searched for threats from each of those sources. He was with the majority in the second *Income Tax Case* (1895),[29] striking down the federal income tax, and later insisted that a progressive federal estate tax was constitutionally invalid.[30] In a dictum in an intergovernmental immunities tax case, Brewer hinted that state socialism (public ownership of utilities, including railroads) might threaten the republican form of government of a state.[31] But in most cases challenging the validity of state taxation, Brewer upheld state taxing powers against Commerce and Contracts Clause challenges.[32] In one such case, he declared broadly that "in respect to [taxation], the State has, speaking generally, the freedom of a sovereign both as to objects and methods."[33] This pattern repeated itself throughout the Progressive era: Scholars from Charles Warren to Melvin Urofsky have pointed out that the Supreme Court upheld far more exercises of regulatory authority than it struck down.[34]

When Brewer insisted, as he often did, that state regulation might intrude so far into essential aspects of property ownership as to require just compensation under the Takings Clause, he anticipated the modern doctrine of regulatory takings, which emerged after *Pennsylvania Coal. Co. v. Mahon* (1922).[35] In *State v. Mugler* (1883),[36] a prohibition case he heard while still on the Kansas supreme court, he opined in a dictum in a concurrence that "is not this taking of private property for public use, without compensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?" The U.S. Supreme Court disappointed him when it upheld the Kansas statute on appeal in *Mugler v. Kansas* (1887),[37] though he might have taken some consolation from a dictum in Justice John M. Harlan's opinion that a regulatory statute might go so far as to be "a palpable invasion of rights secured by the fundamental law" and thus unconstitutional. Brewer was vindicated in 1897 when the Supreme Court incorporated the Takings Clause via the Fourteenth Amendment as a limitation on state police power—the first provision of the Bill of Rights to be so incorporated.[38]

But as in other areas, Brewer's actual judging proved to be less far-reaching than his rhetoric. In *L'Hote v. New Orleans* (1900),[39] he confronted an unusual regulatory-takings claim: The property owner insisted that a local zoning ordinance that shifted prostitution to the neighborhood in which his property was located reduced its value and thus was a compensable taking. Brewer shrugged off that claim: "[T]he exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character." Brewer's commitment to the inviolability of private property served more as a philosophical foundation for his views than as a guide to his actual decision-making. Given the fervor of his rhetoric, what is surprising about the results in property cases he decided is how little they upset the regulatory order of the late nineteenth century. As with most other issues he encountered, Brewer's bark was often more conservative than his bite.

A hallmark of conservative judging in the 1890s was resistance to the regulatory state, especially to federal regulation, and it continues to be a signature of the Constitution-in-exile today. On this issue, Brewer was somewhat more consistent. "The paternal theory of government is to me odious," he trumpeted in one of his early dissents on the Court. "The utmost possible liberty to the individual, and the fullest possible protection to him and his

property, is both the limitation and duty of government."[40] Together with dicta in *In re Debs* (1895), discussed below, this clarion is Brewer's most frequently quoted statement of judicial outlook, and it aptly captures his hostility to the regulatory state.

Brewer saw individual liberty threatened by an ever-spreading web of state and federal regulation. For him, the root of the evil was *Munn v. Illinois* (1877),[41] with its doctrine of "business affected with a public interest," allowing extensive state regulation, including supervision and setting of rates, of private enterprises in which the public had an interest. He insisted that only businesses such as common carriers or public utilities could be regulated in that way, and only if the rates that were set allowed a return on investment. Such rates had to be "reasonable," and their reasonableness was a matter ultimately for judicial evaluation.[42] Thus, he was with the majority in the landmark *Milwaukee Road Case* (1890),[43] which marked the original triumph of substantive due process on the U.S. Supreme Court. The reasonableness of rates was "eminently a question for judicial investigation, requiring due process of law for its determination."

Brewer was unsuccessful in his efforts to get his Brethren to reverse *Munn*, but he enjoyed other antiregulatory triumphs. In *Reagan v. Farmers Loan and Trust Co.* (1894),[44] he established the reasonableness standard for rate-setting and anticipated the doctrine of *Ex parte Young* (1908),[45] permitting federal courts to enjoin state officials who were enforcing an allegedly unconstitutional state law, thus avoiding the bar of the Eleventh Amendment. Brewer joined the opinion in *Smyth v. Ames* (1898),[46] which seduced the Court into attempting to determine valuation as a basis for rate-setting. Two prominent constitutional authorities consider this misguided foray into the worlds of accountancy and economics "one of the worst mistakes the Court ever made" because it dragged the Justices beyond their capacities in micromanaging regulatory economics.[47] *Reagan and Smyth* demonstrate the perils of antiregulatory judicial activism and the limits of Brewer's antipaternalist ethos. Yet there is an oddity in the pattern of these state regulatory cases. While Brewer was consistent in his posture up to 1898, in nearly all subsequent state rate-setting cases, he voted to sustain the state.[48] Statistically, Brewer voted to uphold state regulatory authority in approximately 80 percent of the cases coming before him.[49] Sometimes these votes could be surprising, as when he dissented in *Leisy v. Hardin* (1894),[50] insisting that an Iowa prohibition statute was a proper exercise of the police power. Given his hostility to prohibition in *Walruff*, this seems to have been a remarkable *volte-face* for him.

Federal regulation was another matter. Brewer dissented when the Court upheld Congress's exercise of regulatory power through the Commerce Clause by excluding lottery tickets from interstate commerce,[51] apparently believing that this went too far toward acknowledging a police power in Congress. He was equally determined that what Congress could not do directly it should not be able to do indirectly by delegating its powers to the new regulatory agencies created in the wake of the Interstate Commerce Act of 1887.[52] Thus, he spoke for a majority of the Court in the first round of cases challenging the regulatory authority of the Interstate Commerce Commission, the first of the federal agencies, denying it rate-setting powers in *ICC v. Cincinnati, New Orleans & Texas Pacific Ry.* (1897).[53] In that same year, he joined a majority in denying finality to ICC fact-finding.[54] But neither Brewer nor the Court as a whole were obdurate on regulatory power. After Congress, in the Hepburn Act of 1906,[55] reasserted its determination that the ICC should have all the powers of the "strong" state regulatory agencies,[56] the Court relented (though Brewer himself did not), conceding finality to its factual determinations in *Illinois Central Rr. v. ICC* (1907)[57] and rate-setting power in *ICC v. Illinois Central Rr.* (1910).[58]

This seeming pattern of initial resistance on conservative ideological grounds, followed by pragmatic acquiescence in policies

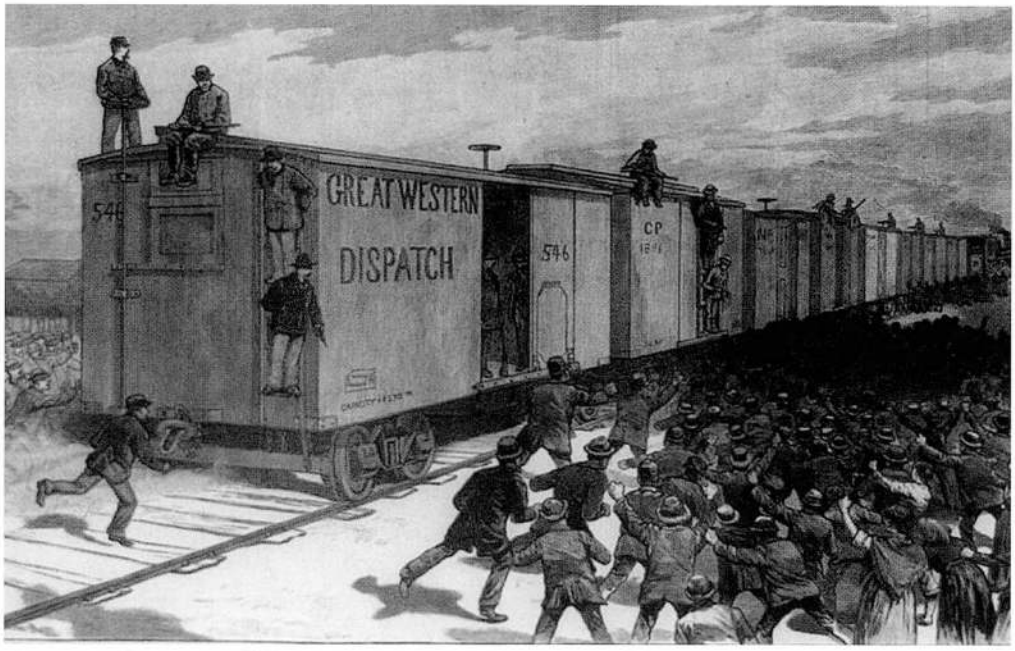
obviously having majoritarian support, was manifest in Brewer's and the Court's response to Congress's other great regulatory initiative of the late nineteenth century, the Sherman Antitrust Act of 1890.[59] The Fuller Court is best remembered for its rebuff of federal antitrust authority in *United States v. E. C. Knight Co.* (1895),[60] in which Brewer joined the majority in a Fuller opinion that held that federal power could not reach a monopoly of sugar refining. This decision was especially galling to Progressives because it rested on two arbitrary grounds having no basis in the textual Constitution or in the Framers' discernible intent: the direct/indirect effects dichotomy; and the distinction between manufacturing on the one hand and commerce on the other.

Yet the remarkable thing about the Fuller Court's overall record on antitrust cases is how readily the Justices acceded to antitrust regulation after *Knight*, which thereby stands out as an anomaly among those cases. In five major cases after *Knight*, the Court sustained antitrust initiatives at least as sweeping.[61] In one of them, *Northern Securities Co. v. United States* (1904), Brewer, in a concurring opinion, endorsed the "rule of reason" that condemned only unreasonable combinations. Whatever might be thought of Brewer's conservative declamations, in most cases he was not a consistent opponent of federal regulatory power.

After the Court had embraced the new doctrine of substantive due process in 1890, it soon developed the derivative doctrine of liberty of contract. Building on suggestions contained in the dissents of Justices Stephen J. Field and Joseph P. Bradley in the *Slaughter-House Cases* (1873),[62] the Justices of the Fuller Court found in the due process liberty guarantee of the Fourteenth Amendment a right to enter into any kind of legitimate contract without interference by the state. In 1895, Brewer endorsed the idea that contract might have a due process liberty dimension.[63] The Court as a whole accepted the new doctrine in an 1897 opinion by Justice Peckham, *Allgeyer v. Lousiana*.[64] The employment contract immediately became the most important kind of contract protected by the new doctrine, which the majority declared was violated by labor-protective legislation in the notorious cases of *Lochner v. New York* (1905) and *Adair v. United States* (1908).[65] *Lochner* involved state regulation, *Adair* federal, so between them they comprehensively restricted state power to regulate workers' hours, wages, and the yellow-dog contract. Brewer joined in each of these opinions, and he added his own antiregulatory spin on the doctrine in *Brass v. North Dakota* (1894),[66] where he warned that the trend toward business regulation—in this case, a grain elevator—"leads to the point where all freedom of contract and conduct will be lost."

Liberty of contract was the foundational doctrine enabling the Court's activism in all cases involving state regulation of workers' wages and hours. From a results-oriented point of view, Brewer's opinions and votes in these cases, with one major exception, were adverse to unions and to regulatory efforts that benefited working people. In this sense, Brewer stands in a long tradition of judges inveterately hostile to labor unions and uncaring at best about the interests of workers. But the most remarkable thing about Brewer's labor opinions is that they spanned the whole gamut of labor-related positions, from the disastrous union-hostile Debs opinion of 1895 to the amazingly progressive *Muller* opinion thirteen years later.

In re Debs (1895)[67] was Brewer's first and most significant labor opinion for the Court. In it, he sustained the use of the labor injunction, which he himself had resorted to on the Circuit bench.[68] That in itself was bad enough, but it was made worse because the injunction stifled activities protected by the First Amendment: speech, press, and assembly. His dicta warmly endorsed the expanding equity powers of the federal courts, which was to have a long-term impact that



Brewer's opinion in the 1895 *Debs* case sanctioned the use of injunctions against striking labor unions and helped the Cleveland administration break the Pullman strike and cripple the American Railway Union. Pictured is an 1886 railway strike in East St Louis, Illinois.

Brewer did not foresee and that he would have deplored: the use of equity to promote social reforms—for example, prison reform. Inconsistently with his views in other cases—most notably *Debs*' contemporary, *Knight*—Brewer ringingly endorsed broad federal regulatory and law-enforcement powers to protect interstate commerce. "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care," Brewer exuberantly proclaimed. "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws."[69] The forceful reaction of the Cleveland administration, endorsed by Brewer's nationalist opinion, broke the Pullman strike and the American Railway Union, sent Eugene Debs to prison (where he converted to socialism), and contributed to the conservative swell that in the next year drowned William Jennings Bryan and the Populists.

Most of Brewer's other opinions dealing with unions or workers' rights were of a piece with *Debs*, which is not surprising. In an 1893 address, "The Nation's Safeguard,"[70] he denounced collectivist tendencies—"the black flag of anarchism . . . the red flag of socialism"—that, he thought, robbed the individual of opportunity, stunted his initiative, threatened property rights, and reflected the paternalist ethos he so loathed. Among these he included the coercive tactics of labor unions, such as harassment of non-union labor, demands for a closed shop, and all forms of violence or intimidation. He condemned "the improper use of labor organizations to destroy the freedom of the laborer and control the uses of capital." Brewer's solution for these trends was to strengthen the independence of the judiciary (the "Safeguard" of his title), making judges as free of democratic, majoritarian constraints as possible.

The Pullman strike epitomized these frightening developments, which accounts for the extraordinary force of Brewer's *Debs* opinion. His suspicion of the regulatory state reinforced his latent indifference to the real-world struggles of laboring people. He reaffirmed his support for the fellow-servant rule in employee suits against their employers in industrial accidents, and at the same time he accelerated the Court's reliance on federal common law (in this case, concerning torts in the field of workplace injuries).[71] He dissented without opinion in *Holden v. Hardy* (1898),[72] which upheld a state law limiting the hours of labor in hazardous occupations such as mining and smelting. A decade later, he joined in the opinion in *Adair v. United States* (1908) striking down the federal statute prohibiting yellow-dog-contracts,[73] and he joined Fuller and Peckham to void the first Federal Employers Liability Act (1906),[74] holding that the federal government lacked the police power to supervise labor relationships, even though interstate commerce was involved.[75] Contrast this pinched notion of interstate commerce with his *Debs* vision of sweeping national authority.

All this, particularly the 1908 decisions, made Brewer's opinion for a unanimous Court in *Muller v. Oregon* (1908)[76] anomalous, even startling. There, he upheld state hours regulation for female employees. Two things stand out about this opinion. First, Brewer smoothly accepted the validity of the Brandeis brief, a Progressive innovation completely incompatible with classical legal thought. Second, he justified his holding—and implicitly distinguished *Lochner*—by reasoning that today would be condemned as arrant sexism: The "inherent difference between the two sexes" justified treating women workers differently from men, because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence." This social-Darwinian note led him perilously close to treating women as breeders: "[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." Above all, "woman has always been dependent on man" because "in the struggle for subsistence she is not an equal competitor with her brother," a thought that enabled Brewer to overcome his revulsion to paternalism.

Up to this point, Brewer might be taken to be an embodiment of the Constitution-in-exile, though a weak and inconsistent one, not a pure type. His decisions involving two other subjects, race and church-and-state, either do not fit the exile image or, if they do, prove only that we are better off if the exiled Constitution never returns.

Brewer displayed what, from today's perspective, seems to be an inconsistency in cases involving non-European peoples. Where African Americans were concerned, he was a man of his times, sharing racial attitudes common to Northeastern or Midwestern middle-class whites of his era. Despite his early commitment to abolition, he saw nothing wrong with segregation.[77] On the Kansas supreme court, he went out of his way to defend racial segregation in the schools.[78] In his first year on the U.S. Supreme Court, he upheld a Mississippi statute mandating Jim Crow cars on railroads in the state, even as it applied to interstate runs—in this case, from Memphis to New Orleans. Trains would have to stop at the state line, hitch on a Jim Crow car, and then divert all black passengers to it, but Brewer shrugged this off as a minimal inconvenience. In one scholar's opinion,[79] this case was more important in affirming the validity of segregation than *Plessy v. Ferguson* (1896),[80] in which Brewer did not participate.[81] Though he upheld the constitutionality of the Peonage Act of 1866 in 1905[82] , in *Hodges v. United States* (1906),[83] Brewer overturned convictions of whites for intimidating African Americans in employment in violation of the Civil Rights Acts of 1866 and 1870. He gratuitously opined that the Thirteenth Amendment was "not an attempt to commit [African Americans] to the care of the nation" and reaffirmed the state-action doctrine in holding the Fourteenth

Amendment inapplicable. His last word on the subject came in *Berea College v. Kentucky* (1908),[84] where he sustained Kentucky's law mandating segregation even in private schools.

But discrimination against Chinese immigrants provoked an entirely different reaction from him. We can only speculate about the reasons for these racially differentiated attitudes. Perhaps, having been born and raised among Turks in the Levant, he was more able to empathize with people his generation lumped together as "Orientals." For whatever reason, mistreatment of Chinese evoked his indignation, leading him to denounce white attitudes in terms that make him sound like an early civil libertarian. In *Fong Yue Ting v. United States* (1893),[85] where the majority sustained a federal statute authorizing summary deportation of resident Chinese aliens, Brewer denounced the lack of process as a violation of the Fourth, Fifth, Sixth, and Eighth Amendments. He was provoked to an uncharacteristic bit of sarcasm: "[I]n view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, 'Why do they send missionaries here?'" He consistently dissented in subsequent cases upholding expulsion of Chinese (and, in one case, Japanese) aliens.[86] Brewer gladly joined the majority in *United States v. Wong Kim Ark* (1898),[87] in which the Court held that children born of resident alien Chinese were American citizens under the explicit terms of the Fourteenth Amendment and refused to carve out a racial exception. Where Brewer's complacent and unquestioning endorsement of segregation marked him as a figure of the Jim Crow era, his forward-looking concern for Asians stood out in welcome relief. The exiled Constitution

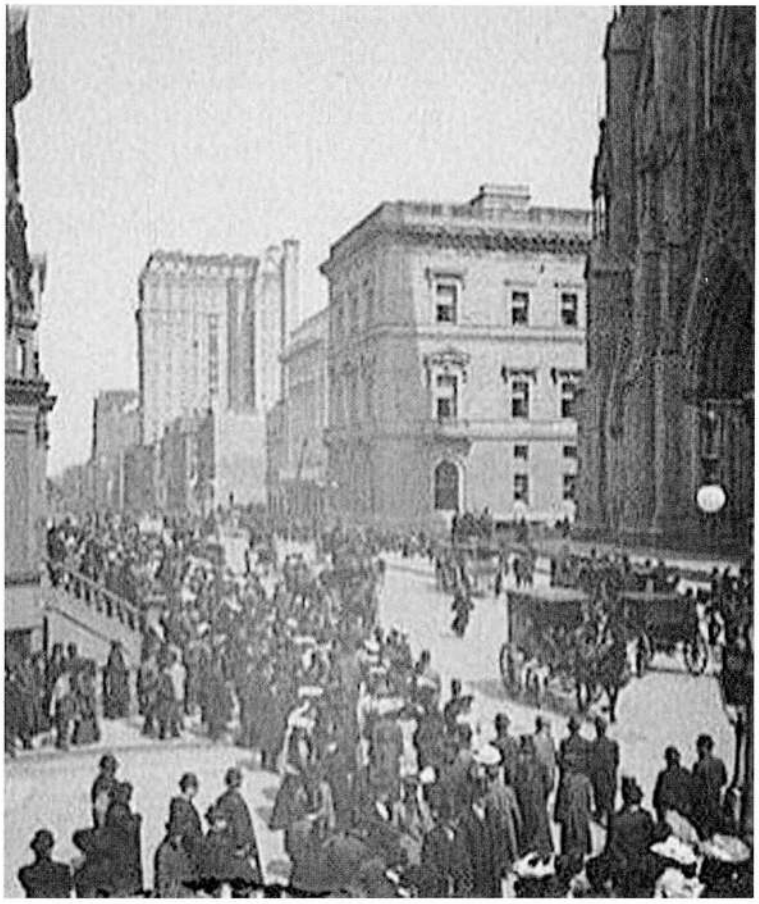
Although allied with the rest of the Court in upholding segregationist laws, Brewer was nonetheless precocious about the treatment of Asian Americans. Pictured is a painting of Chinese Americans on Mott Street, New York City, in 1900.

would have—and did, in fact—support segregation, but its avidity for national and executive power in foreign affairs would have found Brewer's Asian proto-civil-libertarian sympathies unwelcome.

Brewer's views on the relationship between American law, American civilization, and Christianity are well known, not to say notorious, thanks to his opinion in *Church of the Holy Trinity v. United States* (1892),[88] an opinion widely misinterpreted by being quoted out of context. In a case that was otherwise of little significance, involving statutory construction of a relatively unimportant immigration act, Brewer propounded the Christian-nation thesis that America is "a religious nation." After quoting colonial charters and early state constitutions, antebellum appellate opinions declaring Christianity to be part of the common law, and the mass of customs and practices that Justice William J. Brennan once described as "ceremonial deism"[89] (including such things as oaths and invocations in legislatures or courts), Brewer asserted that "these, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."[90]

Such an utterance would be unthinkable today from a Justice of the United States Supreme Court,[91] but did it in its time reflect a legally enforceable characteristic of our constitutional order, or even an aspiration that it should be? In a thorough and thoughtful study, Steven K. Green has conclusively demonstrated that it did not.[92] Brewer was deeply religious throughout his life,[93] reflecting the Congregationalist piety of his missionary parents, and the Holy Trinity dictum—like his book-length sequel, *The United States: A Christian Nation* (1905)—reflected his deep conviction that, historically and culturally, Christianity pervaded, and ought to pervade, American culture. But for Brewer this was a descriptive judgment, not a normative one, and it was so received by his contemporaries. He himself did not treat it as legal precedent, and it got little play in other courts. To be sure, Christian activist groups, especially the American Sabbath Union (which lobbied for Sunday blue laws) and the National Reform Association (which lobbied for a constitutional amendment proclaiming "Lord Jesus Christ as the Governor among the nations") hailed Brewer's vigorous rhetoric and attempted to use it to promote their agendas. Their latter-day Christian activist successors have also extolled it.[94] But none has succeeded in getting the idea taken seriously as a proposition of law. In any event, the Christian-nation thesis has not been suggested by anyone as an element of the Constitution-in-exile. Important as it was to Brewer as a description of American civilization, it formed no part of a restorationist agenda.

While the Christian-nation idea is irrelevant, Brewer's closest affinity to the Constitution-in-exile lies in his attitude toward federal judicial power. In a penetrating analysis, Edward A. Purcell has traced the influence of his thought on the expansion of federal jurisdiction and judicial power generally.[95] Brewer's concept of federal judicial power was breath-taking. His *Debs* opinion was a *ne plus ultra* of federal equity jurisdiction. He was an enthusiast for the general federal common law, expanding its reach into the fields of torts (as in *Baltimore & Ohio Rr. v. Baugh* (1893)), insurance, navigable waters, and common carriers.[96] Brewer proclaimed federal judicial supremacy over both Congress and the states. Yet at the same time, he invoked the Tenth Amendment to restrict federal legislative power, a tour de force of judicial reasoning that promoted the conservative agenda of restricting federal regulatory power while enhancing the power of courts to supervise both state and federal legislative activity. He read the Tenth Amendment as both a limitation on congressional power and, at the same time, an affirmation that "all powers of a national character which are not delegated to the National Government are reserved" to the American people as a whole.[97] This reading converted the Tenth Amendment from a norm of federalism,



Deeply religious, Brewer believed that America was a Christian country by culture and history, but not by law. Pictured is Saint Patrick's Cathedral in New York on a Sunday morning in the 1890s.

allocating power between the federal government and states, into a limitation on the legislative powers of both the federal government and the states. With congressional authority thus corralled, the role of federal courts was enhanced.

General federal common law, based on "principles" "in force generally throughout the United States" elbowed out both state common law and statutory modification.[98] Only the judiciary, in Brewer's view, could be relied on to save the nation from the menacing evils of coercive labor unions, giant corporations, accumulated wealth, legislative irresponsibility, craven politicians, majoritarian democracy, and the creeping paternalism he saw everywhere about him. Given its awesome responsibilities, any effort to restrict the growth of judicial power would be "part and parcel of the scheme to array the many against the few, the masses against the classes." [99] Federal common law allowed protean federal judges to create substantive rules free of statutory constraint and state common-law developments. The courts did not have to justify their rules or identify their sources, because they found the principles of law in keeping with the declaratory function of law. In this theory, law derives from immutable principles extrinsic to law and to society, principles based on "conviction of right and wrong," discovered by judges and expounded as law.

* * * * *

What, then, if anything, does David J. Brewer's twenty years' service on the Supreme Court tell us about the Constitution in exile?

Does such a Constitution exist? If it does, what are its contents? Did Brewer and/or his Court contribute much to the substance of that Constitution?

The contrast between Brewer's traditional reputation as a right-wing, laissez-faire-committed, anti-labor, pro-business, reactionary ideologue and the reality of his judicial performance as sketched out above cautions us to beware of easy generalizations and snippets taken out of context. While Brewer did participate in major decisions that were conservative by anybody's standards, and while the Brewer-Fuller-Peckham troika undoubtedly moved the Court's holdings somewhat to the right at the turn of the twentieth century, the traditional neo-Progressive picture of Brewer comes so close to caricature that it is unreliable as a guide to describing the constitutional heritage of the Progressive era. If there was, or is, a Constitution in exile, it is ill-served by stereotyping and exaggeration.

Assuming arbitrarily that Brewer does represent the Constitution in exile, though, what can we extrapolate about it from this brief synopsis of his career? Brewer's career suggests that the Constitution-in-exile thesis is without merit. A balanced and complete picture of his opinions and positions portrays a judge who decided cases according to his firmly held legal and moral principles, but who was not rigidly consistent around a single jurisprudential axis. He was opposed to regulation in principle, for example (score one for the Constitution-in-exile thesis), but he certainly did not vote that way most of the time, as the state-regulation and federal antitrust cases demonstrate.

It may be that the exile hypothesis was not meant to be taken seriously—that it was an off-the-cuff suggestion, or a feint, or a trial balloon, or a mere rhetorical gesture. Whatever its author's intent, it does not work as an explanatory or even categorizing construct that explains long-term constitutional development. This forces us to question the idea of a Constitution in exile. If anyone might be the archetype of such an idealized constitutional order, it would have been David J. Brewer. But since the body of his work lends only little or weak support to the thesis, we must ask whether the Constitution in exile is more fantasy than history. For if Brewer does not exemplify the thesis, no one can—at least, no one who served prior to the Four Horsemen.

ENDNOTES

[1]Douglas H. Ginsburg, "Delegation Running Riot" (book review), in *Regulation: The Cato Review of Business and Government* (1995), *available at* http://www.cato.org/pubs/regulation/reg18n1f.html (last visited Apr. 19, 2008).

[2]*See* Bernstein's comments in Orrin Kerr, "Is 'the Constitution in Exile' a Myth?," blog and commentary on the Volokh Conspiracy, Dec. 29, 2004, *available at* http://volokh.com/posts/chain_1104346631.shtml (last visited Apr. 19, 2008); Barnett in a debate with Cass Sunstein, May 2, 2005, *available at* http://www.legalaffairs.org/webexclusive/debateclub_cie0505.msp (last visited Apr. 19, 2008): "There is no 'Constitution in Exile' movement, either literally or figuratively."

[3]Cass Sunstein, "The Rehnquist Revolution," *New Republic*, Dec. 27, 2004; Adam Cohen, "What's New in the Legal World? A Growing Campaign to Undo the New Deal," *New York Times*, Dec. 14 2004.

[4]As in an entire symposium issue devoted to the topic in 51 *Duke L. J.* 1 (2001); Jeffrey Rosen, "The Unregulated Offensive," *New York Times Magazine*, Apr. 17, 2005.

[5]The Constitution-in-exile thesis should be distinguished from Randy E. Barnett's concept of the "lost Constitution," as expressed in **Restoring the Lost Constitution: The Presumption of Liberty** (2004). Barnett contends that throughout American constitutional history, judges have consistently ignored or undervalued specific clauses of the Constitution, leaving entire areas of the original document grayed out, as it were, of no constitutional impact today.

[6]I have surveyed the intellectual and social background of this constitutional understanding in William M. Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937** (1998).

[7]*United States v. Lopez*, 514 U.S. 549, 599, 602 (1995) (Thomas, J., concurring); *United States v. Morrison*, 529 U.S. 598 (2000) (Thomas, J., concurring).

[8]Edward Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890); *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

[9]198 U.S. 45 (1905).

[10]*NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[11]*Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U. S. 525, 535–36 (1949).

[12]*United States v. Lopez*, 514 U.S. 549 (1995).

[13]Ginsburg, "Delegation Running Riot."

[14]Michael J. Brodhead provides biographical data in **David J. Brewer: The Life of a Supreme Court Justice, 1837–1910** (1994).

[15]At that time, the Eighth Circuit comprised Kansas, Nebraska, Iowa, Minnesota, Missouri, Colorado, and Arkansas. The Dakotas and Wyoming were added later, at the time of their entry into statehood.

[16]*Wright v. Noell*, 16 Kan. 601 (1876).

[17]*Prohibitory Amendment Cases*, 24 Kan. 704 (1881); *Intoxicating Liquor Cases*, 25 Kan. 751 (1881); *State v. Mugler*, 29 Kan. 252 (1883) (Brewer, J., concurring).

[18]26 F. 178 (C.C.D. Kan. 1886).

[19]*State ex rel. St. Joseph & Denver City Ry. v. Commissioners of Nemaha County*, 7 Kan. 542 (1871); *Gelpcke v. Dubuque*, 1 Wall. (68 U.S.) 175 (1864).

[20]*United States v. Kane*, 23 F. 748 (C.C.D. Colo. 1885).

[21]*Frank v. Denver & Rio Grande Ry.*, 23 F. 757, 758 (C.C.D. Colo. 1885).

[22]Quoted in Brodhead, **Brewer**, 118.

[23]94 U.S. 113 (1876).

[24]*Chicago & Northwestern Ry. v. Dey*, 35 F. 866, 879 (C.C.D. Iowa 1888).

[25]Arnold M. Paul, **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895** (1960), 70–72. Joseph G. Hylton collected every primary- and secondary-source reference to Brewer's conservatism in "David Josiah Brewer: A Conservative Justice Reconsidered," 1994 *J. Sup. Ct. Hist. Soc.* 45, a thoughtful re-evaluation of its subject's place in American constitutional development. I review the Progressive and neo-Progressive historiographic traditions, which are essential to the conventional interpretation of the fuller Court, in Wiecek, **Lost World of Classical Legal Thought**, 255–63. I imply here no disparagement of this grand tradition. On the contrary: all my own work is written within it.

[26]Arnold M. Paul, "David J. Brewer," in Leon Friedman and Fred L. Israel, comps., **The Justices of the United States Supreme Court, 1789–1969, Their Lives and Major Opinions** (1969–1978), II, 1515, 1520.

[27]*See generally* John E. Semonche, **Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920** (1978), an early and thorough effort to rethink the conservative image of the Court. Peckham, on the other hand, would be a perfect candidate for the prototype of unthinking reaction.

[28]*New Englander and Yale Review* 256 (Aug. 1891) 97 at 108, 109.

[29]*Pollock v. Farmers Loan and Trust Co.*, 158 U.S. 601 (1895).

[30]*Knowlton v. Moore*, 178 U.S. 41, 110 (1900) (Brewer, J., concurring and dissenting).

[31]*South Carolina v. United States*, 199 US. 437, 454 (1905).

[32]On Brewer and state taxation, see Brodhead, **Brewer**, 93–94, 149–50.

[33]*Michigan Central Rr. v. Powers*, 201 U.S. 245, 293 (1906).

[34]Charles Warren, "The Progressiveness of the United States Supreme Court" and "A Bulwark to the Police Power—The United States Supreme Court," 13 *Colum. L. Rev.* 294, 667 (1913), respectively; Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era,"1983 *Yearbook of the Supreme Court Historical Society*, *available at* http://www.supremecourthistory.org/04_library/subs_volumes/04_c20_h.html (last visited Apr. 19, 2008).

[35]260 U.S. 393 (1922).

[36]29 Kan. 252, 274 (1883).

[37]123 U.S. 623 (1887).

[38]*Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 297 (1897). Brewer dissented there because he objected to merely nominal compensation for the taking.

[39]177 U.S. 587, 598 (1900).

[40]*Budd v. People*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

[41]94 U.S. 113 (1877).

[42]*Chicago & Grand Trunk Ry v. Wellman*, 143 U.S. 339 (1892); *Ames v. Union Pacific Ry*, 64 F. 165 (C.C.D.Neb. 1894).

[43]*Chicago, Milwaukee & St. Paul Ry v. Minnesota*, 134 U.S. 418, 458 (1890).

[44]154 U.S. 362 (1894).

[45]209 U.S. 123 (1908).

[46]169 U.S. 466 (1898).

[47]Melvin I. Urofsky and Paul Finkelman, **A March of Liberty: A Constitutional History of the United States**, vol. II, **From 1877 to the Present**, 2d ed. (2002), 530. *Smyth* was overruled in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

[48]Hylton, "David Josiah Brewer," collects the cases at n. 81.

[49]Hylton, "David Josiah Brewer," 48.

[50]135 U.S. 100 (1890). *Leisy* was the most significant prohibition case to come before the Supreme Court in the nineteenth century, so we might have expected it to showcase Brewer's conviction that prohibition raised substantive due-process questions.

[51]*Champion v. Ames*, 188 U.S. 321 (1903). Yet the following year, he incongruously joined the majority in *McCray v. United States* (1904), upholding Congress's authority to use its tax powers for regulatory purposes. 195 U.S. 27 (1904).

[52]Act of 4 Feb. 1887, ch. 104, 24 Stat. 379.

[53]167 U.S. 479 (1897).

[54]*ICC v. Alabama Midland Ry.* 168 U.S. 144 (1897).

[55]Act of 29 June 1906, ch. 3591, 34 Stat. 584.

[56]On the distinction between "strong" state agencies (those having rate-making powers) and the "weak" (those having publicity capability only), see Thomas K. McCraw, **Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn** (1984).

[57]206 U.S. 441 (1907). Brewer dissented without opinion.

[58]215 U.S. 452 (1910). Brewer dissented without opinion.

[59]Act of 2 July 1890, ch. 647, 26 Stat. 209.

[60]156 U.S. 1 (1895).

[61]*United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Loewe v. Lawlor*, 208 U.S. 274 (1908). The outcome in the last case might better be explained by its hostility to labor organizations than as supportive of antitrust policy generally.

[62]16 Wall. (83 U.S.) 36 (1873).

[63]*Frisbie v. United States*, 157 U.S. 160 (1895).

[64]165 U.S. 578 (1897).

[65]198 U.S. 45 (1905) and 208 U.S. 161 (1908), respectively.

[66]153 U.S. 391, 410 (1894).

[67]158 U.S. 564, 582 (1895).

[68]*In re Doolittle*, 23 Fed. 544 (1885); *United States v. Kane*, 23 Fed. 748 (1885).

[69]Such enthusiasm for the use of military force was incongruous in one who in other respects was something of an antimilitarist. Michael J. Brodhead, "Justice David J. Brewer: A Voice of Peace on the Supreme Court," 1985 *Yearbook of the Supreme Court Historical Society* 93.

[70]This address is reprinted in Alan F. Westin, comp., **An Autobiography of the Supreme Court** (1963), quotations at 133, 123–24.

[71]*Baltimore & Ohio Rr. v. Baugh,* 149 U.S. 368 (1893).

[72]169 U.S. 366 (1898).

[73]208 U.S. 161 (1908); the statute was the Erdman Act (Act of 1 June 1898, ch. 370, 30 Stat. 424).

[74]Act of 11 June 1906, ch. 3073, 34 Stat. 232.This statute made common carriers liable for the death or injury of their employees at work, abrogated the fellow-servant rule, and modified the doctrine of contributory negligence. Congress re-enacted the statute in 1908, and this time, with Brewer, Fuller, and Peckham dead, the Court acquiesced in *Mondou v. New York New Haven & Hartford Rr.* (the Second Employers Liability Case), 223 U.S. 1 (1912).

[75]*First Employers Liability Case*, 207 U.S. 463 (1908).

[76]208 U.S. 412, 421–23 (1908).

[77]J. Gordon Hylton considers Brewer's opinions & attitudes involving African Americans in "The Judge Who Abstained in *Plessy v. Ferguson*: Justice David Brewer and the Problem of Race," 61 *Miss. L. J.* 315 (1991).

[78]*Board of Education v. Tinnon*, 26 Kan. 1 (1881) (Brewer dissenting).

[79]Semonche, **Charting the Future**, 15.

[80]163 U.S. 537 (1896).

[81]Brewer abstained because of his daughter's death and funeral.

[82]*Clyatt v. United States*, 197 U.S. 207 (1905).

[83]203 U.S. 1, 16 (1906).

[84]211 U.S. 45 (1908).

[85]149 U.S. 698, 744 (1893).

[86]*See, e.g., United States v. Sing Tuck,* 194 U.S. 161 (1904); *United States v. Ju Toy*, 198 U.S. 253 (1905); *Yamataya v. Fisher,* 189 U.S. 86 (1903).

[87]169 U.S. 649 (1898).

[88]143 U.S. 457, 471, 470 (1892).

[89]*Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

[90]This was not a new theme for him: he had called the United States a "Christian Commonwealth" while on the Kansas supreme court. *Wyandotte County v. First Presbyterian Church*, 30 Kan. 620, 1 P. 109 at 112 (1883).

[91]Though Justice Scalia seems to think that we are at least a monotheistic nation, *McCreary County v. ACLU*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting), and has endorsed Justice William O. Douglas's dictum in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952), that Americans "are a religious people whose institutions presuppose a Supreme Being."

[92]"Justice David Josiah Brewer and the 'Christian Nation' Maxim," 63 *Alb. L. R.* 427 (1999).

[93]Green, *id.*, emphasizes Brewer's religiosity, as does J. Gordon Hylton, "David Josiah Brewer and the Christian Constitution," 81 *Marq. L. R.* 417 (1998). Robert E. Gamer, "Justice Brewer and Substantive Due Process: A Conservative Court Revisited," 18 *Vand. L. Rev.* 615 (1965), was the earliest reconsideration of Brewer's career that moved beyond neo-Progressive stereotypes, emphasizing the role his values played in his judging.

[94]Their efforts are discussed in Green, "'Christian Nation' Maxim," 428–29.

[95]**Brandeis and the Progressive Constitution: *Erie*, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America** (2000), 46–63.

[96]*Baltimore & Ohio Rr. v. Baugh,* 149 U.S. 368 (1893).

[97]*Kansas v. Colorado*, 206 U.S. 46, 90 (1907).

[98]206 U.S. at 96, quoting *Western Union Telegraph Co. v. Call Publ. Co.*, 181 U.S. 92, 101 (1901).

[99]1898 address to the Colorado Bar Association, quoted in Purcell, **Brandeis and the Progressive Constitution**, 49.

A Tall Tale of *The Brethren*

ROSS E. DAVIES*

In their book **The Brethren: Inside the Supreme Court**, Bob Woodward and Scott Armstrong tell a small but striking story of the racial insensitivity of Justice Harry A. Blackmun.[1] It happened during the drafting and circulation of opinions in *Flood v. Kuhn*, the 1972 baseball antitrust case.[2] As the story goes, when Blackmun circulated the first draft of his opinion in *Flood*, with its famously romantic introductory salute to the good old days of baseball and list of "celebrated . . . names" from the history of the game, the list of names was as segregated as the Topeka public schools in 1954. Blackmun had excluded African Americans from his list of baseball celebrities. It was only when pressed to do so by Justice Thurgood Marshall that he added black players to the list—Satchel Paige, Jackie Robinson, and Roy Campanella.

It has been said that this story from **The Brethren** "makes no sense,"[3] but that is not enough to make it false. **The Brethren** accurately reports some pretty nonsensical behavior by people who worked at the Supreme Court during the period covered by the book (1969 to 1976). Moreover, the authors of **The Brethren** claim there is documentary proof of their story of Blackmun-versus-Marshall in *Flood*. Nevertheless, the story is false. The document from which the authors quote—Blackmun's allegedly racially exclusive circulated first draft in *Flood*—does not exist and never did. Paige, Robinson, and Campanella were present in the first circulated draft and thereafter. And thus Marshall's objection to the offending draft never occurred either. There was nothing to object to.

Before getting to the business of correcting this sliver of the historical record, it is worth pausing to consider the value of contradicting a two-page anecdote about a single baseball case buried in the middle of a 444-page book written almost thirty years ago. In short, the accuracy of **The Brethren**'s Blackmun-versus-Marshall story matters not only because it is generally good to know the truth—especially on a subject as perennially salient as a Justice's views on the place of race in a decision by the Court—but also because **The Brethren** is an important book, the importance of which hinges in large part on the consistency with which the stories it tells turn out to be true.

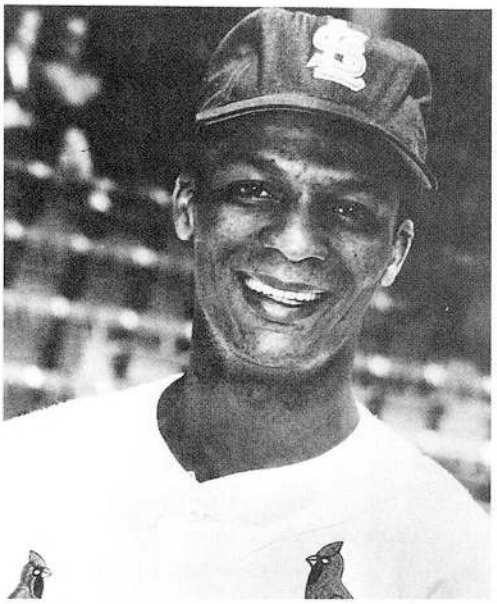
The Brethren

When it was published in 1979, **The Brethren** gave the public an unprecedented look at the inner workings of the Supreme Court.[4] It did so in a crisp, anecdotal style that made it appealing and accessible to the lay reader. The book's numerous behind-the-curtains vignettes also provided a wealth of otherwise unavailable factual detail about the thinking and behavior of the Justices and their staffs that made it irresistible to Supreme Court journalists, scholars, and other specialists. The combination of an important subject, intriguing new information, and good writing made **The Brethren** a commercial success. It was also controversial, both for its content (it related many less-than-flattering stories about the Justices and others at the Court) and for its method of reporting (it was based largely on anonymous sources and confidential documents).[5] The book weathered the early controversies and has gradually become a standard resource for scholars and other commentators—and, in recent years, even some federal judges[6]—seeking to understand the Court. The list of respectable scholars who have relied on **The Brethren** is long and lengthening.[7] Nowadays, whenever a new Supreme Court exposé appears, it is to **The Brethren** that it must first be compared.[8]

At first, however, readers—having no access of their own to Woodward and Armstrong's anonymous sources and confidential documents—had no basis for believing the stories told in **The Brethren**, other than the inherent plausibility of those stories and the authors' reputations for reliably uncovering and sorting the true from the not-so-true. On that front, there was at the time (and probably remains) no user of anonymous and confidential sources with a more impressive track record than Woodward. He had already written two anonymously sourced and largely vindicated books about the inner workings of the executive branch of the federal government, **All the President's Men** and **The Final Days**, as well as many articles based on anonymous sources for the *Washington Post*. And Armstrong had played a major role in the research and writing of **The Final Days**.[9]

As time passed, **The Brethren** had to stand on its own. Anonymous sources spoke to other authors, previously confidential documents became public, and some stories told in **The Brethren** could be verified or falsified. If those stories that could be checked did not check out—if Woodward and Armstrong, or their sources, had been fabricating tales of the Supreme Court—those truths would come out, undermining not only those particular stories but also the book as a whole. After all, if the stories we *can* check turn out to be false, why should we believe the stories we *cannot* check?[10] On the other hand, if those stories that could be checked did check out, then the converse inference would apply: It would be only reasonable to acknowledge that the credibility of the stories we cannot check is enhanced by the accuracy of the ones we can. So far, **The Brethren**'s checkable stories have turned out, scattered bit by bit, episode by episode, to be true[11]—or at least not definitely false—with the exception of a few "small errors" picked up by early reviewers.[12] This has added to the credibility and influence of the book as a whole. Linda Greenhouse, the Pulitzer Prize-winning journalist who covers the Supreme Court for the *New York Times*, wrote in her biography of Blackmun that **The Brethren**'s "reliance on anonymous sources has made that best-selling book controversial, but, in many instances, Blackmun's case files attest to its accuracy."[13] And Professor Mark Tushnet, who clerked for Marshall during part of the period covered by **The Brethren** and has studied the Court ever since, has observed that "[t]he accounts in **The Brethren** are factually accurate on nearly every point."[14]

Until the opening of Blackmun's papers at the Library of Congress in 2004, the Blackmun-versus-Marshall episode in *Flood v. Kuhn* was one of the uncheckable stories. Now it can be checked, and it does not check out.



Curt Flood, the plaintiff in the landmark baseball antitrust case, played center field for the Saint Louis Cardinals. Although his 1969 legal challenge was ultimately unsuccessful, it brought about additional solidarity among players as they fought against baseball's reserve clause and sought free agency.

Bowie Kuhn was the commissioner for Major League Baseball who rejected Flood's challenge, citing the propriety of the reserve clause in the contract Flood had signed.

Which raises a more complicated question: If some of the stories we can check are true and at least one is false, does that make all of the remaining unchecked stories unreliable, or only some of them, or perhaps none? The answer to that question depends on the answers to two intermediate questions. First, where did the false story come from, the authors or a source? If the former, then all unchecked stories are subject to doubt. If the latter—if a source somehow duped the authors—then the second question arises: Did that source provide information for any other part of the book, and if so what part or parts? If the source helped only with the Blackmun-versus-Marshall story, then perhaps the rest of the book should retain the standing it enjoys today, subject perhaps to a bit of extra skepticism courtesy of one small blemish on the authors' reputation for winnowing truths from lies delivered by anonymous sources. If the source (or sources, if Woodward and Armstrong relied on more than one for Blackmun-versus-Marshall) did more, then those stories should be doubted (fool me once, shame on you; fool me twice . . .). The answers to these questions are probably available only from Woodward and Armstrong. But the true story of Blackmun-versus-Marshall in *Flood* can sharpen the questions, even if it cannot answer them. This is the added value of contradicting one anecdote about a single baseball case buried in the middle of **The Brethren**.

Which brings us to that anecdote: **The Brethren**'s tall tale of Blackmun-versus-Marshall in the *Flood* case.

The Tall Tale

Part I of Blackmun's published opinion in *Flood*, which he announced in Court on June 19, 1972, contains his salute to the game of baseball. It includes a list of eighty-eight "celebrated . . . names" from the history of the game, a list that grew from seventy-four names when he circulated his first draft of the opinion on

May 5, 1972. The tale of the birth and growth of the list was first reported by Woodward and Armstrong. Here is the story as they tell it on pages 190 and 191 of **The Brethren**, starting with Blackmun's reaction when Potter Stewart, the senior Justice in the majority after the initial vote in Conference on the case, assigned the opinion for the Court to him:

> Blackmun was delighted. Apart from the abortion assignment, he felt he had suffered under the Chief, receiving poor opinions to write, including more than his share of tax and Indian cases. He thought that if the antitrust laws were applied to baseball, its unique position as the national pastime would be undermined. A devoted fan first of the Chicago Cubs and later the Minnesota Twins, he welcomed this chance to be one of the boys.
>
> With his usual devotion to detail, Blackmun turned to the *Baseball Encyclopedia*, which he kept on the shelf behind his desk. He set down minimum lifetime performance standards—numbers of games played, lifetime batting averages or earned-run averages. He picked out representative stars from each of the teams, positions, and decades of organized baseball. Then, closeted away in the Justices' library, Blackmun wrote an opening section that was an ode to baseball. In three extended paragraphs, he traced the history of professional baseball. He continued with a list of "the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided timber for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in season and off season: Ty Cobb, Babe Ruth . . ." There were more than seventy names. "The list seems endless," Blackmun wrote. He paid homage to the verse "Casey at the Bat," and other baseball literature. When he had finished, Blackmun circulated his draft.
>
> Brennan was surprised. He thought Blackmun had been in the library researching the abortion cases, not playing with baseball cards.
>
> One of Rehnquist's clerks called Blackmun's chambers and joked that Camillo Pascual, a former Washington Senators pitcher, should have been included in the list of greats.
>
> Blackmun's clerk phoned back the next day. "The Justice recalls seeing Pascual pitch and remembers his fantastic curve ball. But he pulled out his Encyclopedia and looked up his record. He decided Pascual's 174 wins were not enough. It is difficult to make these judgments of who to include but Justice Blackmun felt that Pascual is just not in the same category with Christy Mathewson's 373 wins. I hope you will understand."
>
> Calling Blackmun's chambers to request that some favorite player be included became a new game for the clerks.
>
> Stewart was embarrassed that he had assigned the opinion to Blackmun. He tried to nudge him into recognizing the inappropriateness of the opening section, jokingly telling him that he would go along with the opinion if Blackmun would add a member of Stewart's home-town team, the Cincinnati Reds.
>
> Blackmun added a Red.
>
> Marshall registered his protest. The list included no black baseball players. Blackmun explained that most of the players on his list antedated World War II. Blacks had been excluded from the major leagues until 1947.

> That was the point exactly, Marshall replied.
>
> Three black players were added—Jackie Robinson, Roy Campanella, and Satchel Paige.[15]

This story has since been told and retold, in whole and in part, and has become part of the history of *Flood*.[16] Pieces of it soon checked out as true—the bit about Stewart and the addition of a Cincinnati Red, for example. Justice William O. Douglas's papers, which he had deposited in the Library of Congress, were opened to the public in 1986, just seven years after **The Brethren** was published. Douglas's file on the *Flood* case included three versions of Blackmun's *Flood* opinion:

- A version labeled "1st DRAFT" and "Circulated: 5/5/72." This draft featured a list of only seventy-four "celebrated names," and not one of them had been a Cincinnati Red.[17]
- A version labeled "2nd DRAFT" and "Recirculated 5/25/72." In this draft, there were twelve more baseball greats on the list, one of whom was Reds pitcher Eppa Rixey.[18]
- A copy of the final slip opinion, dated June 19, 1972, with two more names on the list: Jimmie Foxx and Moe Berg. The story of their addition is not relevant here, and is well told (as is the entire story of the *Flood* case) in Brad Snyder's **A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports**.[19]

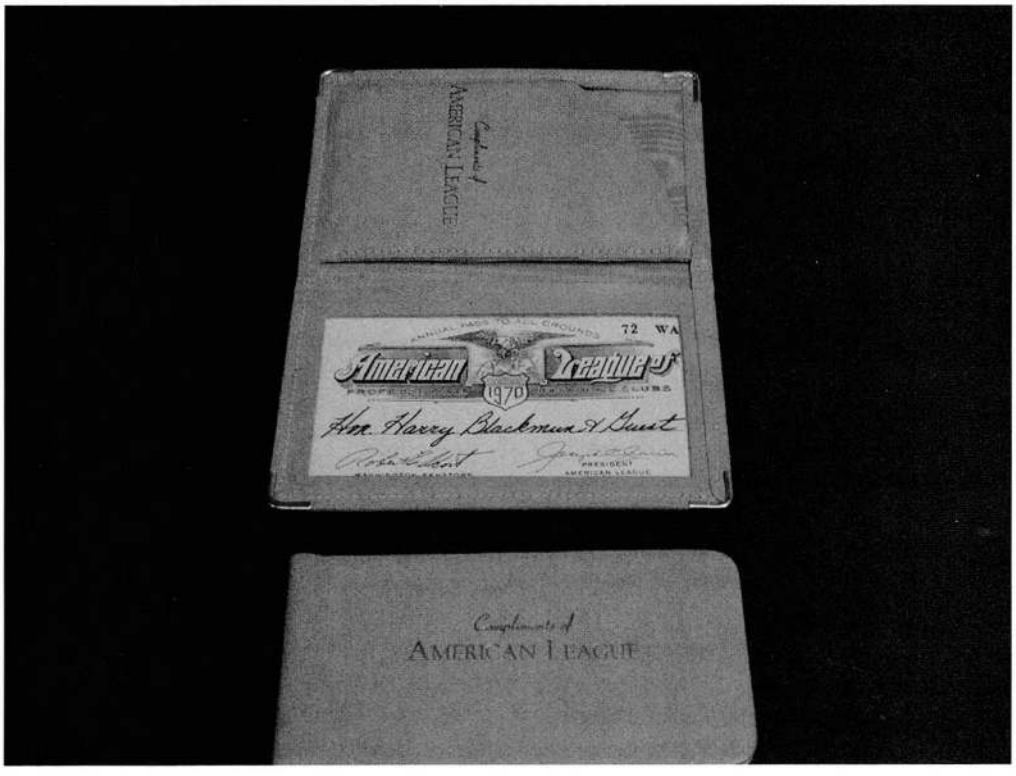
When they were opened to the public during the 1990s, the papers of Justices Marshall and William J. Brennan, Jr. revealed *Flood* files that consistently matched the one in the Douglas papers. They included the same versions of Blackmun's *Flood* opinion, and no more.[20]

But, while the "1st DRAFT" and "2nd DRAFT" of Blackmun's *Flood* opinion in the files of Douglas, Brennan, and Marshall supported the anecdote about the addition of a Cincinnati Red, they undermined the Blackmun-versus-Marshall story about the addition of Paige, Robinson, and Campanella. The "1st DRAFT" in the Justices' files already had all three of those names. All three men were still there in the "2nd DRAFT," and none of the twelve added celebrities was African American. And all three remained in the final slip opinion as well, accompanied by two more white additions, Foxx and Berg. That is, the three black baseball celebrities were there from the beginning, and no African Americans were added or subtracted thereafter. Moreover, the very labeling of the two drafts suggested that the version labeled "1st DRAFT" was, indeed, the first circulated draft, because it had been "Circulated," while the "2nd DRAFT" had been "Recirculated." If some other draft had been circulated prior to the "1st DRAFT" then surely the "1st DRAFT" would have been labeled "Recirculated" too. Furthermore, there was the word of Blackmun himself. He repeatedly acknowledged the provenance of the Rixey addition during his 1995 interviews with Professor Harold Koh for the Justice Harry A. Blackmun Oral History Project, and alluded to it in correspondence.[21] But he consistently denied the Blackmun-versus-Marshall story in his correspondence (it did not come up during the oral history interviews).[22]

Confirming a positive is, however, not the same as proving a negative. Who knows, perhaps Blackmun did circulate some sort of preliminary draft before the "1st DRAFT" in the Justices' files. Finding a needle (the added Cincinnati Red) in the proverbial haystack is one thing; proving there is no needle (the racially exclusive circulated draft) is quite another.

In addition, there is good reason for the careful reader to discount Blackmun's statements that there was no dispute with Marshall over African Americans on the list of "celebrated names." Long experience teaches that some public figures sometimes resort to self-serving lapses of memory, artfully mendacious warping of the English language, or simple falsehood when recalling their foibles and mistakes or polishing their legacies. This

A Minnesota Twins fan, Justice Blackmun (pictured) was passionate about the game and collected baseball memorabilia. This annual pass to the American League, good for the year 1970, belonged to Blackmun.



is not to say that Blackmun lied when he denied the conflict with Marshall. Rather, it is to say that his word standing alone cannot serve in this context, no matter how honest he was in fact. Suffering that skepticism is a legacy for which he and all other public servants can thank prominent members of all three branches of the federal government who have given inaccurate accounts of their behavior only to have their misstatements discovered and disclosed, to the shame of the institution, if not the individual. And then there is the general imperfection of human memory that occasionally afflicts Supreme Court Justices just as it does the rest of us.[23] There is also some specific cause to suspect Blackmun's recall of matters relating to **The Brethren**. For example, in his Oral History, he minimizes his own role as a source for **The Brethren**, saying "One of them did come in and talk to me a little. It was a very short interview."[24] In fact, Blackmun's own records show that he met with Armstrong at least twice, and that he looked into and was impressed by Armstrong's background and credentials.[25] His appointment book for 1978 shows meetings with Armstrong on Thursday, July 6 at 2:30 p.m., and Friday, September 15 at 3:00 p.m., and notes added to a June 30, 1978 memorandum show the same two meetings.[26] Perhaps Blackmun misremembered the number of drafts he circulated in *Flood*, just as he misremembered the extent of his engagement as a source for **The Brethren**, including the number of times he met with Armstrong.

The Blackmun-versus-Marshall story is, however, more susceptible to proof or disproof than many of the stories in **The Brethren**, because the story stands or falls on the content of a document, not on the memory of a person, whether an anonymous source or a named Supreme Court Justice.

Recall that in the long second paragraph of the passage from **The Brethren** quoted above, the authors describe in detail Blackmun's preparation of his first draft, quoting from it twice, and concluding, "When he had finished, Blackmun circulated his draft." It is this draft, they report, to which Stewart responded with a request that Blackmun add a Cincinnati Red, and to which Marshall objected on the ground that its list of "celebrated names" lacked African Americans. As Woodward and Armstrong explain in their "Introduction" to **The Brethren**, "[w]here documents are quoted, we have had direct access to the originals or to copies," including "unpublished drafts of opinions."[27] Thus, the quotes from the racially exclusive first draft must be from a document that the authors had in hand when they wrote the Blackmun-versus-Marshall story, not merely recitations from an anonymous source who told the authors what some document said. And thus there is no need to independently identify and corner an anonymous source—a practically impossible task, as aspiring story-checkers of **The Brethren** have learned.[28] All that is necessary to check the Blackmun-versus-Marshall story is to check the document—the draft Blackmun circulated without African-American players. If Blackmun circulated such a document, then Marshall's reaction and Blackmun's response are just about as plausible as the eminently believable story of Stewart's request for the addition of a Cincinnati Red. But if Blackmun did not circulate such a document, then there also was never a reaction against it by Marshall, and thus no such racial dispute between the two Justices in *Flood*.

No such document appears, or is referred to, in the other Justices' files. And four features of Blackmun's papers show that whatever **The Brethren** was quoting from in the story of Blackmun-versus-Marshall, it was not a racially exclusive draft circulated by Blackmun. Thus, the Blackmun-versus-Marshall story in **The Brethren** is not true.

First, Blackmun's *Flood* files contain two pieces of correspondence with Justice Potter Stewart which, taken together, reveal the logistical impossibility of a circulated draft predating the "5/5/72" "1st DRAFT" in the

papers of Douglas, Brennan, and Marshall. First, on March 20, 1972, Stewart announced his assignment of the opinion for the Court to Blackmun:[29]

March 20, 1972

No. 71-32 – Flood v. Kuhn

Dear Chief,

I have asked Harry Blackmun to undertake the writing of the opinion for the Court in this case, which, hopefully, can be a rather brief per curiam.

The Chief Justice
Copies to the Conference[30]

Blackmun's notes on *Flood* similarly indicate that when he made the assignment, Stewart did so with a request to keep it short.[31] Six weeks later, Blackmun wrote to Stewart as follows:

May 4, 1972

Re: *No. 71-32 – Flood v. Kuhn*

Dear Potter:

I have a proposed Per Curiam for this case at the Printer. I must confess to you that I have done more than merely follow *Toolson* with a bare peremptory paragraph. The case, for me, proved to be an interesting one, and I have indulged myself by outlining the background somewhat extensively. As a matter of fact, this has prompted me to conclude that *Federal Baseball* and *Toolson* have a lot to be said for them. When I finally get

Satchel Paige, Jackie Robinson (pictured), and Roy Campanella all appeared on Blackmun's list of baseball's all-time greats. At issue is whether the Justice had prepared an initial draft that had not contained the names of any African American players.

> to the heart of the matter, however, I give it rather summary treatment. The briefs on both sides are good and I rationalize by saying that they deserve at least this much.
>
> Please give the opinion a reading and let me have your general reactions. The case, supposedly, is critical for the baseball world. I am not so sure about that, for I think that however it is decided, the sport will adjust and continue.[32]

Thus, on May 4, 1972 Blackmun is warning Stewart that his draft opinion in *Flood* is an elaborate piece of work, more than the brief per curiam Stewart had suggested, and that it is at the printer—meaning not yet ready for circulation, but soon. The next day, May 5, 1972, Blackmun circulates the "1st DRAFT" that can be found in the files of Douglas, Brennan, and Marshall. There would have been no point in sending the May 4 note to Stewart if Blackmun had already circulated a draft containing "somewhat extensive" background, including the list of "celebrated names." If he had already circulated such a draft, then Stewart would already have known that he had "done more than merely follow *Toolson* with a bare peremptory paragraph." But if there had been no earlier circulation, Blackmun might well have wanted to give Stewart a heads-up about the unexpectedly long (and surely unexpected in other ways, including the list of baseball celebrities) "1st DRAFT" that was in the works. And he did.

Second, Blackmun's papers reveal his perfectly consistent opinion-circulation and recordkeeping practices, which in turn reveal that the only opinions he circulated in *Flood* were the version labeled "1st DRAFT" and "Circulated: 5/5/72" and the version labeled "2nd DRAFT" and "Recirculated: 5/25/72."

Blackmun kept an "opinion log sheet" for every case in which he wrote an opinion for the Court or a substantial per curiam opinion. Each sheet begins with the name of the case and the case number at the top, and lists down the right-hand side of the sheet the dates on which the decision was announced and on which drafts were circulated (for the first draft) and recirculated (for subsequent drafts). The rest of the sheet is devoted to other data about the case, including the dates on which other Justices joined Blackmun's opinion and the circulations of concurrences and dissents by others. During the 1970–71 and 1971–72 Terms—Blackmun's first two Terms on the Court, and the period preceding and including the drafting and announcement of his *Flood* opinion—whenever he circulated a draft opinion, he always recorded that circulation on the corresponding opinion log sheet.[33]

I have examined every piece of paper in every case file of every Justice whose papers are open to the public for every case in which Blackmun wrote an opinion for the Court or a substantial per curiam opinion during the 1970–71 or 1971–72 Term. In every case, Blackmun's opinion log sheet corresponds perfectly to the circulated and recirculated drafts in those files.[34] And he was thorough. Consider *NLRB v. Scrivener*,[35] like *Flood* a 1971–72 Term case, in which his correspondence with Douglas reveals that Blackmun insisted on receipt of a formal "join" letter from Douglas so that his "records [would be] complete."[36]

The opinion log sheet for *Flood v. Kuhn* was no exception to Blackmun's invariably comprehensive and precise record-keeping. It records the same opinions found in the files of the five Justices whose papers are open to the public:

- "Circulated: 5/5/72"—the "1st DRAFT" in the Justices' files.
- "Recirculated: 5/25/72"—the "2nd DRAFT" in the Justices' files.
- "Announced: 6/19/72"—the slip opinion in the Justices' files.

Like his *NLRB v. Scrivener* file, Blackmun's opinion log sheet for *Flood* reflects his penchant for comprehensively accurate

record-keeping: it includes a correction to the date of assignment, changing it from March 20, 1972 (the date when Stewart notified the Court that he had assigned the *Flood* opinion to Blackmun) to April 3, 1972 (the date on which the Court's assignment list formally recorded Stewart's assignment of the opinion to Blackmun).[37]

Third, Blackmun's *Flood* files contain a five-page document consisting of proofreading and cite-checking corrections to Blackmun's *Flood* opinion, most of which are reflected in the "1st DRAFT." The document is dated "5/4/72" and signed "JTR" (the initials of John Townsend Rich, one of Blackmun's clerks at the time). Blackmun might have had a practice of circulating drafts of his opinions to the Court and only afterward enlisting his clerks to proofread and cite-check those opinions. Such a course would have been odd, even silly, and so it should come as no surprise that he did not operate that way. All of the evidence in his case files for the 1970–71 and 1971–72 Terms indicates that Blackmun's clerks squeegeed his opinions before the first circulation to the other Justices, not after.[38] And so Rich's notes comport neatly with the timing of Blackmun's May 4 note to Stewart warning him of the "somewhat extensive" draft of his *Flood* opinion that had just gone to the printer. Rich finished proofreading and cite-checking on May 4, Blackmun promptly reviewed Rich's work and incorporated most of it, then sent the draft off to the printer and warned Stewart of what would circulate the next day—"5/5/72"—as the "1st DRAFT" of *Flood*.

Fourth and finally, Blackmun's files on the *Flood* case contain only the same three versions of his opinion that are available in the papers of Douglas, Brennan, and Marshall: (1) The version labeled "1st DRAFT" and "Circulated: 5/5/72," with a list of only seventy-four "celebrated names," including Paige, Robinson, and Campanella; (2) the version labeled "2nd DRAFT" and "Recirculated 5/25/72," with twelve more baseball greats on the list, one of whom was Reds pitcher Eppa Rixey and none of whom was African-American; and (3) the final slip opinion, with Berg and Foxx slipped in.[39]

In sum, the evidence in Blackmun's papers, combined with the evidence in the papers of Douglas, Brennan, and Marshall, leaves no room for the circulation of a segregated first draft of Blackmun's *Flood* opinion. (Marshall's papers, by the way, contain no hint of any dispute of any sort, racial or otherwise, over Blackmun's list of "celebrated names.") Consider the following:

- If the story in **The Brethren** were true, then Blackmun's May 4, 1972 note to Stewart would not exist, because it reflects Blackmun's knowledge that Stewart had not as of that date seen Blackmun's "somewhat extensive[]" draft in *Flood*.
- If the story in **The Brethren** were true, then Blackmun's opinion log sheet for *Flood* would be inaccurate, even though there is not a single instance in any case from the 1970–71 or 1971–72 Terms in which a Blackmun opinion log sheet is inaccurate about any circulation of any draft of any of his opinions.
- If the story in **The Brethren** were true, then Rich would have proofread Blackmun's first circulated draft in *Flood* after that draft had circulated, even though there is not a single instance in any case from the 1970–71 or 1971–72 Terms for which a proofread has been preserved where a Blackmun clerk engaged in such nonsensical behavior. They proofed before circulation, not after.
- If the story in **The Brethren** were true, then not a single Justice whose files are open to the public would have saved the racially exclusive draft reported and quoted in **The Brethren**, even though every one of them who participated in the case saved every other draft.
- If the story in **The Brethren** were true, then the Blackmun opinion in the Justices' files labeled "1st DRAFT" and "Circulated: 5/5/72" that includes the three great

African American players would have been labeled "2nd DRAFT" and "Recirculated," because it would have been preceded by the segregated draft from which Woodward and Armstrong quote. But there already is a version in each of those files labeled "2nd DRAFT" and "Recirculated"—the one dated "5/25/72" that features only a few additional white players, including Eppa Rixey, the Cincinnati Red.

The bottom line is that Blackmun's first circulation in *Flood* was the "1st DRAFT" dated "5/5/72" that appears in all of the Justices' files and that contains the names of seventy-four baseball celebrities, including the great African-American players Satchel Paige, Jackie Robinson, and Roy Campanella. Blackmun did not circulate a racially exclusive draft. It follows that any story about Marshall being offended by such a draft is wrong, because the basis for such a story—the circulated draft opinion—does not exist. Marshall and Blackmun certainly had disagreements on matters of race at the time,[40] but the integration of Blackmun's list of baseball celebrities in *Flood* was not one of them.

* * * *

The fact that **The Brethren** contains inaccuracies should come as no surprise. No lengthy study of the Supreme Court or any other subject is (or likely ever will be) entirely accurate. Authors err. So do archivists, researchers, editors, typesetters, printers, and webmasters. Paper and electronic records can be incomplete or inaccurate. Human sources can be mistaken or misleading. And new discoveries can alter or destroy what were once perfectly reasonable understandings of history.

Finding each other's inaccuracies and misinterpretations and bringing them to light is a service that historians provide to each other, to their subjects, and to the public. This kind of work involves reassessing existing evidence or combining new discoveries with that evidence to present a different—and, the revisionist hopes, more accurate—picture of the past. **The Brethren** is a hard case, because much of its evidence is inaccessible. Its sources are anonymous and confidential.[41] That means there is no way for later students of the Court to return to that evidence, to reassess it, to combine it with new discoveries in order to improve our understanding of the Court. As Professor Walter Murphy observed in a review of **The Brethren**, "The scholar, of course, longs to see the full documents and to hear the tapes of the interviews, not only to check the accuracy of the authors' work but also to test other ideas."[42] Woodward and Armstrong's approach surely enabled them to uncover many true stories that would otherwise have remained hidden, at least for a time, but it also disabled others from building on their work, at least in the conventional cumulative and synthetic senses. But at the very least, we can still compare a story presented in **The Brethren** with a story based on existing public records and new discoveries, and weigh their merits.

Which brings us to the questions suggested earlier in this article: What document were Woodward and Armstrong quoting from? Where did it, and the story of Marshall's objection, come from? And did the source or sources for Blackmun-versus-Marshall contribute to any other stories in **The Brethren**? We are unlikely to learn the answers to these questions unless Woodward and Armstrong's research files for **The Brethren** are opened to the public, as Woodward and Carl Bernstein's files for **All the President's Men** and **The Final Days** have been at the University of Texas, with files involving each confidential source remaining sealed until the source's death.[43] For **The Brethren**, that is unlikely to happen anytime soon. After all, nearly all of the sources for the book spoke to Woodward and Armstrong on condition of anonymity.[44] Many of them were young at the time and are likely to be relying for their livelihoods and social standing on their lawyerly reputations for discretion and confidence-keeping for many years yet. It may well be that Woodward and Armstrong would prefer to endure whatever small doubts

might be raised by this article rather than break their promises to the source or sources of the Blackmun-versus-Marshall story.[45]

In the meantime, the careful reader of **The Brethren** might consider, on the one hand, that respected observers of the Court have concluded that "[t]he accounts in **The Brethren** are factually accurate on nearly every point"[46] and "in many instances, Blackmun's case files attest to its accuracy,"[47] and, on the other hand, that in at least one instance—the story of Blackmun-versus-Marshall in *Flood*—the book is not accurate. For students of the Court, then, perhaps the best approach to **The Brethren** for the time being is the one to which President Ronald Reagan treated President Mikhail Gorbachev: Trust, but verify.[48]

*Thanks to Adam Bonin, Bennett Boskey, Ofemi Cadmus, Susan Davies, Vincent Gaiani, Suzanne Garment, David Garrow, Paul Haas, Dennis Hutchinson, Anthony Lewis, G. Edward White, Diane Wood, participants in a Robert A. Levy Fellow Workshop, and the George Mason Law & Economics Center.

Editor's Note

Ross Davies, the author of "A Tall Tale of *The Brethren*," sent a draft of the article to Bob Woodward and Scott Armstrong in September 2007, along with an invitation:

> The enclosed article (which is scheduled to appear in the spring issue of the *Journal of Supreme Court History*) suggests that one passage in your book, *The Brethren*, is not accurate. If I have gone astray in any way, I would be grateful to hear about it from you before we go to press. Also, I am told by the editor of the *Journal* that she would be happy to consider printing a reply from either or both of you.

I sent a follow-up invitation of my own to Woodward and Armstrong early in 2008, and postponed publication of the article to our summer issue in order to give them plenty of time to draft a reply. Armstrong expressed an interest in replying, but in the end nothing was forthcoming from either him or Woodward. It would have been nice to include their perspective here and now, but it appears that we will have to wait for a later issue of this *Journal*, or for another forum.

ENDNOTES

[1]**The Brethren: Inside the Supreme Court** 190–91 (1979) (hereafter **The Brethren**).

[2]407 U.S. 258 (1972).

[3]Brad Snyder, **A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports** 301 (2006) (hereafter **Well-Paid Slave**).

[4]Earlier profiles of the Court, such as Drew Pearson and Robert S. Allen's **Nine Old Men** (1936) and J. Harvie Wilkinson's **Serving Justice: A Supreme Court Clerk's View** (1974), had not been anywhere near as revealing of its interior workings.

[5]*See, e.g.*, Anthony Lewis, "Supreme Court Confidential," *N.Y. Rev. Books*, Feb. 7, 1980 (hereafter "Supreme Court Confidential"); "The Evidence of **The Brethren**: An Exchange," *N.Y. Rev. Books*, June 12, 1980 (hereafter "The Evidence of **The Brethren**"); John G. Kester, "Breaking Confidences," *The Washingtonian*, Feb. 1980; *see also* Dennis J. Hutchinson, **The Man Who Once Was Whizzer White** 384–86 (1998) (hereafter **Whizzer White**); Adrian Havill, **Deep Truth: The Lives of Bob Woodward and Carl Bernstein** 130–35 (1995).

[6]*See, e.g.*, *Landell v. Sorrell*, 382 F.3d 91, 109 (2d Cir. 2004), *rev'd* 126 S. Ct. 2479 (2006); *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 132 n.5 (D.D.C. 2004).

[7]*See, e.g.*, Neal Devins, "Should the Supreme Court Fear Congress?," 90 *Minn. L. Rev.* 1337, 1341 (2006); Linda Greenhouse, "How Not to Be Chief Justice," 154 *U. Pa. L. Rev.* 1365, 1369 (2006); James J. Brudney and Corey Ditslear, "Canons of Construction and the Elusive Quest for Neutral Reasoning," 58 *Vand. L. Rev.* 1, 44 (2005); Clarke D. Forsythe and Stephen B. Presser, "The Tragic Failure of *Roe v. Wade*," 10 *Tex. Rev. L. & Pol.* 85, 127 (2005); Sanford Levinson, "The Pedagogy of the First Amendment," 52 *UCLA L. Rev.* 1359, 1361 (2005); *see also* G. Edward White, **The American Judicial Tradition** chs. 13 & 14 & 523 n.124 (3d ed. 2007) (describing **The Brethren** as "a source on the internal history of the Burger Court that needs to be used with great care"). A search for "woodward /5 armstrong /5 brethren" in Westlaw's jlr database

of law reviews and similar periodicals on March 30, 2007 turned up 492 documents.

[8]*See, e.g.*, David J. Garrow, "Breaking Silence and Legal Ground," *L.A. Times*, Jan. 23, 2007 (reviewing Jan Crawford Greenburg's **Supreme Conflict**); Rodger Citron, "A Peek Into the Marble Palace," *Legal Times*, May 29, 2006 (reviewing Todd Peppers's **Courtiers of the Marble Palace**); Kim I. Eisler, "Truth Teller or Sore Loser?," *Legal Times*, Apr. 27, 1998 (reviewing Edward Lazarus's **Closed Chambers**).

[9]Carl Bernstein and Bob Woodward, **All the President's Men** (1974); Bob Woodward and Carl Bernstein, **The Final Days** (1976).

[10]Victor S. Navasky, "The Selling of the Brethren," 89 *Yale L.J.* 1028, 1030 (1980).

[11]*Compare, e.g.*, **The Brethren** at 357 *et seq. with* **Whizzer White** at 434–35, 463–65 (1998); Bruce Allen Murphy, **Wild Bill** ch. 38 (2003).

[12]*See, e.g.*, Walter F. Murphy, "Spilling the Secrets of the Supreme Court," *Wash. Post Book World*, Dec. 16, 1979, at 11.

[13]Linda Greenhouse, **Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey** 254 (2005) (hereafter **Becoming Justice Blackmun**).

[14]Mark V. Tushnet, **Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961–1991** at viii (1997) (hereafter **Making Constitutional Law**).

[15]**The Brethren** at 190–91.

[16]*See, e.g.*, Andrew O'Toole, **The Best Man Plays** 97 (2003); David Greenberg, "Baseball's Con Game," *Slate*, July 19, 2002; Roger I. Abrams, "Before the *Flood*," 9 *Marq. Sports L.J.* 307, 311 (1999); Tony Mauro, "Would the Court Go to Bat for Baseball?," *Legal Times*, Aug. 29, 1994; Chad Millman, "Bench Player," *Sports Illustrated*, Apr. 18, 1994; Max Vobiscum, "The Supreme Court's Sports Page," (Passaic County, NJ Bar Association) *Reporter*, Aug.–Sept. 1980, at 40; "Games Justices Play," *Newsweek*, Dec. 10, 1979, at 88.

[17]*Flood v. Kuhn*, 1st Draft at 4–5 (May 5, 1972), *in* Papers of William O. Douglas, Library of Congress, Manuscript Division, Box 1561 (hereafter Douglas Papers).

[18]*Flood v. Kuhn*, 2d Draft at 4–5 (May 25, 1972), *in* Douglas Papers.

[19]**Well-Paid Slave** at 305–6.

[20]*Flood v. Kuhn*, 1st Draft at 4–5 (May 5, 1972) and *Flood v. Kuhn*, 2nd Draft at 4–5 (May 25, 1972), *in* Papers of William J. Brennan, Jr., Library of Congress, Manuscript Division, Box I:268, Folder 2; Papers of Thurgood Marshall, Library of Congress, Manuscript Division, Box 87, Folder 10 (hereafter Marshall Papers). The *Flood* file in the papers of Justice Lewis F. Powell, Jr. contained no draft opinions at all. Lewis F. Powell, Jr. Papers, Washington and Lee University School of Law, Lewis F. Powell, Jr. Archives, Box 148. Powell determined early on in the deliberations over the *Flood* case that his ownership of shares of Anheuser-Busch, which owned the St. Louis Cardinals baseball team, a respondent in *Flood*, obligated him to disqualify himself, and he did so. Memorandum to the Conference (Mar. 21, 1972), *in* Powell Papers, box 148. The papers of the other members of the Court at the time—Chief Justice Warren Burger and Justices Potter Stewart, Byron R. White, and William H. Rehnquist—are not yet open to the public.

[21]The Justice Harry A. Blackmun Oral History Project 184, 186, 293 (1994–95) (hereafter Oral History); Harry A. Blackmun to Jim Caple, Feb. 11, 1997, *in* Papers of Harry A. Blackmun, Library of Congress, manuscript Division, Box 145, Folder 3 (hereafter "Blackmun Papers").

[22]*See, e.g.*, Harry A. Blackmun to Daniel Crystal, Oct. 9, 1980, *in* Blackmun Papers, Box 145, Folder 3; Harry A. Blackmun to Jim Caple, Feb. 11, 1997, *in* Blackmun Papers, Box 145, Folder 3.

[23]*Compare, e.g.*, Justice Thurgood Marshall, Memorandum to the Conference (Oct. 4, 1984), *in* Blackmun Papers, box 1405, folder 14, *reprinted in* "NAACP Recusals," 10 *Green Bag* 2D 93, 93–99 (2006), *with Milliken v. Bradley*, 418 U.S. 717, 722 (1974); *id.* at 781 (1974) (Marshall, J., dissenting); *Meek v. Pittenger*, 421 U.S. 349, 356 n.5 (1975).

[24]Oral History at 292.

[25]*See* Memorandum from "sjb" to "Mr. Justice" (Jan. 17, 1978), *in* Blackmun Papers, Box 1435 ("sjb" were the initials of Blackmun's secretary, Shirley J. Bartlett).

[26]*See* 1978 Appointment book, *in* Blackmun Papers, Box 61; Memorandum from "sjb" to "Mr. Justice" (June 30, 1978), *in* Blackmun Papers, Box 1435; *see also* **Becoming Justice Blackmun** at 153.

[27]**The Brethren** at 4.

[28]*See, e.g.*, "Supreme Court Confidential"; "The Evidence of **The Brethren**"; David J. Garrow, "The Supreme Court and **The Brethren**," 18 *Const. Commentary* 303 (2001); *see also, e.g.*, Leonard Garment, **In Search of Deep Throat** chs. 4 & 5 (2000).

[29]Stewart had the privilege of assignment because he was the senior Justice in the majority at the time.

[30]Memorandum from Justice Potter Stewart to Chief Justice Warren Burger (March 20, 1972), *in* Douglas Papers, Box 1561.

[31]Handwritten note dated "3-20-72," *in* Blackmun Papers, Box 145, Folder 1 ("PS [Potter Stewart] Asks me to PC [per curiam] this essentially along t[he] lines of Toolson & n[ot] too long").

[32]Memorandum from Justice Harry A. Blackmun to Mr. Justice Stewart (May 4, 1972), in Blackmun Papers, Box 145, Folder 2.

[33]This is not to suggest that in later years he did not continue this practice. Rather, it did not seem necessary to go beyond the 1970–71 and 1971–72 Terms for the purposes of this article.

[34]Compare Justice Blackmun's opinion log sheets for the 1970–71 and 1971–72 Terms, *in* Blackmun Papers, Boxes 118, 133, with the corresponding case files in the papers of Justices Douglas (boxes 1507, 1511, 1516, 1518, 1542, 1543, 1545, 1547, 1549, 1551, 1561), Brennan (boxes I:233, I:236, I:239, I:240, I:244, I:246–I:248, I:257, I:258, I:259, I:261, I:263, I:265, I:267, I:268, I:273, II:3), Marshall (boxes 80, 81, 83–85, 87, 90, 91), Blackmun (boxes 120–22, 124, 125, 127, 129, 130, 134–40, 142, 145), and Powell (boxes 146–49).

[35]405 U.S. 117 (1972).

[36]Memorandum from Justice William Douglas to Justice Harry A. Blackmun (Feb. 16, 1972) and Memorandum from Justice Harry A. Blackmun to Justice William Douglas (Feb. 16, 1972) *in* Blackmun Papers, Box 142. When asked recently about Blackmun's papers, Justice Ruth Bader Ginsburg noted that "he was a great saver; he didn't toss out anything." "An Open Discussion with Justice Ruth Bader Ginsburg," 36 *Conn. L. Rev.* 1033, 1042 (2004). This is not to say that he knew all, saw all, and accurately recorded all that he knew and saw—*see, e.g.*, *id.* at 1042 (recalling that he mistakenly noted an advocate had worn a red dress at oral argument when in fact she had worn black)—but rather that his compilations of documents relating to particular cases can generally be counted on to be complete.

[37]*See* Assignment List (Apr. 3, 1972), *in* Marshall Papers, Box 75.

[38]*See generally* Blackmun Papers, Boxes 119–31, 134–47.

[39]*See* Blackmun Papers, Box 145, Folder 1.

[40]*See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217 (1971); *Palmer v. Thompson*, 1st Draft at 3 (Apr. 29, 1971) (Blackmun, J., concurring), in Blackmun Papers, Box 124, Folder 10; **Becoming Justice Blackmun** at 67–68; *see also* Deborah C. Malamud, "Intuition and Science in the Race Jurisprudence of Justice Blackmun," 26 *Hastings Const. L.Q.* 73, 84–88 (1998); Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** 230–33 (rev. ed. 1999).

[41]This approach to studying the Court has shown signs of enduring popularity in recent times. *See, e.g.*, Jan Crawford Greenburg, **Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court** 321–22 (2007); Jeffrey Toobin, **The Nine: Inside the Secret World of the Supreme Court** 342 (2007).

[42]Walter F. Murphy, "Spilling the Secrets of the Supreme Court," *Wash. Post Book World*, Dec. 16, 1979, at 10. Scholars should be cautious, however, about exaggerating the importance of source-transparency in their work. Plenty of important and reputable scholarship generated in the academy shares **The Brethren**'s source-opacity. Consider, for example, John W. Kingdon's highly regarded study of decision-making in the executive and legislative branches of the federal government, **Agendas, Alternatives, and Public Policies** (2d ed. 2003). Kingdon's book is based largely on interviews with "many congressional staffers, administration appointees, civil servants, lobbyists, journalists, researchers, and consultants" conducted during the late 1970s—the same period in which Woodward and Armstrong were doing their research for **The Brethren**. "I guaranteed [the interviewees] their anonymity," writes Kingdon, "so cannot acknowledge their help by name. But this book could not have been written without their generous cooperation." *Id.* at xvii, 232–33. Just like **The Brethren**. *See also, e.g.*, Bennet Boskey, "Justice Reed & His Family of Law Clerks," *in* Bennett Boskey, **Some Joys of Lawyering** 14 n.4 (2007) (observing "that the claims of history, journalism, and biography strongly press against principles of privacy, confidentiality and ethics. There is not always a simple answer to questions of how much should be published how soon.").

[43]*See* The Woodward and Bernstein Watergate Papers: About the Papers, *available at* http://www.hrc.utexas.edu/exhibitions/web/woodstein/about/ (last visited Apr. 20, 2008); Lee Hockstader, "Watergate Papers Sold For $5 Million," *Wash. Post*, Apr. 8, 2003, at C1; *see also, e.g.*, Bob Woodward, **The Agenda: Inside the Clinton White House** 12 (1993).

[44]**The Brethren** at 3–4.

[45]*See Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *but see* "The Evidence of **The Brethren**."

[46]**Making Constitutional Law** at viii.

[47]**Becoming Justice Blackmun** at 254.

[48]William Safire, "Nyet Problemy on Snow Jobs," *N.Y. Times*, Jan. 3, 1988, § 6, at 6 (Reagan: "Though my pronunciation may give you difficulty, the maxim is *doveryai no proveryai*. 'Trust but verify.'").

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

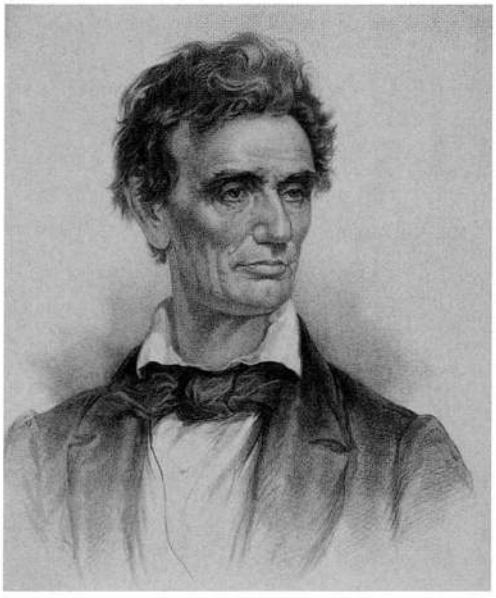
The first meeting of Politics 514 for fall semester 1964 was scheduled for Thursday afternoon, September 24, coincidentally the 209th anniversary of the birth of Chief Justice John Marshall. As an exceedingly green first-year student in the Graduate School, I made my way to "A" level (one floor below the first floor) of Princeton University's Firestone Library a few minutes before two o'clock. A short distance from the stairwell, I found the Politics Department seminar room and took a seat at the table. Promptly on the hour, Professor Alpheus Thomas Mason entered the room, greeted the dozen beginning and continuing students present, and occupied a chair with his back to the window. There followed an hour's discourse from this celebrated judicial biographer[1] on what awaited us during the Term: an adventure in American constitutional law. Without notes and with the captivating voice of an orator, he drew from the words of James Madison, James Wilson, Alexander Hamilton, Thomas Jefferson, and Marshall so extensively and with such familiarity that I wondered whether, during nearly four decades of teaching, he had somehow divined a way to commune directly with the founding generation. After he made clear his expectations and explained how the course would proceed, I then grasped why this seminar, although deservedly praised as one of the best taught in the Graduate School, was rarely heavily enrolled: He expected each student, each week, to write a research paper of nine to twelve pages.

An initial focus of the course, Professor Mason continued, would be the "great antagonists." The cadence of his speech slowed as he spoke the two words, and he paused ever so slightly for effect between them. "I'm referring to Marshall and Jefferson," he added, in case his point had sailed over anyone's head. But then he digressed. An entire course on American constitutional and political development, he explained, could be organized around that theme: not only Marshall versus Jefferson and Jefferson versus Hamilton, but Marshall versus Andrew Jackson, Marshall versus John Banister Gibson, and so on. It was, and is, an intriguing idea. Examination of the tensions between the thinking and action of such individuals would lay bare the polarization in the American political tradition between long-standing principles such as fundamental law and popular sovereignty. And lurking within that tension

was the intriguing question of whom or what within the American political system should monitor and resolve that tension.

If one prepared a course similar to the one Professor Mason outlined, several recent books on the Supreme Court and its Justices would compete for space on the syllabus. Among them is **Lincoln and Chief Justice Taney** by James F. Simon of New York Law School.[2] The book's subtitle ("Slavery, Secession, and the President's War Powers") suggests as much, and some of Simon's previous work demonstrates that he is hardly a stranger to the theme.[3] His book offers a window into the lives of two key players in the high drama that unfolded in the mid-nineteenth-century United States.

Despite some common experiences and values, in crucial respects the gulf between these pivotal individuals proved to be as deep as it was wide. The future fifth Chief Justice was born into Maryland plantocracy in 1777, some thirty-two years before the sixteenth President's infancy on the Kentucky frontier. Professionally, both Roger Brooke Taney and Abraham Lincoln became successful lawyers and enjoyed modest success in state legislative politics. Morally, Lincoln, like Taney, disapproved of slavery but was more than willing to defend the property rights of slave owners. Taney owned slaves but gave them their freedom. Both men were active in colonization societies that strove to relocate free blacks from the United States to self-governing communities in Africa. Politically, Taney accepted the states-rights orientation of Andrew Jackson and the Democratic party, while Lincoln identified with Henry Clay and the National Republicans, who were soon to be called Whigs. Jurisprudentially, these affinities meant that Lincoln was comfortable with Chief John Marshall's doctrine of national supremacy, which the Chief Justice had boldly defended in *McCulloch v. Maryland*[4] when he affirmed the constitutionality of the Second Bank of the United States and rejected Maryland's attempt to destroy the bank by taxing it.



Lincoln and Chief Justice Taney **by James F. Simon of New York Law School examines the antagonistic relationship between Abraham Lincoln (pictured) and Roger Brooke Taney.**

For Marshall, the Necessary and Proper Clause gave Congress a discretionary choice of means in implementing granted powers. As a result, Congress possessed not only those powers expressly delegated by the Constitution, but an indefinite number of others as well, unless prohibited by the Constitution. Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide. Thus, Marshall established not only the proposition that national powers must be liberally construed, but also the equally decisive principle that the Tenth Amendment does not create in the states an independent limitation on national authority. A part of the Union could not be allowed to cripple the whole.

By contrast, the concept of federalism common to Marshall's critics insisted that the Constitution was a compact of sovereign states, not an ordinance of the people. The national government and the states faced each other as equals across a precise constitutional line defining their respective jurisdictions.

Accepting the basic creed of nation-state equality, Taney stripped it of its anarchic implications. After all, Taney was thoroughly familiar with John C. Calhoun's doctrine of nullification, which claimed the authority of a state to be the judge of the validity of national policy, a position that led South Carolina to challenge President Andrew Jackson's authority in 1832. For Taney, within the powers reserved by the Tenth Amendment, the states were sovereign, but final authority to determine the scope of state powers rested with the national judiciary, an arbitrator standing aloof from the sovereign pretensions of both nation and states. "This judicial power," Taney wrote in *Ableman v. Booth*[5] some twenty-three years after Jackson picked him to succeed Marshall as Chief Justice, "was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the general government.... So long ... as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forum of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."[6] Thus, for Marshall's concept of national supremacy, the Taney Court substituted a theory of federal equilibrium, sometimes called dual sovereignty or dual federalism. Yet Marshall and Taney were agreed on one essential point: The Supreme Court provided a forum for keeping conflict within peaceful bounds.

As circumstances unfolded, it had fallen to Taney as Jackson's Treasury Secretary to draft the President's explanation for a veto of Congress's renewal of the Bank's charter in 1832. Taney's memorandum upended Marshall's thinking on the constitutionality of the Bank, and indeed on the Court's place in the constitutional order: "If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this government. The Congress, the executive, and the court must each for itself be guided by its own opinion of the Constitution.... It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."[7]

After he was elected in 1860 to succeed James Buchanan, Lincoln drew upon the same theme for his first inaugural address in rejecting the constitutional force of a decision that not only occupies a prominent place in Simon's narrative, but has long been practically synonymous with the Taney Court: *Scott v. Sandford*.[8] "[T]he candid citizen must confess," Lincoln observed, "that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having to that extent, practically resigned their government, into the hands of that eminent tribunal."[9]

That fateful decision had an oversized impact on the careers of Lincoln and Taney. Without it, Taney's stature as Chief Justice would certainly be more enhanced today, perhaps ranking him second only to Marshall among the Chief Justices. Without it, Lincoln might never have become President of the United States. The case is so central to Simon's book that it merits at least a brief review here.

In 1852, the Missouri Supreme Court issued a ruling in the litigation that became known as the *Dred Scott* case. The case was

actually two cases, one pursued in the courts of Missouri and the other in the federal courts. Combined, the cases commenced in 1846 and ended in 1857. At one level, the litigation involved efforts by a man to obtain his and his family's freedom as well as back pay for services rendered. At another level, the litigation became a vehicle for resolution of an issue that divided the land. At both levels, the litigation failed.

Scott was born into slavery, probably in Virginia around 1800. He later became the property of Dr. John Emerson, an Army surgeon. In 1834, Emerson took Scott from Missouri to Illinois where, under both the Northwest Ordinance and state law, slavery was forbidden. In 1836, Emerson and Scott traveled to Fort Snelling in what is now the state of Minnesota. The territory was in that part of the Louisiana Purchase where, under the Missouri Compromise of 1820, slavery was also forbidden. In 1838, Emerson returned to Missouri with Scott, who had now acquired a family. After Dr. Emerson died, Scott brought suit against Mrs. Emerson in state court, maintaining that his residence in free territory had made him a free man. The trial court held for Scott, but the state supreme court reversed.[10] Whatever Scott's legal status outside Missouri, that bench held, he remained a slave under that state's law.

Under jurisdictional rules of the day, if a suit was to be heard in federal court, a necessary element in this kind of proceeding was diversity of citizenship. By this time, Mrs. Emerson had married Dr. C. C. Chaffee, a Massachusetts abolitionist who would shortly be elected to the U.S. House of Representatives. Accordingly, to shield Chaffee's reputation, ownership of Scott passed to Mrs. Chaffee's brother, John Sanford, of New York.[11] This transfer allowed Roswell Field, an abolitionist attorney in St. Louis, to file suit on Scott's behalf against Sanford in the U.S. Circuit Court in Missouri. This court ruled against Scott, deeming dispositive both the state supreme court's holding in Scott's first suit and the U.S. Supreme Court's 1851 decision in *Strader v. Graham*.[12] In the U.S. Supreme Court, *Scott v. Sandford* was argued twice: in February and December of 1856. Setting the case for re-argument thus guaranteed that a ruling could not come down until after the presidential election. In fact, the Court announced its decision against Scott on March 6, 1857, two days after James Buchanan's inauguration as the fifteenth President. The case involved three questions that might be, but did not necessarily all have to be, addressed. First, was Scott's status settled by Missouri law, under which he had already been declared to be a slave? Second, was Scott a citizen of the United States, for the purpose of maintaining a suit in federal court against a citizen of another state? Third, what was the effect of his sojourn in territory declared free by the Missouri Compromise on his status as a slave? If the Court decided one or the other, or both, of the first two questions against Scott, there would be no need to answer the third.

After re-argument, the Court seemed to have agreed to focus on the first question alone, with Justice Nelson assigned the task of writing the opinion. As first cast, then, *Dred Scott* would have avoided the most sensitive issues. Several Justices, however, wanted the decision to do more, "to quiet all agitation on the question of slavery in the Territories," as Justice Curtis explained later.[13] Boldness thus displaced caution, as felt necessity to settle an issue of unprecedented national divisiveness thus presumably dictated a wider swathe.

Nine Justices filed nine opinions, seven holding for Sanford and two (McLean and Curtis) for Scott. Traditionally viewed as the majority opinion, Chief Justice Taney's opinion addressed all three questions. First, while a state might grant citizenship to blacks, they were not intended to be citizens of the United States within the meaning of the Constitution and so could not press a suit in federal court. The Circuit Court therefore had no jurisdiction in Scott's suit. Second, Scott was a slave because he had never been free. The provision of the Missouri Compromise of 1820 banning

slavery in certain areas was unconstitutional because of the absence of language in the Constitution granting Congress authority to prohibit slavery in the territories and because the law interfered with rights of property the Constitution protected through the Fifth Amendment. Last, and almost as an afterthought, whatever the status of slaves in a free state or territory, once they returned to a slave state, their status depended on the law of that state, as the Taney Court had ruled in *Strader v. Graham*[14] and as Nelson's draft initially would have maintained. And Missouri had decided that Scott was a slave. As Simon observes, had Taney crafted his opinion along lines similar to Nelson's or had he adhered to the Court's precedent in *Strader*, the Chief Justice's "reputation for judicial probity would have been preserved."[15]

It would be difficult to exaggerate the significance of the second part of Taney's opinion. True, Taney's position was hardly novel; questions about Congress's authority to ban slavery in the territories had been raised for several decades. Moreover, the direct short-term effect of the pronouncement on *national* law was minuscule: Congress had expressly repealed the free-soil provision of the Missouri Compromise three years earlier. Yet just because the Congress of 1854 had substituted a policy of local popular sovereignty for a policy of free soil did not mean that a future Congress might not choose to do otherwise. *Scott v. Sandford*, however, declared that congressionally mandated free soil was constitutionally unacceptable, and it did so within months of a presidential campaign during which a major political party had made free soil in the territories its overriding objective. As construed by the Court, the Constitution now placed that policy out of the Republicans' reach.

In one key respect, the presidential election of 1860 was a disaster. Large numbers of people in a single geographical region of the country refused to accept the outcome of the ballot box, and secession and war followed. In 1860, slavery and Congress's authority over it captured the public agenda and divided the people in a way previously unknown in American history. The situation called into question a bedrock principle of democracy: the capacity of competing political parties to manage and to diffuse an issue of great magnitude.

The first round in the campaign of 1860 had begun in 1858. "The prairies are on fire,"[16] commented a New York newspaper in describing a heated race in Illinois for the United States Senate. Republicans in the state wanted Abraham Lincoln to replace two-term Democrat Stephen Douglas. This being long before the Seventeenth Amendment instituted direct election of United States senators, the Illinois legislature would make that choice. Accordingly, if voters elected more Democratic delegates to the state house in 1858, Douglas would "defeat" Lincoln; if Republicans obtained a majority, Lincoln would "win."

Although the legislature returned Douglas to the Senate for another term, the campaign proved to be more important for a series of seven debates that occurred at Lincoln's invitation across the state in the summer and fall of 1858. It is the only time in American history that two persons have sought the same Senate seat and then run against each other for the presidency two years later. *Dred Scott* and slavery consumed so much of the candidates' attention that one wonders what the two men would have discussed had the Taney Court not rendered its momentous decision. Indeed, Taney's convoluted opinion put Douglas on the defensive and proved to be an easy target for Lincoln to attack and ridicule. In Lincoln's characterization of the decision, Taney and Douglas were synonymous. A blemish on the thinking of the Chief Justice was a blemish on Douglas. Drawing extensively on Justice Curtis's dissent, Lincoln insisted that the opinion was based on fallacious constitutional history in its claim that African Americans were purposely excluded from the privileges bestowed by the Constitution. Lincoln promised that "we shall do what we can to have it [the Court] to over-rule this" but "we offer

no *resistance* to it."[17] Although Douglas won the Senate seat Lincoln sought, "Lincoln had grasped an issue that resonated politically in Illinois and throughout the northern and western states."[18] In turn, the debates helped build a national reputation for Lincoln. Without the visibility that they provided, it seems improbable that he would have become the Republican party's second candidate for President.

After the onset of war in 1861, clashes between constitutional outlooks personified by these antagonists persisted. For Lincoln, states had no legal right to secede, and the new Chief Executive took bold measures to resolidify the Union. Taney disagreed. As Simon explains, not only could states legitimately leave the Union, but "a peaceful separation of North and South, with each forming an independent republic, was preferable to civil war." Lincoln then construed his powers as Commander-in-Chief to prosecute the war that had ensued, while Taney "vociferously" accused the President "of assuming dictatorial powers in violation of the Constitution."[19]

One of the most vivid examples of this tension surfaced in the spring of 1861. From Lincoln's perspective, Maryland's status as a continuing member of the Union remained unacceptably volatile. Its legislature contained enough Southern sympathizers to make secession a distinct possibility. Furthermore, hostile elements in the state sabotaged railway and telegraph lines, impeding the movement of reinforcements from northern points to Washington to secure the capital militarily. To meet the threat, the President suspended the writ of habeas corpus in the area between Philadelphia and Washington, thus empowering military commanders to arrest "suspected secessionists and imprison them indefinitely."[20] One such person taken into custody was a landowner from Cockneysville, Maryland, named John Merryman who was imprisoned at Fort McHenry on May 25. On that same day, Merryman's attorneys delivered a petition for a writ of habeas corpus to Chief Justice Taney, sitting as circuit judge. On May 26, Taney signed the writ, which directed General George Cadwalader, commander of the garrison at Fort McHenry to appear before him the following day at the courtroom in Baltimore with Merryman. The general instead dispatched his aide-de-camp, who read a statement from the general (who was himself a lawyer and brother of a federal judge[21]) apologizing for his general's absence but explaining that Merryman was an enemy of the United States and was being held under orders from President Lincoln. This situation led Taney to issue a second order to the general that he appear before the court the following day and show cause why he should not be held in contempt. Taney soon learned, however, that the marshal had been detained at the gate and had been unable to deliver Taney's message to Cadwalader. Anticipating defiance, Taney was equipped with a prepared statement declaring that the President "cannot suspend the privilege of the writ of *habeas corpus*, nor authorize any military officer to do so."[22] Taney then instructed the general to hand over Merryman to civil authorities, as he began work on a longer opinion directed to the President. This document insisted that the writ of habeas corpus could be suspended only by an act of Congress, not by executive authority.[23]

In Simon's appraisal, "The certitude with which Taney marched toward his conclusion... was reminiscent of some of his best opinions... and his worst." The *Merryman* opinion was "a clarion call for the President, and the military forces under his command, to respect the civil liberties of American citizens," and it "proved that the Chief Justice, well into his ninth decade of life, was still capable of writing a formidable piece of judicial advocacy."[24] Still, the opinion embodied a surreal quality, for it was devoid of context indicating that the President had a major insurrection on his hands. Indeed it was Taney's *Merryman* opinion that led Lincoln to reshape the controversy by posing a starkly simple question in his message of July 4 to a special session of Congress: "[A]re all the laws,

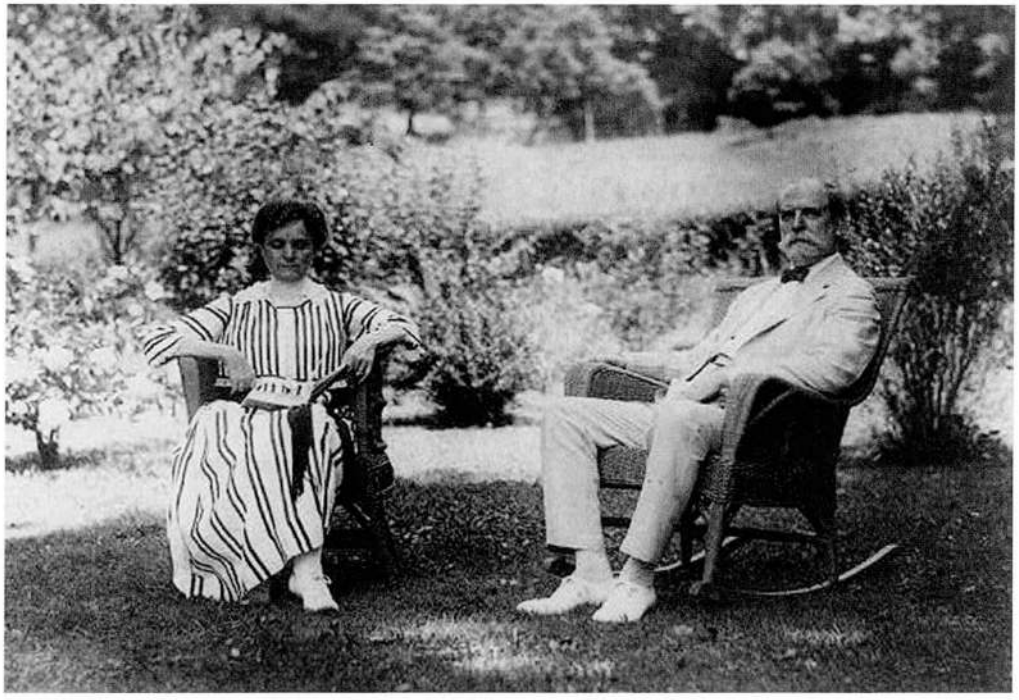
but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[25] As for Merryman, he was released in July 1861 on $40,000 bail to face treason charges, but the case never went to trial. Simon explains that Taney repeatedly postponed the proceedings because of ill health but refused to allow another judge to sit in his place. The irony is too plain to miss. "Taney had demanded throughout the habeas corpus proceedings that the Lincoln administration justify Merryman's incarceration before a judge in a civil courtroom. But once the administration had belatedly complied with Taney's judicial directive, the Chief Justice denied the government the opportunity to prove its case."[26]

Simon's able narrative yields riveting political and legal drama.[27] The book is a solid reminder that actions in the courtroom sometimes influence a nation's destiny as much as do maneuvers on the battlefield. If the reader is left pondering whether politics typically trumps constitutional theory, the volume leaves little doubt that—in the wake of the outcome of the Civil War and ratification of the Thirteenth, Fourteenth, and Fifteenth amendments that collectively ensconced the values of Lincoln, not Taney—elections have constitutional consequences.

Under far different circumstances and with different values at stake, the conflict between President Franklin Roosevelt and the Supreme Court some seven decades afterward certainly rivaled in constitutional significance the sparring between Lincoln and Taney. This later clash is a central focus of **The Chief Justiceship of Charles Evans Hughes** by William Ross of Samford University's Cumberland School of Law.[28] His book is the latest entry in a valuable series on Supreme Court history, "The Chief Justiceships of the Supreme Court," under the general editorship of Herbert A. Johnson of the University of South Carolina School of Law. Inspired by the scholarly convention that emerged in the first third of the twentieth century, as it became commonplace to think and write about the development of the Third Branch and American constitutional law in terms of periods bearing the name of the Chief Justice in office at the time, the series already includes books on the Court before Marshall,[29] the Marshall Court,[30] the Fuller Court,[31] the White Court,[32] the Vinson-Stone years,[33] the Warren Court,[34] and the Burger Court.[35] Well-researched, comprehensive, and engagingly written, Ross's contribution lives up to expectations generated by its series predecessors. The author seems as comfortable with the literature of political science and constitutional history as with law.

The eleven years of the Hughes Chief Justiceship were as politically and legally tumultuous as any in American history. Against the backdrop of the nation's severest domestic crisis since the Civil War, the Supreme Court during 1934–1936 invalidated significant parts of President Franklin Roosevelt's New Deal legislative program. This state of affairs provoked a counterattack from the White House that dwarfed all previous attempts by any President or Congress at Court-packing and Court-curbing. The Justices shortly jettisoned a substantial body of jurisprudence that for nearly half a century had characterized its labors to varying degrees in defense of property rights. As if that shock to legal sensibilities were insufficient, the Court, for the first time and on an unprecedented scale, soon embraced serious protection of noneconomic personal rights and liberties. Moreover, Roosevelt enjoyed an abundance of Court vacancies after 1936, so that, by the time Hughes retired in the summer of 1941 at age 79, the President had been able to reconstruct the Bench. It was as if the Court had both generated and witnessed more history than it could consume. The period is therefore clearly worth the time of both author and reader.

No Chief Justice has assumed office with greater breadth and depth of experience in public life than did Hughes. Indeed, unlike any previous Chief other than Edward Douglass White, Hughes began his tenure on the Court with the special advantage of having sat as an



The conflict between President Franklin Roosevelt and the Supreme Court is a central focus of *The Chief Justiceship of Charles Evans Hughes* by William Ross of Samford University's Cumberland School of Law. Ross's book is the latest entry in a valuable series on Supreme Court history: "The Chief Justiceships of the Supreme Court," under the general editorship of Herbert A. Johnson of the University of South Carolina School of Law. Above, Hughes relaxes with his wife, Mary.

Associate Justice (1910–1916).[36] He had also been Governor of New York and, in 1916, the Republican nominee for President. As Secretary of State in the Harding administration, he received credit for a naval disarmament treaty among the great powers. An acclaimed leader of the American bar, he was sitting as a judge of the World Court when President Hoover picked him to succeed William Howard Taft in 1930, a nomination that symbolically ran into unexpectedly stiff opposition from progressives. Confirmation by a vote of 52 to 26, with eighteen senators not voting, was evocative of two other highly contentious but ultimately successful nominations for Chief Justice: Roger B. Taney's in 1836 and Melville W. Fuller's in 1888.

Concerns expressed that Hughes would lead a Court too solicitous of corporate interests were soon confounded by a record that, for nearly five years, was "more deferential toward regulatory legislation than at any time since [Hughes's] previous tenure on the Court,"[37] with Hughes sometimes providing a fifth vote to spare a statute from annihilation.[38] Propitiously, the Bench seemed less deferential than its predecessor toward laws curtailing personal freedoms,[39] again with Hughes casting an essential fifth vote.[40] For the reform-minded, however, this glimmer of hope proved, in the short run at least, to be the dusk before the dark, once the Court disposed of its first significant batch of New Deal legislation during 1935 and 1936.

The results were even gloomier than the President's supporters had feared. Indeed, in twelve decisions over the years 1934–1936, the Supreme Court declared unconstitutional all or part of eleven New Deal measures, a statistic that was exceptional both numerically and substantively in its pace and extent.[41] "Never before had the Court so severely frustrated an administration's political agenda during so short a period."[42] As Justice Harlan Stone wrote to

his sister at the end of the Court's Term in June 1936, "[W]e seem to have tied Uncle Sam up in a hard knot."[43] State regulatory laws foundered on the shoals of unconstitutionality as well.[44]

Ross offers several explanations for this astonishing resistance to the President's agenda. First, and most obvious, was the composition of the Court itself, which provided an unreceptive environment at best. Any litigant challenging a New Deal measure seemed nearly assured of four votes, from Justices Pierce Butler, James McReynolds, George Sutherland and Willis Van Devanter. By contrast, the President could ordinarily count on no more than three Justices: Louis Brandeis, Benjamin Cardozo, and Stone. This left the validity of the New Deal, as well as state legislation inspired by the New Deal, in the hands of two Justices, Hughes and Owen Roberts. Second, with programs that were as novel as the economic emergency to which they were directed, the New Deal imperiled itself. Even though adequate constitutional precedent existed to undergird Roosevelt's policies, those theories, which the trio of Justices more friendly to the New Deal could capably articulate, had never been applied by the Court to policies fundamentally designed to remake the national economy. Third, the variety of New Deal responses seemed to disrupt "the delicate balances of federalism and separation of powers."[45] These were concerns shared even by the Court's liberal bloc, as illustrated by the votes in *Schecter Poultry Corp. v. United States*[46] and *Louisville Bank v. Radford*,[47] and the single dissent by Cardozo in *Panama Refining Co. v. Ryan*.[48] Judicial resistance may also have been facilitated by public opinion, which remained dubious about the new regulatory era even while returning Roosevelt to the White House in a landslide and handing Democrats congressional margins in the 1936 elections that, thus far, remain unsurpassed. Fourth, support of New Deal initiatives was made more difficult at the margin by sloppy legislative drafting and less-than-stellar legal defense. Finally, Hughes and Roberts, both "Yankee Protestant Republicans who were devoted to an ideal of disinterested government," may have shared "a fundamental distrust" of the New Deal "because its power emanated from a coalition of corrupt urban political machines and feudal white southerners."[49] The reservations of Hughes and Roberts—and it would be their objections, after all, that were dispositive—may have thus been as much cultural as jurisprudential.

However one assesses the causes for the anti-Roosevelt environment that prevailed at the Court, there remains in doubt what Ross terms the "enduring dilemma"[50] of the Hughes Court and the puzzle Ross's book attempts to unravel: the timing, causes, and extent of the transformation that took place. For those the author labels "internalists," the Court's "consistent approval of economic legislation beginning in 1937 was not revolutionary but rather the natural result of an evolutionary process by which the Court gradually had accepted the regulatory state."[51] In other words, for the internalists, what, in retrospect, appears as a revolution was merely change that was already underway to some degree before 1937. By contrast, so-called "externalists . . . draw upon a tradition of legal realism and behaviorialism in contending that the Court's 1937 decisions constituted a distinct departure"[52] from the Bench's earlier posture, a reversal brought about by the 1936 elections and particularly the Court-packing proposal.[53] From the externalist perspective, these events persuaded Hughes and Roberts "to accept more deferential attitudes toward such laws."[54] Thus, externalists emphasize the importance of circumstances and events apart from constitutional precedent and judicial values. Ross also notes the existence of a middle position, which he associates with Bruce Ackerman, that is a synthesis of the two. According to this explanation, the Depression and the expansion of the regulatory state "generated a transformation of popular attitudes toward the nature and purpose of government that found expression in a judicial revolution."[55] The author espouses

none of these viewpoints exclusively. Instead, recognizing that labels can obscure as well as clarify, he draws from one or another at various points in the story in order to enrich understanding of the "forces that transformed the Court during Hughes's Chief Justiceship."[56] For instance, Ross believes that a combination of the 1936 elections, FDR's attack, the social tragedy of the Depression, and the transformation of public attitudes toward government itself seem highly persuasive at least in accounting for Roberts's switch to a position favorable to the New Deal.[57] Ultimately, however, what mattered most in changing the Court was not that Hughes and/or Roberts became "wholehearted converts to a theory of judicial restraint in economic cases, but rather [that] the numerous Justices appointed by Roosevelt formed a permanent liberal majority."[58] It was this new majority that cemented judicial restraint onto economic regulations and shifted to a new nonproprietarian, rights-oriented activism, as presaged by Stone's Footnote Four in *United States v. Carolene Products Co.*[59] This new majority also closed the door on adoption of a regulatory fallback position by which most, but not all, economic regulations would be allowed to stand.

Aside from confronting what happened on Hughes's watch and why, Ross also assesses Hughes as Chief Justice. Acknowledging the well-documented success of the "Jovian presence"[60] as court administrator, the author also acknowledges the views of critics that Hughes "might have done more"[61] to avert the crisis of 1937, particularly with respect to Roberts, whose position in *Tipaldo*[62] Ross finds inadequately explained by Felix Frankfurter's latter-day apparent attempt[63] to enable Roberts posthumously to exculpate himself from accusations that he had flip-flopped.[64]

Ironically, despite the political experience and presumed acumen that Hughes brought to the Bench, his Court needlessly moved to the constitutional precipice. Yet Ross believes that Hughes deserves credit for preserving the Court's power and prestige and, when public support mattered most, in averting long-term hostility toward the institution. Otherwise, Hughes's legacy might have been a vastly weakened and ineffectual Court, with profound consequences for later generations. In his lectures on the Court at Columbia University in 1927, to which Ross refers in places, Hughes contributed a term of art to judicial scholarship when he spoke of the Supreme Court's "self-inflicted wounds,"[65] mentioning *Dred Scott*, the *Legal Tender Cases*,[66] and *Pollock v. Farmers' Loan & Trust Co.*[67] by name. Making its own unintended additions to that list, and with brinksmanship jarringly akin to some behavior of the Taney Court, Hughes's Chief Justiceship, in its encounter with Franklin Roosevelt, stands as a sobering reminder that even the combination of an imposing professional pedigree and remarkable insight do not necessarily yield altogether enviable results.

Within a generation, the new course that the later Hughes Court charted toward nonproprietarian, rights-oriented activism again entangled the Justices in political controversy. By this time, the Chief Justice was Earl Warren, and among the Court's harshest critics was fellow Californian and former Vice President Richard Nixon, who orchestrated his campaign for the White House in 1968 in part around an attack on some of the principal handiwork of the Warren Court.

The literature on the fourteenth Chief Justice has now been enriched by publication of **Justice for All** by Jim Newton, editorial-page editor of the *Los Angeles Times*.[68] Engagingly written and carefully researched, Newton's biography of Warren presents a detailed and sympathetic yet perceptive treatment of Warren the man, as a product of the progressive wing of California Republican politics, and a portrayal of Warren the Chief Justice with particular emphasis on the dynamics and work of the Court he led. For someone approaching Warren's life for the first time, Newton's book is an essential source, just as the book is well worth the time of anyone who wants

to revisit the Court of the 1950s and 1960s. However, a generational word of caution is in order. For those of late middle age and beyond who first began to pay close attention to the Supreme Court during the years Warren was at the helm, it may be difficult to realize that someone of college age encountering Warren today for the first time will view him very much as a figure from history. But he is now a historical figure. He was born in 1891, only twenty-six years after the Confederate surrender at Appomattox Courthouse. He was the last Chief Justice born in the nineteenth century. Melville Weston Fuller was the Chief Justice during Warren's boyhood years in Bakersfield. Appointed Chief Justice by President Dwight Eisenhower in 1953, Warren was only the second Chief to be appointed from a state west of the Mississippi. During his first Term on the Bench, his Court's decisions appeared in volume 346 of the *United States Reports*. His Court's last opinions were published in 1969, in volume 395. His death in 1974 preceded President Nixon's resignation from office by about a month. Between 1953 and 1974, thirteen new faces, counting his own, appeared on the Bench, a number now equal to 12 percent of the total number of Justices to serve since 1790. Warren's Court has been part of history for nearly forty years.

Like Charles Evans Hughes, Warren came to the Court as a very public man. He moved from deputy city attorney of Oakland and district attorney of Alameda County to Attorney General and Governor of California. He was Governor Thomas E. Dewey's running mate in the presidential campaign of 1948, and he actively sought the Republican presidential nomination in 1952. Indeed, it was in the events surrounding the Republican Convention of 1952 that Newton depicts Nixon as having betrayed Warren, who, going into the convention with seventy-six delegates pledged to him hoped to be an acceptable second choice to Eisenhower delegates should neither Eisenhower nor Robert Taft command a majority vote. "But even as Nixon publicly allied himself with Warren, he played both sides."[69] After Warren took the constitutional and judicial oaths on October 5, 1953[70] however, his accomplishments during his previous thirty-four years of public service paled in comparison alongside what "his" Court would do during the next sixteen. Warren led his Court in a way the nation had not seen since the days of John Marshall. At his retirement, the designation Warren Court had become so embedded in American political discourse that Newton believes part of Warren's legacy resides in having become the "punching bag in the nation's fratricidal Supreme Court confirmation battles where he has come to symbolize reckless liberal judicial activism . . . When Republicans fret about the possibility of conservative Justices abandoning the faith on the Bench and heading off into unpredictable terrain, it is Warren who strikes that fear."[71] Certainly there is no period of similar length during which the Justices engaged themselves on so many fronts in so many causes involving civil liberties and civil rights. Neither is there another time in the history of any other nation when a court became the prime mover behind such extensive social change. In the words of Justice Abe Fortas, the Warren years witnessed "the most profound and pervasive revolution ever achieved by peaceful means."[72] "Coming to grips with the hard, often unpleasant facts of contemporary life," Alpheus Mason observed, "the Warren Court translated our long-time commitment to racial equality into a certain measure of social and constitutional reality. The reapportionment decisions brought us closer to the ideal professed in 1776 [that] just governments rest on the consent of the governed. New rules of criminal procedure were formulated, giving a ring of truth to Equality under the Law."[73] The Warren Court's effects were probably greater than those of most Presidents and most Congresses.

If the decisions during Warren's tenure as Chief Justice constituted a judicial revolution, part of the significance of this revolution has come from the catalytic effect the

Jim Newton's new biography of Earl Warren, *Justice for All: Earl Warren and the Nation He Made*, is essential reading for any student of the Supreme Court's shift in direction during the 1950s and 1960s.

major cases have had on both the judiciary and the rest of the political system. Litigation spawned further litigation. There seem to be few high-profile issues associated with the Warren Court that did not succumb to this phenomenon. In Robert McCloskey's estimate, "[t]he social and political organism was dynamic enough in its own right to tax the wisdom and authority of the judges. When it was galvanized even further by the judiciary itself, the implication for judicial review became surprisingly hard to calculate."[74] The dominant mood belonged to those whom Warren's colleague Justice John Marshall Harlan disapprovingly described as "observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source."[75]

Uniformly acknowledging the judicial activity of the Warren years, appraisals have been mixed. In 1953, President Eisenhower assured the nation that his choice to replaced Fred Vinson would prove to be a great Chief Justice. Ike's opinion, however, soon soured to the point where, in unusual succinctness, he gauged Warren's selection "the biggest damn fool mistake I ever made in my life."[76] By contrast, President Lyndon Johnson considered Warren "the greatest Chief Justice of them all."[77] Perhaps among the most glowing accolades Warren ever received was the telegraphed message from President John Kennedy to the

Chief Justice in March 1963: "Although [it is] not possible for all of us to be your clerks, in a very real sense we are all your students."[78] Yet, for Alexander Bickel, who had once clerked for Justice Frankfurter, Warren's Court "came under professional criticism for erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions, and for imagining too much history."[79] For others, the Warren Court brought ecstasy as well as agony. They applauded the outcomes of decisions but sometimes expressed displeasure with the means by which they were reached. For Newton, "Earl Warren left a great and voluminous legacy that modern America has not known quite how to absorb."[80] Substantively, Warren's work "courses through modern legal debate in topic after topic, nowhere more so than in the nation's unwinnable argument between the forces of security and those of liberty.... In the decades since Warren left the Court, America has never suffered from too many men or women like him."[81]

The judicial territory that was traversed between 1953 and 1969 is perhaps best illustrated by two examples. The first is that Warren's retirement and the selection of a successor attracted considerably more attention in the press and Congress than had been the case when Chief Justice Vinson died and Eisenhower looked for a successor. The Supreme Court simply counted for more in the political system in 1969—the stakes were higher. The second lies in the presidential race of 1968, in which the Court became a major campaign issue in national politics to a degree not witnessed since 1936.

While decisions in several areas ensnared the Court in electoral controversy, those on criminal justice were probably as much the cause as any. In the words of candidate Nixon, "Some of our courts have gone too far in weakening the peace forces as against the criminal forces."[82] He even accused the Supreme Court of giving the "green light" to "the criminal element" in the nation.[83] The fact was that the Court devoted more and more time to criminal procedure cases, both state and national, in the 1960s. This was in sharp contrast to the 1940s and 1950s, when the Court's docket usually contained barely more than a scattering of criminal cases from state courts. Unless police engaged in especially egregious conduct, state and local governments enjoyed wide discretion in the Court's eye in their choice of law-enforcement practices. This tradition of deference, however, was shortly shoved aside. In its place came the "due process revolution,"[84] which by 1968 was well under way, initiated and sustained largely by the Warren Court. Never before had an American court brought such rapid and extensive change to virtually all stages of criminal justice.

This revolution had at least three elements. The first was the near-complete incorporation of the Bill of Rights into the Fourteenth Amendment. By the end of the Warren Court in 1969, there had ceased to be any significant difference under the U.S. Constitution between rights applicable in federal courts and rights applicable in state courts. The venerable double standard, under which criminal procedure standards had been higher for federal than for state law enforcement, had vanished. Criminal cases from state courts now crowded the High Court's docket. Second, decisions reflected a deep appreciation of the liberties enshrined in the Bill of Rights. Judicial bombshells demolished or recast many of the old ways of fighting crime. Third, and as a result of the first two, this restructuring made the Court for the first time the constitutional overseer of almost every aspect of local law enforcement in each of the fifty states.

Illustrative of what transpired was *Mapp v. Ohio*,[85] which came down at the midpoint of the Warren Court, eight years after senior Associate Justice Hugo Black administered the oath of office to the new Chief Justice.[86] The timing now seems nearly prescient, in that the second half of Warren's Chief Justiceship proved to be even more consequential than the first. The case provides the title of a recent

book by political scientist Carolyn N. Long of Washington State University at Vancouver. Her ***Mapp v. Ohio***[87] joins an expanding body of valuable case studies in the University Press of Kansas's Landmark Law Cases and American Society Series, under the general editorship of Peter Charles Hoffer and N. E. H. Hull. Indeed, Professor Long is no newcomer to the case-study genre, having already authored a volume in the same series on *Employment Division v. Smith*[88] involving free exercise of religion.[89] Long's second contribution to the series is as lively and colorful as it is insightful, adhering to the high standards exhibited by its predecessor entries in the Landmark series. In particular, Long's narrative and analysis have been enriched by careful use of primary sources, including conversations with Dollree Mapp, the appellant in the case.[90]

In an opinion by Justice Tom Clark that was joined by Chief Justice Warren and Justices Black, Brennan, and Douglas, with Justice Stewart concurring separately and with Justices Harlan, Frankfurter, and Whittaker in dissent, the Court placed significant restrictions on searches and arrests by applying the exclusionary rule to the states by way of the Fourteenth Amendment. The majority reasoned that unless illegally seized evidence was barred from trial, the Fourth Amendment's directive that "the people" be free from "unreasonable searches and seizures" would mean little. Herein lay the reason *Mapp* helped to make the Warren Court an issue in the 1968 presidential election. While *Mapp* might deter police misconduct, critics charged that its social costs were too high: an individual would not benefit directly from its operation *unless* incriminating evidence was found. The decision seemed to capture the essence of Judge (later Justice) Benjamin Cardozo's aphorism that the "criminal is to go free because the constable has blundered."[91]

While the exclusionary rule had been a fixture in federal courtrooms since 1914,[92] in 1961 nearly half the states still allowed the introduction of illegally acquired evidence. Indeed, search warrants in many jurisdictions had practically fallen into disuse. Police and prosecutors alike realized that the absence of a warrant in a search of someone's home ordinarily presented no cognizable federal question.[93]

By mandating the exclusionary rule nationally, *Mapp* became the linchpin for much of the due-process revolution, for two principal reasons. First, most encounters between citizens and police—whether those encounters occur in automobiles or along sidewalks—are with state or local police, not with officers of federal law-enforcement agencies. Second, in later cases, the Court would lay down even more rules defining correct police procedure. That is, if a violation of the Fourth Amendment triggered exclusion of evidence, not only would future litigation of necessity present the Justices with ample opportunities to lay out with greater specificity precisely what the Fourth Amendment allowed and what it prohibited, but the Justices themselves would feel obliged to provide greater guidance to police to cover the numerous situations that would invariably arise. As much as any other single decision—including even *Miranda v. Arizona*,[94] which five years later firmly entangled the Court with police interrogations—*Mapp* put the Supreme Court in charge of day-to-day police work. How the decision came about, and how it was ultimately implemented, is the story Long tells so well.

Mapp as *decided* by the Supreme Court was very different from the case that *arrived* at the Supreme Court. Ms. Mapp's appeal followed what Long shows to be a warrantless search of her home and some high-handed behavior by police in Cleveland, Ohio who were in search of a fugitive and evidence related to a bombing.[95] Her conviction, however, stemmed from possession of material deemed to be obscene.[96] Thus, as it reached the Supreme Court and as it was briefed and argued, *Mapp* was a straightforward First (not Fourth) Amendment case presenting the question of whether states could criminalize the mere possession of obscenity. This was not the

question the Court chose to answer in *Mapp*. Indeed the Court would not answer that question until 1968.[97] Instead, the case underwent a constitutional metamorphosis inside the Marble Palace. According to the papers of Justice Clark and Chief Justice Warren, the Justices considered *Mapp* at their Saturday conference on March 31, 1961, one day after oral arguments in the case. Most seemed to find the Ohio statute defective because of its overbreadth. William O. Douglas, however, raised the Fourth Amendment issue and whether the Court should revisit *Wolf v. Colorado*,[98] in which a majority of six had declined to impose the exclusionary rule on the states. That idea had entered the deliberations thanks to the amicus brief filed by the American Civil Liberties Union, a single section of which, seemingly as an afterthought, invited the Bench to reexamine *Wolf*. The brief was noteworthy also apparently because of its quality. As one of Chief Justice Warren's clerks wrote in a Bench memorandum, "The briefs of the parties in this case are among the worst I have seen all year. Happily, however, the amicus brief of the American Civil Liberties Union and Justice [Kingsley A.]Taft's opinion in the court below tend to bring the major issues into focus."[99] Warren and Justice William J. Brennan also found Douglas's suggestion appealing, but with no other takers, "the idea stalled."[100] The conference then coalesced unanimously around the position that Ohio's statute fell short on First Amendment and Fourteenth Amendment grounds alone. As Justice John Harlan wrote Clark a few weeks later, "I would have supposed that the Court would have little difficulty in agreeing (as indeed I thought the whole Court had) that a state prohibition against mere knowing possession of obscene material without any requirement of showing that such possession was with a purpose to disseminate the offensive matter, contravenes the Fourteenth Amendment, in that such a statute impermissibly deters freedom of belief and expression, if indeed it is not tantamount to an effort at thought control."[101]

What happened next is partly a matter of some speculation, but it appears that soon after the conference on March 31, a few members of what would become the new *Mapp* majority huddled in a "rump caucus,"[102] possibly in an elevator, to devise a new basis for the decision. Clark, to whom Warren had assigned the opinion, found Warren and Brennan receptive to a Fourth Amendment basis for it. Knowing from conference that Douglas was already agreeable, he would then have a majority if he could count on Justice Hugo Black's support. That support, however, was problematic for two reasons: Past decisions indicated that Black was not inclined toward an expansive reading of the Fourth Amendment, and his concurring opinion in *Wolf* had declared that the exclusionary rule was a judicially crafted rule of evidence, rather than a command of the Constitution. "What occurred over the next two months," writes Long, "was a flurry of opinions between Clark and Black as the Texan worked to attract Black to his position."[103] Yet presumably even Clark had serious reservations about squarely imposing the exclusionary rule on the states. In a handwritten draft of his opinion, Clark wrote, "We have concluded that the conviction of the appellant is violative of the due process clause of the Fourteenth Amendment . . . which results in a reversal of the judgment." Written in the margin at this point was this note: "On the 4th Amendment question the Court adheres to it rule announced in Wolf v. Colorado."[104] This draft included no mention of the First Amendment issue that had dominated discussion at conference. The strong suggestion is that at this point in the evolution of Clark's thinking about the preferred course of action, he intended to keep the decision focused on the validity of the search. The reference in the draft to the Due Process Clause leads Long to conjecture that perhaps Clark was moving toward a more modest resolution of the case, concluding that police behavior during the search was so outlandish that it violated Justice Felix Frankfurter's "shocks the conscience" test from *Rochin v. California*.[105]

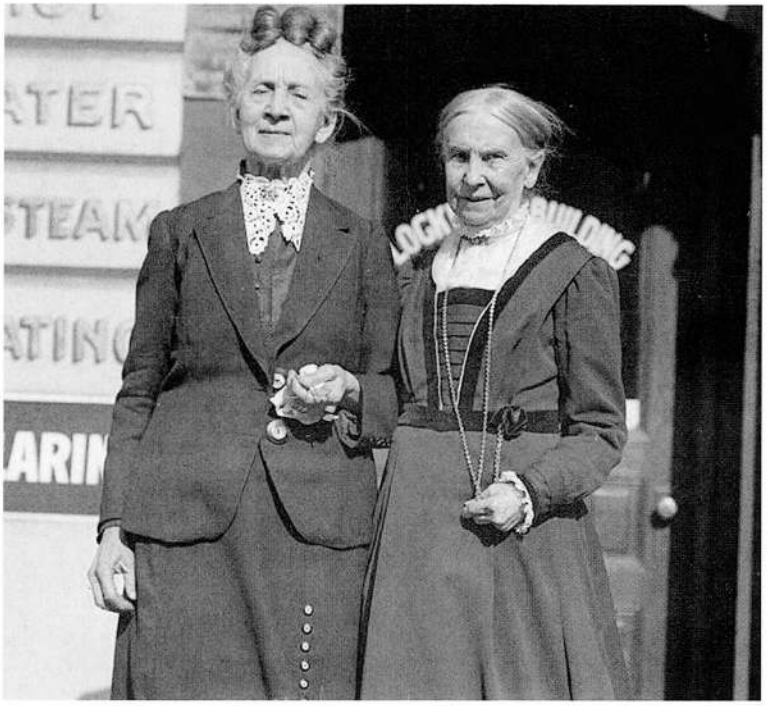
"Whatever the reason," she explains, "the only thing clear from this initial draft is that Clark had chosen not to write an opinion in line with the unanimous agreement of the Court."[106] Nonetheless, Clark had been on record as early as his concurring opinion in *Irvine v. California*[107] that, had he been on the Court when *Wolf* was decided, he would have voted to apply the exclusionary rules to the states. In the same case, Long notes, Clark had written a ten-page draft opinion, which he circulated only to Justice Robert Jackson, that called for the direct reversal of *Wolf*. From the outcome of *Mapp*, it is apparent that Clark had hardly abandoned that objective, as later drafts gravitated more closely toward the form of the opinion that the Court released. As Justice Potter Stewart wrote Clark, "your proposed opinion [comes] as quite a surprise."[108] A majority for imposition of the exclusionary rule was possible because Clark secured Black's vote. At the top of Clark's working draft was this note: "TCC draft after OK from HLB, 4/27/61."[109] And Black's vote for Clark's position was apparently solidified by the explicit link Clark made between the Fourth and Fifth amendments, a point that Black had suggested, and the very point that he then developed in his concurring opinion explaining why his position in *Mapp* departed from his position in *Wolf*. Justice Stewart issued a memorandum expressing no position on the exclusionary rule, but concurred in the reversal of Mapp's conviction, for the reasons that initially had seemed dispositive at conference.

Of course *Mapp* did not end the debate over the exclusionary rule. As Long shows, the Supreme Court has made some modifications,[110] while some state supreme courts, in an example of what is sometimes called the "new judicial federalism," have applied state constitutions in a way to offer within their particular states more stringent restrictions on police searches than those maintained by the U.S. Supreme Court. Indeed, she notes that more than four decades after *Mapp* "federalized the exclusionary rule so that evidence seized illegally could be excluded from all state criminal trials, state criminal procedure threatens to become as fragmented as it was prior to *Mapp*."[111]

Nonetheless, perhaps partly because of this hybridization of rules, *Mapp* generates far less controversy today than in the years immediately after 1961. The scope of rights of the accused in ordinary criminal cases no longer occupies a place at the top of the political agenda.

Two decades after *Mapp* came down, President Ronald Reagan appointed Sandra Day O'Connor as the first woman to sit on the Supreme Court of the United States. That notable event occurred 102 years after Belva Lockwood became the first woman admitted to practice in the High Court. Candidate for president of the Equal Rights party in the elections of 1884 and 1888, Lockwood is now the subject of a compelling biography by Jill Norgren, emerita professor of Government at John Jay College and the Graduate Center of the City University of New York. **Belva Lockwood**[112] should interest not only students of the Court and the American legal profession generally, but also anyone interested in gender equality and the politics and culture of Washington, D.C. in the late nineteenth century. It was Lockwood who noted in an autobiographical article that "while she had failed to raise the dead, she had 'awakened the living.'"[113] Probably no one who pens such words can fairly be said to have led an uninteresting life, and Lockwood's life was anything but uninteresting. Thoroughly researched and carefully documented, Norgren's portrayal reads like a fast-paced novel and suggests the truth of a variation on ancient wisdom: Truth frequently is more interesting than fiction. Norgren successfully navigates and illuminates the life of this accomplished individual even though most of Lockwood's personal papers were destroyed after her death.

A native of Niagara County in western New York, Lockwood (née Belva Ann Bennett) completed the coursework at the National University Law School in Washington but was refused a diploma because she was a woman



Jill Norgren's biography of Belva Lockwood (left), the first woman to become a member of the Supreme Court bar, is both well researched and a compelling read. Lockwood is pictured here in 1913 with a friend, Olympia Brown.

and then denied admission to the bar of the District of Columbia. Only after she penned a letter[114] to President Ulysses Grant that was as insistent as it was intemperate did she receive the diploma she had earned and then, in 1873, admission to the bar. With other hurdles remaining to be jumped, Lockwood would hardly have been unfamiliar with the theme of the "great antagonists."

When her application to practice before the Court of Claims was rebuffed, Judge Charles Nott explained that "it was not the business of the judiciary to 'intermeddle' with the question of woman's proper sphere."[115] As Lockwood had feared, the action by the Claims Court reflected the sentiment of Justice Joseph Bradley's opinion for the Supreme Court in *Bradwell v. Illinois*, following Myra Bradwell's exclusion, as a married woman, from the Illinois bar: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[116] Undeterred, Lockwood took the next step. Rules of the U.S. Supreme Court permitted an attorney to apply for admission to its bar after practicing for three years before the highest state or District of Columbia court, a requirement she shortly met. Accordingly, in 1876 Albert Gallatin, a friend and suffrage supporter, moved her admission to the Supreme Court bar. In November, Chief Justice Morrison Waite announced the Court's denial of the motion, noting that "the Court does not feel called upon to make a change until such change is required by statute."[117] Lockwood, who was a superb self-promoter, had apparently encouraged extensive press coverage of the pending motion, so that one newspaper story proclaimed that "the Chief Justice squelched the fair applicant." As Norgren's depicts the scene, "At the White House that night, the First Lady, who had read the newspaper accounts, asked Waite, her dinner guest, 'how do you look when you squelch people?' Malvina Harlan, also a guest at the party, reported that Waite had replied with a pained look of embarrassment and a

shrug of his shoulders, 'Why, I do not know, I'm sure.'"[118] What Waite did not reveal was that he, along with Justices Samuel Miller and David Davis, had voted to approve her motion, but that the three had been outvoted.

Inspired by Bradwell's successful efforts to achieve passage in Illinois of a statute barring gender discrimination in access to the professions, Lockwood accepted the challenge implicit in Waite's comment about a statute. What followed was an extensive lobbying effort by Lockwood and others—efforts interrupted only briefly by a series of family crises, including the death of her husband—to persuade Congress, over significant separation-of-powers objections, to enact legislation that would prohibit discrimination against women attorneys in practice before the federal courts. Passage of the bill came in February 1879, and President Rutherford Hayes signed it into law. Lockwood "had pushed a reluctant Congress to enact one of the very first measures in support of women's rights."[119] Formal admission to the Supreme Court bar followed when the Justices next convened on March 3.

Norgren's account of Lockwood's career, however, does not end with this personal triumph. The volume also contains rich detail on a Supreme Court case Lockwood argued on behalf of Cherokee Indians who were seeking monetary damages because of their forced removal. The Court ultimately approved a settlement worth some five million dollars.[120] The case was perhaps the climax of a forty-year legal career that ended only with Lockwood's death at age 86, three years shy of ratification of the Nineteenth Amendment. Her legacy, Justice Ruth Bader Ginsburg observes in the foreword to Norgren's book, "is the path she opened for women who later followed the tracks she made."[121] As Norgren demonstrates, Lockwood's life reflected perseverance, resilience, wit, and good humor. It offered lessons on how, amid the tensions and resistance generated by great antagonists, an individual can transform obstacles, putdowns, and slights into opportunities.

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

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ENDNOTES

[1]Alpheus Thomas Mason, **Brandeis: A Free Man's Life** (1946); **Harlan Fiske Stone: Pillar of the Law** (1956); **William Howard Taft: Chief Justice** (1964).

[2]James F. Simon, **Lincoln and Chief Justice Taney** (2006) (hereafter cited as Simon).

[3]James F. Simon, **What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States** (2002); **The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America** (1989); **The Center Holds: The Power Struggle Inside the Rehnquist Court** (1995).

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

[5]62 U.S. (21 Howard) 506 (1859).

[6]62 U.S. at 520–21.

[7]James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents** (1908), vol. 2, 581–82.

[8]60 U.S. (19 Howard) 393 (1857).

[9]James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents** (1908), vol. 6, 9.

[10]*Scott v. Emerson*, 15 Mo. 476 (1852).

[11]In Howard's *Reports*, Sanford's name is incorrectly spelled "Sandford."

[12]51 U.S. (10 Howard) 82 (1851). *Strader* posed the question of whether slaves became free when they entered free states or territories. Lurking within the case was the perilous issue Congress was then confronting: its power over slavery in the territories. The owner of a band of slave musicians had brought a suit for damages against several men who were accused of helping the slaves flee from Kentucky to Canada. The defendants' defense was that the musicians were not slaves at the time of their flight because an earlier musical tour into Ohio had made them free. The Kentucky courts had ruled in favor of the slave owner, reasoning that whatever the musicians' status in Ohio, they were slaves under Kentucky law once they returned home. The U.S. Supreme Court dismissed the appeal: the Northwest Ordinance of 1787, under which the Ohio territory had been declared free soil and upon which the accused abettors built their argument, had no force in Ohio after statehood. Without a federal question, the High Court therefore lacked jurisdiction. Chief Justice Taney's opinion for the unanimous Bench, however, said more—much more—than was necessary, considering that he declared that his Court had no authority to decide the case. Agreeing with the Kentucky courts, he placed the Supreme Court's imprimatur on the doctrine of reversion: Upon return to the home state, the slave reverted to its authority. The status of a slave back in bondage depended on the law of that state. *Strader* thus counseled judicial restraint. Federal courts would not interfere with state court rulings on this subject, even when the former had jurisdiction.

[13]Benjamin R. Curtis, ed., **The Life and Writings of Benjamin Robbins Curtis, LL.D.** (1879), vol. 1, 236.

[14]*See* endnote 12.

[15]Simon, 125.

[16]Harold Holzer, ed., **The Lincoln-Douglas Debates** (New York: HarperCollins, 1993), 1. The quotation is from the editor's introductory essay.

[17]Simon, 137 (emphasis in the original).

[18]*Id.*, 139.

[19]*Id.*, 3.

[20]*Id.*, 186.

[21]John Cadwalader, an appointee of James Buchanan, was a judge on the United States District Court for the Eastern District of Pennsylvania.

[22]Simon, 189.

[23]See *Ex parte Merryman*, 17 Fed. Cas. 144 (C.C.D. Md. 1861).

[24]Simon, 193, 192.

[25]James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents** (1908), vol. 6, 24–25.

[26]Simon, 198. It may be that Taney was convinced that the formidable federal military presence in Baltimore by this time would have made a fair trial impossible.

[27]The Merryman episode occupies a prominent place in **All the Laws But One** by the late Chief Justice William Rehnquist (1998), 32–39.

[28]William G. Ross, **The Chief Justiceship of Charles Evans Hughes** (2007) (hereafter cited as Ross).

[29]William R. Casto, **The Supreme Court in the Early Republic** (1995).

[30]Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801–1835** (1997).

[31]James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller, 1888–1910** (1995).

[32]Walter F. Pratt, Jr., **The Supreme Court Under Edward Douglass White, 1910–1921** (1999).

[33]Melvin I. Urofsky, **Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953** (1997).

[34]Michal Belknap, **The Supreme Court Under Earl Warren, 1953–1969** (2005).

[35]Earl M. Maltz, **The Chief Justiceship of Warren Burger, 1969–1985** (2000).

[36]Seriously considered by President Washington to be the first Chief Justice, Associate Justice John Rutledge rode the southern circuit with Justice James Iredell, but resigned before the Supreme Court convened. Named Chief Justice on a recess appointment after John Jay resigned, Rutledge presided over the August 1795 Term of the Supreme Court before he was rejected by the Senate.

[37]Ross, 29.

[38]Hughes voted with the majority in *Home Building & Loan v. Blaisdell*, 290 U.S. 398 (1934), and *Nebbia v. New York*, 291 U.S. 502 (1934).

[39]*Stromberg v. California*, 283 U.S. 359 (1931).

[40]*Near v. Minnesota*, 283 U.S. 697 (1931).

[41]Economy Act of 1933 in *Lynch v. United States*, 292 U.S. 571 (1934); Agricultural Adjustment Act of 1933 in *United States v. Butler*, 297 U.S. 1 (1936); Joint Resolution of June 5, 1933, in *Perry v. United States*, 294 U.S. 330 (1935); National Industrial Recovery Act of 1933 in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); Independent Offices Appropriation Act of 1933 in *Booth v. United States*, 291 U.S. 339 (1934); 1933 Amendments to Home Owners' Loan Act in *Hopkins Federal Savings & Loan Assn. v. Cleary*, 296 U.S. 315 (1935); 1934 Amendments to Bankruptcy Act of 1898 in *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936); Railroad Retirement Act of 1934 in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); Frazier-Lemke Act of 1934 in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); AAA Amendments of 1935 in *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); Bituminous Coal Conservation Act in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[42]Ross, 58.

[43]Mason, **Harlan Fiske Stone**, 426.

[44]*Morehead v. New York* ex rel. *Tipaldo*, 298 U.S. 587 (1936).
[45]Ross, 244.
[46]295 U.S. 495 (1935).
[47]295 U.S. 555 (1935).
[48]293 U.S. 388 (1935).
[49]Ross, 245.
[50]*Id.*, 243.
[51]*Id.*, xviii. Ross places in the internalist camp such scholars as Barry Cushman, Richard Friedman, and G. Edward White.
[52]Ross, xviii.
[53]For Ross, externalists include scholars such as William Leuchtenburg.
[54]Ross, xviii.
[55]*Id.*, xix.
[56]*Id.*
[57]*Id.*, 135.
[58]*Id.*, 249.
[59]304 U.S. 144, 152 (1938).
[60]Ross, 219.
[61]*Id.*, 219.
[62]In *Morehead v. New York ex rel. Tipaldo*, Roberts and four other Justices, through an opinion by Justice Butler, invalidated New York's minimum wage for women. Chief Justice Hughes, joined by Justices Brandeis, Cardozo, and Stone, dissented.
[63]Felix Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311 (1955). In this article, Justice Frankfurter drew upon a 1945 memorandum from Justice Roberts. In this memo, Roberts explained his vote in *Tipaldo* on the fact that counsel for New York had not asked the Court to overrule *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), in which the Taft Court had invalidated a minimum-wage law for women in the District of Columbia and which the *Tipaldo* Court saw as controlling the outcome in the New York case. In the spring of 1937, in the famous switch in time, Roberts voted to uphold the state of Washington's minimum-wage law for women in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[64]Ross, 124–26.
[65]Hughes, **The Supreme Court of the United States** (1928), 50.
[66]*Hepburn v. Griswold*, 75 U.S. 603 (1870), and *Knox v. Lee*, 79 U.S. 457 (1871).
[67]158 U.S. 601 (1895) (rehearing).
[68]Jim Newton, **Justice for All** (2006) (hereafter cited as Newton). The title seems to be inspired by the Pledge of Allegiance to the Flag, but also by the litany inscribed on Warren's tombstone at Arlington Cemetery: "Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouses of treasures." The passage is drawn from Warren's **A Republic, If You Can Keep It** (1972), 6, quoted in Newton, 516–17.
[69]Newton, 243.
[70]Warren received a recess appointment on October 2. He was commissioned on March 2, 1954, with the commission recorded on April 5.
[71]Newton, 517–18.
[72]*Quoted in* Bernard Schwartz, **Super Chief** (1983), 32.
[73]Alpheus T. Mason, "The Burger Court in Historical Perspective," 89 *Political Science Quarterly* 27, 34 (1974).
[74]Robert G. McCloskey, **The Modern Supreme Court** (1972), 7.
[75]*Baker v. Carr*, 369 U.S. 186, 339 (1962) (Harlan, J., dissenting).
[76]Mason, "The Burger Court in Historical Perspective," 28.
[77]*New York Times*, June 23, 1969, p. 1.
[78]Newton, 382.
[79]Alexander M. Bickel, **The Supreme Court and the Idea of Progress** (1970), 45.
[80]Newton, 516.
[81]*Id.*, 518.
[82]Robert B. Semple, Jr., "Nixon Withholds His Peace Ideas," *New York Times*, March 11, 1968, pp. 1, 33. Nixon used nearly identical phrasing in his acceptance speech at the Republican convention in Miami on August 8.
[83]*New York Times*, May 31, 1968, p. 18.
[84]Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (15th ed., 2008), 387.
[85]367 U.S. 643 (1961).
[86]*Mapp* appropriately receives considerable attention in **Justice for All**. See Newton, 383–84.
[87]Carolyn N. Long, ***Mapp v. Ohio*** (2007) (hereafter cited as Long).
[88]494 U.S. 872 (1990). See Stephenson, "The Judicial Bookshelf," 27 *Journal of Supreme Court History* 1, 73–75 (2002).
[89]Carolyn N. Long, **Religious Freedom and Indian Rights** (2000).
[90]Long, xi. For example, the reader learns that Ms. Mapp, 82 years of age when the book went into production, moved from Cleveland to New York in 1968, where she was sentenced to a prison term on a narcotics charge during the 1970s. She currently resides in Queens County, New York, where she had held a real-estate license for some time. Long, 196, 200.
[91]*People v. Defore*, 242 N.Y. 13, 15, 150 N.E. 585, 586 (1926).
[92]The exclusionary rule was first applied to certain federal criminal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914).
[93]Long, 126.

[94]384 U.S. 436 (1966).

[95]Long, 7–9, 13.

[96]A majority of the Ohio Supreme Court had actually decided for Ms. Mapp, in that four of the seven justices found the statute unconstitutional. Because Ohio did not have an exclusionary rule, the question of the admissibility of the evidence against her was not addressed. The state constitution, however, mandated a supermajority in order for a state law to be invalidated. Long, 28. *See State v. Mapp*, 170 Ohio St. 417, 166 N.E. 2d 387 (1960).

[97]When it came, the Court's answer was in the negative. *See Stanley v. Georgia*, 394 U. S. 557 (1969).

[98]*Wolf v. Colorado*, 338 U.S. 25 (1949), incorporated the Fourth Amendment into the Fourteenth, but did so without also including the judicially crafted exclusionary rule from *Weeks*, and so had been of little help to criminal defendants in state courts.

[99]Long, 69.

[100]*Quoted in id.*, 82.

[101]*Quoted in id.*, 82–83.

[102]*Id.*, 83.

[103]*Id.*, 84.

[104]*Quoted in id.*, 85.

[105]342 U.S. 165, 172 (1952).

[106]Long, 86.

[107]347 U.S. 128 (1954).

[108]*Quoted in* Long, 93.

[109]*Quoted in id.*, 91.

[110]For example, *United States v. Leon*, 468 U.S. 897 (1984), allowed a "good faith exception for certain warrant (although not warrantless) searches in federal criminal prosecutions.

[111]*Id.*, 195.

[112]Jill Norgren, **Belva Lockwood** (2007) (hereafter cited as Lockwood).

[113]*Id.*, xiii.

[114]*Id.*, 50–51.

[115]*Id.*, 71.

[116]83 U.S. 130, 141 (1873).

[117]Lockwood, 73. An excerpt from the Supreme Court's minutes of November 6, 1877, on the denial of Lockwood's application is reprinted in Charles Warren, **The Supreme Court in United States History** (rev. ed. 1926), vol. 2, 550–51 n.

[118]Lockwood, 74. Some years later, Lockwood was unsuccessful in petitioning the Supreme Court for a writ of mandamus to the Supreme Court of Appeals of Virginia to admit her to practice law in that court. See *Ex parte Lockwood*, 154 U.S. 116 (1894).

[119]Lockwood, 82.

[120]*United States v. Cherokee Nation*, 202 U.S. 101 (1906).

[121]Lockwood, ix.

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Correction:
In the last issue of the *Journal* due to a typesetting error, the images of Justice Kennedy and Justice Blackmun on pages 111 and 116 were switched. The Society deeply regrets the mistake.