Introduction

Melvin I. Urofsky

The other day I was looking at the Court's docket for this year, and realized that while the specifics may have changed—there are more cases dealing with technology, for example—the heart of the docket is what it has been for more than eight decades: important questions of constitutional and statutory interpretation. In the course of recent research, I read through some volumes of *U.S. Reports* for the mid-1920s, before the Judges' Bill of 1925 took force and reoriented the Court. While one would run across the occasional case that would have been important in any Term, a vast majority of the cases involved matters of private law or obscure state regulation. Chief Justice William Howard Taft wanted to make the Court primarily a constitutional tribunal, and he succeeded brilliantly. It is hard to believe that a historian reading about the cases during the Rehnquist and Roberts eras would dismiss the vast majority of them as "unimportant."

The Court itself, of course, since the founding of the nation, has been critical to the successful operation of the great experiment, and this issue looks at some of those events in which the Court played a part. In some instances, it did so through expounding principles in a decision, and Thomas Cox examines one of the most important of those cases, *Gibbons v. Ogden.* Moreover, as historians have understood for a long time, it is not only the jurisprudential issue that counts, but also how that decision plays out against the context of changing economic and social conditions. Mr. Cox does an admirable job of explicating this.

The Supreme Court never ruled on the Alien and Sedition Acts of 1798, but matters arising under America's first "internal security act" did come up before some of the lower courts. Given how active the judiciary is regarding current security measures, Arthur Garrison's examination of how judges treated the early laws is instructive.

In the last issue of the *Journal*, we ran the first part of Theodore Vestal's examination of how the Court during the Warren years engaged in public diplomacy, a role then somewhat alien to the Justices. Since then, of course, members of our High Court have become familiar figures as they travel overseas during the summer recess and speak to jurists

and legal academics in other countries. In this issue, we have the conclusion of Mr. Vestal's study.

A few years ago, the Supreme Court Historical Society's annual lecture series dealt with advocacy before the High Court. At the time, we heard from many people who wanted to know why we did not include this person or someone else who was a great advocate. (One was reminded of Justice Brandeis's comment that Robert H. Jackson ought to be made Solicitor General for life!) There were, of course, many other lawyers who practiced before the Supreme Court who were very good, but in a series one can only deal with a few. Here we make up for at least one omission, as Jeremy McLaughlin examines the role of one of the great orators of the nineteenth century, Henry Clay, in his Supreme Court practice.

Todd C. Peppers has graced the pages of the *Journal* before. In this issue, he looks at a topic very close to my own heart: the relationship between Justice Louis Brandeis and his clerks. It was far different from those of say Holmes, Frankfurter, or Brennan, but when I interviewed several of his clerks many years ago, all spoke of their year with Brandeis in terms of awe.

Finally, as ever, we are indebted to Grier Stephenson for keeping us up to date on recent historiography. The interest in the Court never seems to wane—which is fortunate for all of us—and Grier performs an invaluable service in his efforts to sort out the books in front of us.

As always, enjoy!

The Internal Security Acts of 1798: The Founding Generation and the Judiciary during America's First National Security Crisis

ARTHUR H. GARRISON

It is a truism that a nation must protect itself from internal enemies as well as foreign threats of aggression and invasion. But that is not the entire matter. Our American democracy has striven, with mixed success, to be careful that the justified ends of the American experiment—freedom, justice, and the rule of law—are not sacrificed on the altar of the means to protect these ends.

On the eve of the Civil War, Supreme Court Justice Samuel Nelson wrote in *Durand v. Hollins* that the "great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving."[1] Thomas Jefferson wrote in 1810, after leaving the Presidency, that "[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself... thus absurdly sacrificing the end to the means."[2] Abraham Lincoln, in total agreement, rhetorically asked in 1861, "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"[3] But James Madison cautioned us against accepting the idea that the end justifies the means. During the Virginia debate on the ratification of the Constitution in June 1788, he observed, "Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."[4] Eternal vigilance against the folly of the sacrifice of the civil liberties of the minority to secure the freedom of the majority should not to be taken lightly,

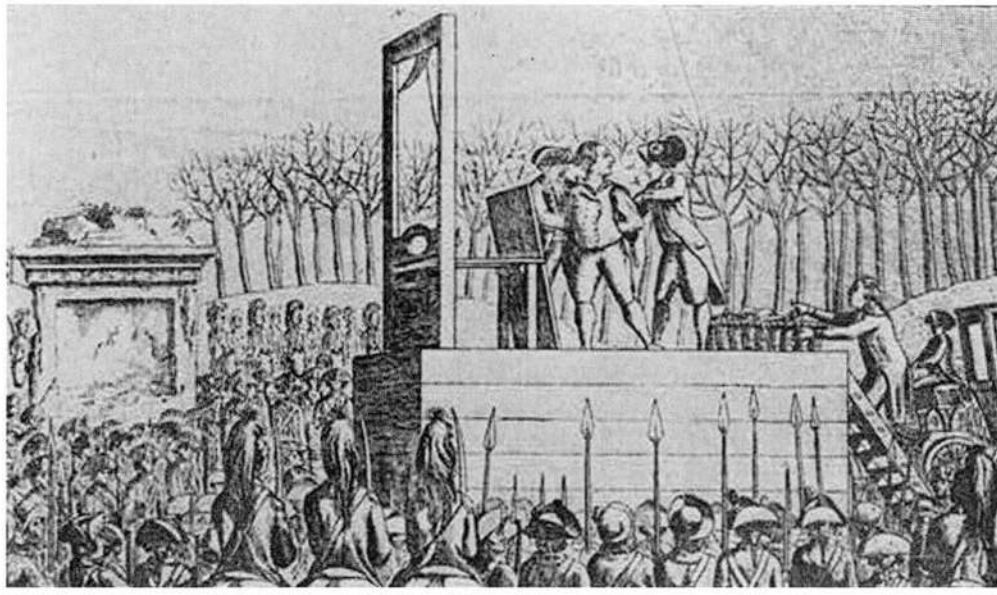
because "if men were angels, no government would be necessary [and if] angels were to govern men, neither external nor internal controls on government would be necessary."[5] In 1755, Benjamin Franklin warned with equal eloquence that "[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[6] Paradoxically, history has vindicated all four men as correct.

In times of war and national-security threats, laws are always passed to protect the nation from internal and external threats in order to safeguard the nation. The correctness of such action is never seriously debated by serious people. But what are the limits of those laws? What rights can and have been sacrificed—or, to be more historically correct, *whose rights have been sacrificed*—in order to safeguard the nation is and always has been a bone of serious contention in law, history, and politics. The first time that Americans dealt with this question was during the period between 1790 and 1800, when war between the great powers of France and Britain threatened both the independence and the economic viability of the United States. It was a time when French invasion was seriously feared, and when vocal disagreement with the policies of the Federalists was considered tantamount to treason in the eyes of many Americans. It was this conflagration of threats to national security, foreign interference in domestic politics, and political rivalries between the Federalists and the Republicans, headed by Jefferson, that gave birth to the Internal Security Acts of 1798 and the eventual "Revolution of 1800" in which the Federalists lost power and never recovered it.

The Internal Security Acts of 1798: Historical Background

The Federalists feared that the Republicans were American Jacobins and little more than a fifth column with the goal of destroying the republic. The Republicans saw the Federalists as elitists who, if left unchecked, would reduce the republic to an American version of a British monarchy, at worst, or an oligarchy, at best. The debate between the Federalists, intellectually and politically led by Alexander Hamilton, and the Republicans, led by Jefferson, was more than a difference of opinion on domestic and foreign policy. Each had a specific view of what the American republic was and felt that the other was a national security threat to that republic. Leaving aside the question of whether, in fact, the Republicans were Francophiles or the Federalist were elitists (at best) or monarchists (at worst), the question we will explore is how the founding generation reacted to the first national security threat to the nation and the lessons learned.

By 1792, the war between France and Great Britain had begun. In April 1793, President George Washington issued a proclamation that the United States would remain neutral in the conflict. Not only did his action cause great consternation on the part of Madison and Jefferson, but the failure of the United States to honor the treaty of alliance with France caused hostilities between the United States and its Revolutionary War ally. During the same month that Washington issued the proclamation of neutrality, the new French Minister to the United States, Edmond Genet, arrived to enthusiastic applause in South Carolina. The French Revolution was seen by many, including Jefferson, as the next step in the evolution of the freedom of man from the tyranny of the church and the monarchies of Europe. Genet systematically sought to use popular support for the French Revolution and the Declaration of the Rights of Man of 1789—the purported equal and successor to the Declaration of Independence—to influence the American government to enter the war on the side of the French. Not only was he actively propagandizing the virtues of the Revolution, he was also actively undermining Washington's neutrality proclamation by supporting privateers to raid British ships, enlisting American crews to support French



Arriving in Charleston in 1793, French Minister Edmond Genet set out to use the American people's sympathy for the ideals of the French Revolution to persuade the government to enter the war on the side of the French. Pictured is a French illustration of the beheading of Louis XVI in 1793.

commerce, and plotting with Americans to harass the possessions of Spain in Florida and Louisiana.[7]

The actions by Genet fanned the general belief by President Washington and the Federalists that there were plotters within the United States to subvert the United States and its government.[8] The growing fear of subversion, both organized and supported by internal and external forces of France, was fostered by the events of the Whiskey Rebellion of 1794. With a force of 13,000 men, Washington personally marched into Pennsylvania and put down the insurrection against the enforcement of a whisky tax that had a disproportionate impact on Scottish and Irish merchants. It was believed by the Federalists that the Republicans, supported by France, had instigated the revolt against the national tax.

The Federalist fears of internal forces threatening their administration and the republic itself—to them, synonymous terms—were supplemented by the outcry against John Jay's treaty and peace with England. In addition to the support for the French Revolution, there was great support for war with Great Britain because of British raiding of American shipping and the impressment of American sailors. In an effort to avoid war with Great Britain, Washington sent Jay to negotiate a peace treaty settling long outstanding issues between the two nations. In November 1794, a treaty was signed, and it was submitted to the Senate in June 1795. In essence, Jay's treaty maintained the peace and ended British occupation of Western lands, but it did not recognize the right of freedom of American commerce on the seas or end the impressment of American sailors. As a result, it had very little wholehearted support from the Federalists and very strong Republican opposition. Despite its limitations, however, it was ratified by the Senate on June 24, 1795 by a vote of 20 to 10, just meeting the two-thirds required by the Constitution.[9] On April 30, 1796, the House of Representatives appropriated funding for the implementation of Jay's treaty by an even closer vote of 51 to 48.

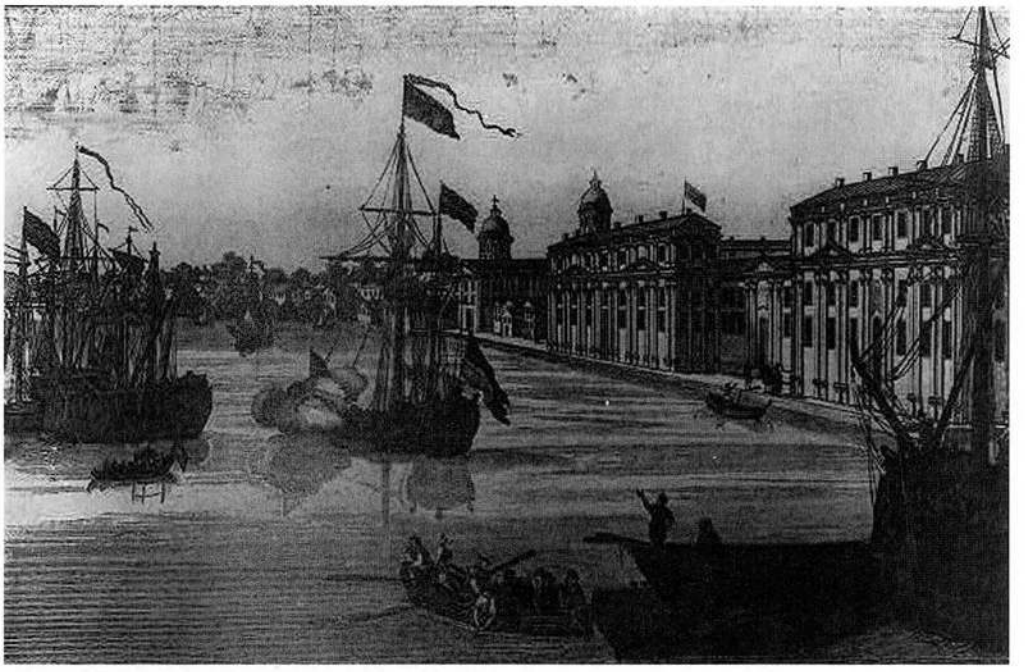
With the United States making peace with Britain, the French increased attacks on American ships. Such was the situation when John Adams took office as President in March 1797.

By the summer of 1797, the Federalists were advocating for war with France. Secretary of State Timothy Pickering had reported to Congress on June 21, 1797 that the French had captured 316 American merchant ships in the previous eleven months. The Republicans, fearing that a war with France would strengthen the Federalists in the 1800 elections specifically and would increase the power of the national government generally, were completely opposed to any actions against France. Although Hamilton and other Federalists wanted war, President Adams did not. In October 1797, he sent a delegation to France in an effort to negotiate a peace. When Charles Pickering, John Marshall, and Elbridge Gerry were informed by three agents representing French Foreign Minister Charles-Maurice de Talleyrand that a tribute was required before they would be received, however, the peace mission failed. President Adams so informed Congress in March 1798. Marshal and Pickering returned home to a national celebration in June 1798[10] in which crowds yelled "millions for defense, but not one cent for tribute."

The Republicans openly questioned why the delegation had failed and demanded an explanation. Jefferson and the Republicans were sure that the peace mission had failed due to Federalists' duplicity. While Adams had the diplomatic proof of the requested bribe, Jefferson did not. By a vote of 65 to 27, the Republicans in the House demanded full release of all of the diplomatic letters regarding the mission.[11] Adams published the diplomatic letters from the delegation and created an almost complete reversal of the public opinion that had supported France. These events, known as the XYZ Affair, left the Republicans in the position of appearing disloyal, rather than simply being on the wrong side of foreign-policy debate.[12]

Further adding to fears of external threats of invasion, in February 1798 the French attacked a British ship in Charleston Harbor and implemented a new policy of attacking all neutral ships that conducted trade with Great Britain. Congress quickly enacted a series of laws allowing for the raising of a regular army, the authorization and creation of the Department of the Navy, the creation of the U.S. Marine Corps, the ordering of four additional warships for the naval department, the unilateral abrogation of the 1778 treaty of alliance with France, and the authorization of privateers and public vessels to attack French ships attacking or otherwise interfering with American commerce.[13] The Quasi-War was in full operation, and between 1798 and 1800 the U.S. Navy captured eighty-five French ships.

With the advent of the Quasi-War with France, internal political battles further added to the national security fears of the Federalists. During this period there was a new wave of immigration from France and other European nations and the Federalists feared that these new immigrants were supporters of the French Revolution and a threat to order and liberty. The new immigrants were also feared as a potential voting bloc of support for the Republicans, who were still supporters of France and opposed Federalist calls for war. In addition to fearing the growth of political support of the Republicans by the increasing number of foreign aliens, the Federalists feared that if France invaded, these foreign aliens would provide support to an invading French army. Republican newspapers were full of attacks on both the policies of the Federalists and their virtues. Federalist fears were further amplified by the Republican failure to support increased military preparations—not to mention their opposition for war itself—in the face of French military, economic, and diplomatic assaults. If the Republicans supported the existence of their nation, Federalist papers asserted, they would not oppose the actions of the Federalists. In the eyes of the Federalists, the failure of the Republicans to support the Adams administration, in general, and their opposition to the military preparations of the Federalists, in particular, was proof of Republican support for the enemies of order, freedom, and justice.



During the Quasi-War against France between 1798 and 1800, the U.S. Navy captured eighty-five French ships. Pictured is a French artist's drawing of American ships in the Philadelphia harbor.

The meddling of the French in the American elections of 1796, France's support of Jefferson in the first election between Adams and Jefferson, the increase of immigrants considered supportive of the Republicans, the XYZ Affair, the military and economic attacks of the French against American commerce, and the long-growing political and philosophical divide between the Federalists and Republicans all came to a head in the summer of 1798, when the Internal Security Acts were passed.

The Internal Security Acts of 1798: It's Not as Simple as "Thou Shalt Not Speak Ill of President Adams"

The Internal Security Acts were designed to address the presence of enemy and friendly aliens in the country if war occurred with France, and the prevention of what the Federalists considered slanderous and seditious actions designed to bring the Adams administration into disrepute, which they believed was synonymous with attempts to bring down the government of the United States itself. Although it may seem ridiculous at best and tyrannical at worst to equate Republican political attacks on the public policies of the Adams administration with wholesale treachery and treason, Federalist political theory did not make so easy a distinction.[14] The Federalist theory of government held that the people chose their leaders, and that public attacks upon the character and judgment of those leaders were attacks on that process of choice and opposition to those chosen to govern. To the Federalists, opposition to policy was, in fact, opposition to the structure and process of the constitutional governmental system, a threat to order, and a call for anarchy. To oppose the government was to oppose the people.

Republicans had a different philosophical view of the American political system. They held the view that the process of democracy did not end with an election. To the Republicans, democracy involved public confidence,

not simply public participation in elections. Under Republican theory, an election was a statement of public opinion at one point in time. That support for and confidence in those elected to government could change between election cycles, and the questioning of elected public officials demonstrated not evidence of disloyalty to the Constitution, but fidelity to it, by requiring those elected to maintain public confidence and thus maintain the sovereignty of the people over the government.

Although Hamilton and the Federalists believed in liberty and government of the people, they envisioned such a government based on a meritocracy, rather than on a completely free and open participatory democracy of the people, because they feared the unleashed power of the mob. Hamilton developed his aversion to the work of a politically whipped-up mob and its capacity for violence at the very early age of 21. In 1776, while he was still a student at King's College (now Columbia University), a mob broke onto the campus demanding to take the president of the college, Dr. Myles Copper, into the night in order to tar and feather him due to his support of the British. Hamilton faced down the mob, arguing with them that to do such violence to Copper was a disgrace to the cause of liberty and to the honor of the Revolution.[15] His intervention allowed Copper to escape with his life, which Copper acknowledged in the July issue of the *Gentlemen's Magazine*.[16] The experience developed in Hamilton the view that liberty is only ensured through the assurance of law and order.[17] The acts of violence by the Sons of Liberty, including the tarring and feathering of Tories and British customs officers during the revolutionary period, the French Revolution of 1789 and Robespierre's reign of terror[18] that followed in 1793–1794, convinced Hamilton and the Federalists that the passions of less educated men could be raised and unleashed to produce mobs of violence and the fall of the rule of law and reason.

The Federalists feared an unleashed press because it had the power to publish incendiary words and thus bring the government into disrepute and initiate violent revolution and the destruction of the still new and fragile United States. This aversion to the licentious behavior of the press was lamented by Attorney General Charles Lee in 1797, when he wrote the Secretary of State:

Attorney General Charles Lee (pictured) feared that an unleashed press with the power to publish incendiary words could threaten the destruction of the still-new and fragile United States.

> With respect to national concerns among ourselves, as well as with respect to foreign nations, our presses have been unlimited and unrestrained. If on those subjects the liberty of the press can be excessive, or carried to licentiousness, it must be admitted that, in many instances, licentiousness of the press has prevailed in our country. It is important that this subject should be understood, when it is considered that the public mind is in a great degree formed by the press, and that the public opinion is in a great measure directed by the press.[19]

The Bostonians Paying the Excise Man 1774. **This picture captures the tarring and feathering of Boston Commissioner of Customs John Malcolm a few weeks after the Boston Tea Party. The victim was stripped of his clothes and had hot tar poured on his back, chest, and legs before being rolled in feathers. Although not a regular occurrence in the colonies, this method of mob violence was used to intimidate supporters of the British during the revolutionary period and became infamous when Samuel Adams and the Boston Sons of Liberty used it to prevent the enforcement of the Stamp Act of 1765 by British Customs Officers.**

It was this fear of the licentious press,[20] guided by philosophical views of human nature and the nature of democracy, as well as political motives to isolate and defeat the Republicans in the 1800 elections, that produced the Internal Security Acts of 1798. The Naturalization Act was passed on June 18, 1798. The Alien Act was passed on June 25, 1798. The Alien Enemies Act was passed on July 6, 1798. And the flagship of the Internal Security Acts, The Sedition Act was passed on July 14, 1798.

The Naturalization Act increased the number of years of residency required before citizenship could be granted from five to fourteen years. The Alien Act made it "lawful for the President of the United States, at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States." Under the Alien Enemies Act, in the event of "a declared war between the United States and any foreign nation or government, or [if] any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens,[21] or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies."

Section 1 of the Sedition Act, which made it unlawful to impede the lawful execution of the laws or those who are responsible for their execution, received no serious opposition.[22] The Alien Enemies Act was also less offensive than other parts of the Internal Security Acts, since it focused on aliens of a nation with which the United States was at war. The Alien Enemies Act, one of the two Internal Security Acts without an expiration date, is still law today.[23] The Alien Act, which authorized the President, on his own determination, "to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States," encouraged the Republicans in their belief that the Federalists were attempting to take the powers of a monarch for the national government and thus violate the freedoms protected by the Constitution. But the seeds of the fall of the Federalists and the consternation of history are found in Section 2 of the Sedition Act. Section 2 made it unlawful to

> write, print, utter or publish, or . . . cause or procure to be written, printed, uttered or published, or . . . knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government . . .

Conviction under Section 2 carried a penalty of a fine not exceeding two thousand dollars or imprisonment not exceeding two years.

Between 1798 and 1800, twenty-five individuals were arrested under the Sedition Act or under common law or both[24] for slanderously publishing newspapers or pamphlets to bring disrepute upon the President or government of the United States. The first arrest for sedition was of Benjamin F. Bache of the *Aurora*, on June 26, 1798.[25] Although there were twenty-five arrests, only about half of the arrests resulted in trials, all of which resulted in

Vermont Representative Matthew Lyon and Connecticut Representative Roger Griswold fought it out on the floor of Congress in 1798 after trading insults. Lyon was one of twenty-five people arrested under the Sedition Act, which made it a crime to criticize the U.S. government or its leaders. The Act was enacted in 1798 with an expiration date of 1801.

guilty verdicts.[26] The first trial was brought against Matthew Lyon in October 1798, and the last was brought against William Duane in October 1800. With almost complete unanimity, the Sedition Act has been condemned as a political weapon used by the Federalists against the Republicans to maintain power and win the election of 1800. Their failure to win the election, the victory of the Republicans, the advent of Jeffersonian democracy, and the fall of the Federalists as a national party are heralded as vindication of the First Amendment and the American constitutional system. Leaving aside for the moment this judgment of history, how the Sedition Act was enforced and how the judiciary interpreted and applied the Act is of separate interest. Although the Supreme Court never addressed the constitutionality of the Act, two of the Justices of the Court, while on circuit, handled some of the most famous trials under the Act. Although the Justices did not provide a definitive ruling on the constitutionality of the Act, they enforced the Act with a presumed approval of its constitutionality.

The Internal Security Acts of 1798: The Judiciary and the Sedition Trials

In the trial of Matthew Lyon, a sitting Congressman from Vermont, Lyon was indicted for publishing a letter in the *Spooner's Vermont Journal* in which he asserted that

> [a]s to the Executive . . . whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice; when I shall behold men of real merit daily turned out of office, for no other cause but independency of sentiment; when I shall see men of firmness, merit, years, abilities, and experience, discarded in their applications

> for office, for fear they possess that independence, and men of meanness preferred for the ease with which they take up and advocate opinions, the consequence of which they know but little of—when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate.[27]

During his campaign for Congress in 1798, Lyon read the letter in various speeches.[28] For the implication that under the Adams administration "the public welfare [was] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice" and that men of quality were discarded in favor of men who acted and advocated with little knowledge of what they were saying and doing, Lyon was indicted for publishing the letter with the intent to "stir up sedition, and to bring the President and Government of the United States into Contempt."[29] Witnesses were called and testified that Lyon had made these statements "in public and private [and] had extensively used the letter for political purposes, and in doing so had frequently made use of language highly disrespectful of the administration."[30] Lyon, acting as his own attorney, asserted that the letter was drafted before the passage of the Sedition Act, that the statements in the letter were innocent in publication, and that his statements were true.[31] Lyon also argued to the jury that the Sedition Act was unconstitutional and that his words were mere words of political opposition and not sedition.

Justice William Patterson, presiding over the trial with District Judge Samuel Hitchcock, instructed the jury on two aspects of the law. Justice Patterson asserted to the jury that the constitutionality of the Sedition Act was not theirs to consider. "You have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law. Congress has said that the author and publisher of seditious libels is to be punished.... The only question you are to determine is... Did Mr. Lyon publish the writing... [and d]id he do so seditiously?"[32] Since Lyon had openly admitted the writing of the letter, Justice Patterson informed the jury that the first question of authorship "is undisputed... As to the second point [regarding whether the publication was seditious,] you will have to consider whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the President and the government, and bring them both into disrepute."[33] The jury found Lyon guilty within an hour of being released to deliberate.

Before imposing sentence, Justice Patterson admonished Lyon that "as a member of the federal legislature, you must be well acquainted with the mischiefs which flow from an unlicensed abuse of government," and that his actions were such that if a fine alone was imposed, the sanction would provide support for the view that such actions could be implemented with impunity.[34] Justice Patterson sentenced Lyon to four months in prison and fined him $1,000 and the costs of the trial.

Two years later, Justice Patterson charged the jury in the trial of Anthony Haswell that the Sedition Act allowed for the defense of truth but "unless the justification came up to the charge, it was no defense. Here it was for the jury to determine whether the violent language applied to the marshal as descriptive of his treatment of Colonel Lyon, had been sustained by the evidence. If it had not, no defense had been made out."[35] Haswell had published in his newspaper, the *Vermont Gazette*, a scathing editorial describing Jabez Fitch, the U.S. Marshal holding Lyon, as "a hard-hearted savage." The editorial in part was as follows:

> To the enemies of political persecution in the western district of Vermont:
>
> Your representative [Lyon] is holden by the oppressive hand of usurped power in a loathsome prison,

> deprived almost of the right to reason, and suffering all the indignities which can be heaped upon him by a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims. But in spite of Fitch [the marshal] and to their sorrow... the month of February will arrive, and with it bring liberty to the defender of your rights.[36]

In the conclusion of his instructions to the jury, Justice Patterson explained that if they believed "beyond a reasonable doubt, that the intent was defamatory, and the publication was made, they must convict. Nor was it necessary that the defendant should have written the defamatory matter. If it was issued in his paper, it is enough."[37] Haswell was convicted, sentenced to two months in jail, and fined $200.00.

A month before Justice Patterson conducted the trial of Anthony Haswell, Justice Samuel Chase finished presiding over one of the more famous sedition trials, the trial of Thomas Cooper.[38] Cooper was a lawyer and scientist who immigrated to the United States from England in 1794. He later became the editor of the Northumberland County, Pennsylvania *Gazette* and aligned himself politically with the Republicans.[39] Between April and June 1799, Cooper published various articles attacking Adams and the Federalists.[40] But it was his farewell address that put him on the Federalist radar screen. In his address, he proposed himself to be the President "and then listed party measures he would follow if he wanted to increase executive power at the expense of the governed.... Cooper declared that if he were a usurping President, he would first undermine the Constitution either by expanding its grants of power... or by explaining away the plain and obvious meaning of its words.... His chief weapon would be laws against libel and sedition, which would serve as legal fences to protect the sanctity of government officials."[41] He wrote that through the use of sedition laws, he would brand all those who disagreed with him "as dangerous and seditious, as disturbers of the peace of society, and desirous of overturning the constitution [so as to] suppress all political conversation."[42] His address was reprinted in the chief Republican newspaper, the Philadelphia *Aurora*, on July 12, 1799.[43]

On November 2, 1799, Cooper published a handbill in response to an anonymous letter that was published in the Reading *Weekly Advisor*. The letter asked if the Thomas Cooper who had published various letters against President Adams was the same Thomas Cooper who had, in 1797, applied for a government post in the Adams administration, and who had stated in that application that he shared the political views of the President—and the same Thomas Cooper who had not received appointment to that post.[44] Clearly, the anonymous letter was intended to imply that Cooper was a hypocrite and a jilted applicant for a political post, not a man of principle. Cooper published his handbill within a week of the anonymous letter. His response formed the basis for his indictment under the Sedition Act.[45] After presenting these facts to the jury, he concluded:

> Nor is it true that my address originated from any motive of revenge. Two years elapsed from date [of my application], before I wrote anything on the politics of this country.... Nor do I see the objection to taking any fair means of improving my situation. This is a duty incumbent on every prudent man who has a family to raise....
>
> Nor do I see any impropriety in making this request of Mr. Adams. At the time he had just entered into office. He was hardly in the infancy of political mistake; even those who doubted his capacity, thought well of his intentions. He had not at that time given the public to understand that

To the PUBLIC.

TO THE PRINTER.

Republican newspaper editor Thomas Cooper's arrest under the Sedition Act led to the publication of this anonymous broadside questioning whether Cooper was a man of principle or a hypocrite and a jilted applicant for a political post.

he would bestow no office but under implicit conformity to his political opinions. He had not declared that "a republican government may mean anything"; he had not yet sanctioned the abolition of trial by jury in the alien law, or entrenched his political character behind the legal barriers of the sedition laws. Nor were we yet saddled with the expense of a permanent navy, or threatened under his auspices with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace, while the unnecessary violence of official expressions might justly provoke a war. Nor had the political acrimony which still poisons the pleasures of private society, been fostered by those who call themselves his friends.... Mr. Adams had not yet... interfered, as President of the United States to influence the decisions of a court of justice. A stretch of authority which the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy!...

Most assuredly, had these transactions taken place in August 1797, then President Adams would not have been troubled by any request from Thomas Cooper.[46]

At his trial before Justice Chase, Cooper presented himself to the jury, proclaiming that he had "published nothing which truth will not justify. That the assertions for which I am indicted are free from malicious imputation, and that my motives have been honest

and fair."[47] Acting as his own lawyer, Cooper argued to the jury that "the law requires it to be proved... that the passages for which I am indicted should be false and scandalous, and published from malicious motives."[48] Cooper maintained that he could not be found guilty for publishing a political assessment of the President's performance of his public duties if no implication of improper motives were made.

As to the motive of the handbill, Cooper explained to the jury that it was birthed as a result of the release of information regarding his letter to the President, supported by a reference letter as to his character by Dr. James Priestley, requesting appointment to a federal post.[49] It was the publication of his application by supporters of President Adams, with the support of the President—since only he could have released the information about the application—that fostered the need to produce the handbill. Cooper argued to the jury that the anonymous letter and the publication of his application had "founded the base and cowardly slander which dragged me in the first instance before the public in vindication of my moral and political character, and has at length dragged me before this tribunal, to protect, if I can, my personal liberty... [The handbill] is not a voluntary, but an involuntary publication on my part. It has originated, not from motives of turbulence and malice, but from self-defense; not from a desire of attacking the character of the President, but of vindicating my own."[50]

To the first article of the indictment, that his statement that the President "was hardly in the infancy of political mistake" and that such a statement was seditious, Cooper sarcastically asked, "[H]ave we advanced so far on the road to despotism in this republican country, that we dare not say our President may be mistaken? Is a plain citizen encircled [with] political infallibility the instant he mounts the Presidential chair?... I know that in England the king can do no wrong, but I did not know till now that the President of the United States had the same attribute."[51] To his backhand compliment to the President that "even those who doubted his capacity, thought well of his intentions" rose to the level of sedition and libel, Cooper asked, "Is it a crime to doubt the capacity of the President?... Those who voted for his opponent must have believed Mr. Adams' inferior capacity to that gentleman.... If it be a crime thus to have thought and thus to have spoken, I fear I shall continue in this respect incorrigible."[52] To the third assertion in the indictment, that the nation had been "saddled with" a navy, Cooper asserted that it was an objective fact that the nation had a navy to support and that the creation of the navy had the support of the President. Cooper concluded, "[I]f the assertions I have made are true, whatever the motives of them may be, you cannot find me guilty.... I have, in the very outset of the paper, spoken well of the President. I have been in the habit of thinking his intentions right, and his public conduct wrong."[53]

In his charge to the jury, Justice Chase immediately let it be known that he considered Cooper guilty. Rather than starting with an explanation of libel, slander, or sedition, the Justice opened his remarks by stating that when "men are found rash enough to commit an offense such as [Cooper] is charged with, it becomes the duty of the government to take care that they should not pass with impunity."[54] Explaining why men who voiced policy disagreement with the President were guilty of committing "false, scandalous and libel against the President." Justice Chase echoed the Federalist theory of government:

> If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government. A republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press.... The legislature of this country, having this maxim, has thought proper to pass a law to check this licentiousness of the press.[55]

After explaining to the jury that it must be proven that Cooper intended to defame the President by his handbill and that his intent was to bring him into contempt and disrepute in the eyes of the American people, Chase asserted that the charge was proven by the statement of lack of confidence in the President alone. As Chase explained, the seditious language was established by negative assessments of the President's performance. In this, the Federalists could not have achieved a more expansive view of the Sedition Act. Chase explained to the jury:

> Shall we say to the President you are not fit for the government of this country? It is no apology for a man to say, that he believes the President to be honest, but that [he] has done acts which prove him unworthy the confidence of the people, incapable of executing the duties of his high station, and unfit for the important office to which the people have elected him.
>
> [S]peaking of the President in the following words: "Even those who doubted his capacity, thought well of his intentions." This [Cooper] might suppose would be considered as a compliment... but I have no doubt that it was meant to carry a sting... for it was in substance saying of the President, "you may have good intentions, but I doubt your capacity."[56]

After reviewing charges made by Cooper that the President "saddled" the country with a navy, encouraged the establishment of a standing army, and borrowed money at too high a price, Chase explained that such charges needed to be punished, because they were "made not only against the President, but against yourselves who elect the House of Representatives, for these acts cannot be done without first having been approved of by Congress."[57] Chase's point was that Cooper claimed the President had done these things, but he could not have done so—thus the false and seditious action—because an act of Congress is required for the establishment of a navy and army and the borrowing of money.

> There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government. Therefore, to say, that under the auspices of the President, we were saddled with a standing army, was directly calculated to bring him into contempt with the people, and excite their hatred against him...
>
> This publication is evidently intended to mislead the ignorant, and inflame their minds against the President, and to influence their votes on the next election.[58]

As a lawyer, Cooper knew that Congress—not the President—raises the army and the navy. Thus, he had written and published falsehoods in order to bring disrepute to the President by claiming that the President acted outside of his constitutional authority, thus violating the law. This is how prosecutions under the Sedition Act were conducted: political exaggeration or hyperbole formed acts of libel and sedition, because the statements were technically false or were exaggerations of a truth that could not be sustained in their exaggerated form.

In another example of criminalizing political hyperbole, Cooper asserted that the President had interfered with a judicial proceeding and delivered Jonathan Robbins, an American citizen, to Great Britain for a "mock trial of a British Court martial" for a murder on a British ship.[59] Cooper, Chase explained, had published his account of the case, stating the "case [is] too little known, but of which the people ought to be fully apprised before the election, and they shall be." As Chase

explained to the jury, "Here, then, the evident design of [Cooper] was, to arouse the people against the President so as to influence their minds against him on the next election. I think... this... proves, that [Cooper] was actuated by improper motives to make this charge against the President. It is a very heavy charge, and made with intent to bring the President into contempt and disrepute, and excite against him the hatred of the People of the United States."[60] What was false and scandalous, Chase explained to the jury, was that by treaty the President was required to deliver Robbins upon formal request by Great Britain. Thus, Cooper's statement that Adams delivered Robbins without precedent in law or mercy was factually false. As a lawyer, Cooper knew—or should have known—that, by treaty, the President acted within the rule of law, not outside of it. As to the charge of interference with the judiciary, Chase explained that a federal district judge had heard the evidence to establish that Robbins had committed the murder, and that the judge allowed the transfer. Rather than being interfered with in his judicial duty, the judge "was the instrument made use of by the President to ascertain [the] fact"[61] of the legality of delivering Robbins to the British. Chase, rhetorically, asked the jury "Was this, then, an interference on the part of the President with the judiciary without precedent, against law and against mercy; for doing an act which he was bound by the law of the land to carry into effect...?"[62]

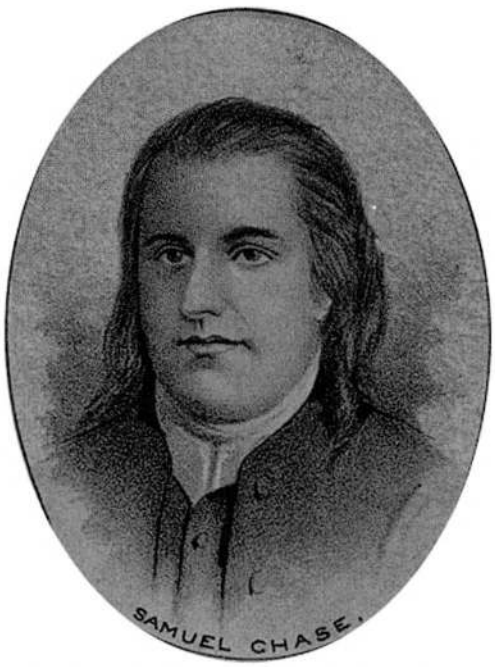
Chase expanded that the burden of proof was on Cooper to "prove every charge he has made to be true..."[63] after the prosecution had established falsehoods in the statements made by him. In other words, once the prosecution had shown that the words of Cooper were technically or factually wrong, Cooper must prove each of them true. Further, according to Chase, the burden of proof was both specific and general. Chase explained that all of the statements individually and collectively must be proven true. If any of Cooper's statements were found to be false, or if the entire publication was found to have some false statements, Cooper's defense of truth would fall. "If he fails, therefore, gentlemen, in this proof, you must then consider whether his intention in making these charges against the President were malicious or not."[64] Under such an application of the Sedition Act, Cooper could not have been found anything but guilty. With political statements subjected to the test of technical truth and, when found to be technically false, found also to be, by definition, libel and seditious and thus, by definition, made with malice, Chase had effectively guaranteed a guilty verdict. The jury found Cooper guilty, and Chase sentenced him to a fine of $400, six months' imprisonment and a surety of $2,000 for good behavior.[65]

In the trial of James Callender,[66] one of the more famous sedition trials, Justice Chase further elaborated on the enforcement of the Sedition Act and the burden of proof. He informed the counsel for the defense that under the law,

> The United States must prove the publication, and the fallacy of it. When these are done, you must prove a justification, and this justification must be entire and complete, as to any one specific charge; a partial justification is inadmissible.[67]

Callender's trial was the only sedition trial in the South[68] and Chase was determined to prove that the law could and would be enforced in the Republican-supported South.[69]

Callender was one of the most "vitriolic of the Republican journalists,"[70] who was encouraged and financially supported by Jefferson.[71] Callender had long been on the Federalists' radar. It was Callender who published *History of the United States for 1796*, in which he accused Hamilton of corruption by implying that Hamilton indulged in what today would be called insider trading of stocks.[72] Callender, as did Jefferson, knew that Hamilton was making secret payments, not to commit illegal speculation with federal funds,



Sedition cases were brought to silence vocal opposition to President Adams and the Federalist Party. The way Justice Samuel Chase (pictured) interpreted the Sedition Act all but guaranteed convictions.

but to pay blackmail due to his affair with Maria Reynolds. As a result of Callender's assertion that Hamilton was stealing public funds, Hamilton published a pamphlet admitting to the affair—proving it by publishing the love letters from the affair—and to the blackmail.[73]

Along with various articles published in the *Aurora*, Callender published *The Prospect Before Us* in 1800, in which he stated that President Adams "has never opened his lips, or lifted his pen without threatening and scolding . . . to culminate and destroy every man who differs from his opinion."[74] It was his publication of *The Prospect Before Us* that led to his indictment. Callender wrote that the Adams had contrived the war with France, created a standing Army and Navy and levied large, oppressive taxes.[75] Callender asserted that the election of 1800 was "between Adams, war and beggary, and Jefferson, peace and competency."[76] He continued his attack on Adams, asserting that the "object of Mr. Adams was to recommend a French war, professedly for the sake of supporting American commerce, but in reality for the sake of yoking us into an alliance with the British tyrant."[77] If these words were not enough to bring the wrath of the Federalists down on Callender's head, his summation of the election of 1800 was: "You will choose between that man whose life is unspotted by crime, and that man whose hands are reeking with the blood of the poor . . . ."[78]

The publication of *The Prospect Before Us* occurred in early 1800. By March 1800, the book had found significant publication outlets and had survived Federalist attempts to block its publication in Philadelphia.[79] Having moved to Virginia and feeling safe, Callender challenged the Federalists in an article published in the Richmond *Examiner* on May 9, 1800, stating "If the author has affording room for *an action*, do prosecute him. But do not take such pitiful *behind the door measures* in order to stop the circulation of the truth."[80] The Federalists took the challenge and indicted him on May 28, 1800 for his writings in *The Prospect Before Us*.[81]

The trial became a national sensation, described by the case reporter as a "contest . . . between the Republican lawyers of the Virginia bar and Judge Samuel Chase, the most reckless, the most partisan, the most fearless judge on the bench of the Circuit Court. . . . [A] struggle to the death between himself and the [three] distinguished lawyers which Virginia had sent against him."[82] Just coming off of the Cooper trial and the second treason trial of John Fries,[83] Chase was ready to prove that in the Old Dominion, the law would be obeyed.[84] Although the Virginians and Republicans supported Callender, "what became of Callender was of little consequence,"[85] for his case had become a symbol of resistance against the Federalists, the national government, the Federalist judiciary, and the Sedition Act, rather than an actual trial over his guilt, because to "read his book . . . and say the writer was not guilty of sedition was impossible."[86]

The trial began on July 3, 1800, with the defense requesting a continuance for additional time to prepare for a defense. Justice Chase refused, and he also rejected a defense strategy of arguing to the jury that the Sedition Act was unconstitutional. In the course of the legal propositions made by the defense and the responses from the bench, Chase made three rulings of interest to the law. One did not survive the fall of the Sedition Act, another has become a truism in criminal law and procedure, and the remaining ruling foreshadowed a subsequent Supreme Court decision that would institutionalize the Supreme Court as a coequal branch of government and the final determiner of constitutional law.

George Hay, one of Callender's defense attorneys, asserted that the purpose of the seditious libel "was to punish a man, not for abuse nor for erroneous deductions or opinion, but for facts falsely and maliciously asserted."[87] The defense requested time to prepare witnesses and counsel for arguments before the court, asserting that only the statements made by Callender that were "susceptible of direct and positive evidence" could be judged in regard to libel, and that "everything else was opinion" and opinion could not form a charge of sedition and libel.[88] Hay asserted to the court that the distinction of opinion from fact is significant because opinion, by definition, cannot be measured by direct evidence. As an example, Hay explained that

> [t]he circumstances to which the writer might allude, and which satisfied his mind that Mr. Adams was intemperate and passionate [when the President said in a speech that the Republicans were] "dangerous and restless men misleading the understanding of well-meaning citizens, and prompting them to such measures as would sink the glories of America, and prostrate her liberties at the feet of France" would only prove to a man of different political complexion, that he was under the influence of a patriotic, honest and virtuous sensibility. This was a question of opinion only, and therefore was open to endless discussion.[89]

Justice Chase would have none of the idea of making a distinction between fact and opinion. He answered,

> Must there be a departure from common sense[?]... This construction admits the publication, but denies its criminality. If [Callender] certainly published that defamatory paper, read it and consider it. Can any man of you say that the President is a detestable and criminal man? [Callender] charges him with being a murderer and a thief, a despot and a tyrant! Will you call a man a murderer and a thief and excuse yourself by saying it is but mere opinion—or, that you heard so? Any falsehood, however palpable and wicked, may be justified by this species of argument. The question here is, with what intent [Callender] published these charges? Are they false, scandalous, and malicious, and published with intent to defame? It is for the jury to say, what was the intent of such imputation, and this is sufficiently obvious.[90]

After losing on having the jury stricken and requesting additional time to secure various witnesses who could provide testimony to support the charge made by Callender that the President had changed his political views over time and that he was an aristocrat, the defense proposed that they be allowed to assert to the jury that the Sedition Act was unconstitutional and thus void of effect. William Wirt argued to the jury that its power to determine the constitutionality of the Sedition Act had been developed through the common law of England and maintained in Virginia law, and

was enforceable in the present case.[91] Wirt argued to the jury that

> a jury in a court of the state would have a right to decide the law and the fact, so have you. The Federal Constitution is the supreme law of the land; and a right to consider the law, is a right to consider the Constitution. If the law of Congress under which we are indicted, be an infraction of the Constitution, it has not the force of a law, and if you were to find [Callender] guilty, under such an act, you would violate your oaths.[92]

Justice Chase was incensed by this assertion and ordered Wirt to take his seat during his argument to the jury. "If I understand you rightly," Chase said, "you offer an argument that the petit jury, to convince them that the statute of Congress . . . is contrary to the Constitution of the United States, and, therefore, void. Now I tell you that this is irregular and inadmissible."[93]

Both the defense and Justice Chase knew that this proposition would be made in court, and both were prepared. Upon invitation to make a formal argument supporting his proposition, Wirt asserted that the jury was "sworn to give their verdict according to the evidence; if the jury have no right to consider the law, how is it possible for them to render a general verdict?"[94] Philip Nicholas, the third attorney for Callender, provided a more detailed defense of the proposition that juries have the power to declare a law unconstitutional.

> First, it seems to be admitted on all hands, that, when the legislature exercises a power not given them by the Constitution, the judiciary will disregard their acts. The second point, that the jury have a right to decide the law and the fact, appears to me equally clear. In the exercise of the power of determining law and fact, a jury cannot be controlled by the court. The court have a right to instruct the jury, but the jury have a right to act as they think right; and if they find contrary to the directions of the court, and to the law of the case, the court may set aside their verdict and grant a new trial.
>
> From this right of the jury to consider law and fact in a general verdict, it seems to follow, that counsel ought to be permitted to address a jury on the constitutionality of the law in question; this leads me back to my first position, that if an act of Congress contravene the Constitution of the United States, a jury have a right to say that it is null, and that they will not give the efficacy of a law to an act which is void in itself; believing it to be contrary to the Constitution, they will not convict any man of a violation of it. If this jury believed that the Sedition Act is not a law of the land, they cannot find the defendant guilty.[95]

Invoking the values of the Fifth and Sixth amendments, Nicholas continued his arguments by asserting that

> [t]he Constitution secures to every man a fair and impartial trial by jury, in the district where the fact shall have been committed: and to preserve this sacred right unimpaired, it should never be interfered with. If ever a precedent is established, that the court can control the jury so as to prevent them from finding a general verdict, their important right, without which every other right is of no value, will be impaired, if not absolutely destroyed. Juries are to decide according to the dictates of conscience and the laws of the country, and to control them would endanger the right of the most invaluable mode of trial. . . . I do not deny the right of the court to determine the law, but I deny the right of the court to control the jury. . . .

> The act of Congress to which I have alluded, appears to have given to the jury the power of deciding on the law and the fact; and I trust, that when this whole question comes into consideration, the court will suffer the counsel for [Callender] to go on to speak to the jury, subject to the direction of the court.[96]

Hay concluded the arguments by asserting that "the jury have a right to determine every question which is necessary to determine, before sentence can be pronounced upon [Callender.]"[97] He asserted that the jury has the power to determine if the statements made by Callender are false, scandalous, malicious, and libel. He also announced that he intended to "convince the jury that [Callender's statements are] not a libel, because there is no law in force, under the government of the United States, which defines what a libel is, or prescribes its punishment. It is a universal principle of law, that questions of law belong to the court, and that the decision of the facts belongs to the jury; but a jury have a right to determine both the law and fact in all cases."[98]

In a prepared written opinion, Justice Chase ruled that "the petit jury have no right to decide on the constitutionality of the statute" that Callender was charged for violating, because such an action would "usurp the authority entrusted by the Constitution of the United States to this court."[99] Thus, the court would not allow the defense to make an argument to the jury that they had a right to decide on the constitutionality of the Sedition Act. Justice Chase's opinion included a detailed discussion of judicial review that was echoed three years later in the seminal case of *Marbury v. Madison*,[100] which established the power of the Supreme Court and the federal judicial department to declare an act of Congress unconstitutional.

In his charge to the jury, Chase rejected the proposition that the right of the jury to decide the outcome of the case based on the facts included the right to determine if there is any law to apply to the facts in first place.

> It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law. To decide what the law is on the facts, is an admission that the law exists. If there be no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them.
>
> The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not.... Was it ever intended, by the framers of the Constitution, or by the People of America, that it should ever be submitted to the examination of a jury.... I cannot possibly believe that Congress intended, by the statute, to grant a right to a petit jury to declare a statute void. The man who maintains this position must have a most contemptible opinion of the understanding of that body; but I believe the defect lies with himself.[101]

Chase then explained that Congress could not have given the jury the right to declare an act of Congress unconstitutional, because it has no such power to do so: "by the Constitution (as I will hereafter show), this right is expressly granted to the judicial power of the United States."[102] The Justice explained to the jury that it "never was pretended, as I ever heard, before this time, that a petit jury in England... or in any part of the United

States ever exercised such power."[103] Having entered the Jeffersonian, Republican-held, freedom-loving, liberty-conscious, African-slave-trading, future capital of the Confederacy, Chase commented that he had to enter the City of Richmond to hear the "contemptible opinion of the understanding" of the law that a jury can determine the constitutionality of a statute in open court. "I declare that the doctrine is entirely novel to me, and that I never heard of it before my arrival in this city. It appears to me to be not only new, but very absurd and dangerous, in direct opposition to, and a breach of the Constitution."[104] Two hours after the court released the jury to their deliberations, they returned with a verdict of guilty in which Callender was sentenced to a $200 fine and nine months imprisonment.

The Callender case is best known for how Justice Chase handled the Virginia defense team, which eventually withdrew from the case in protest of Chase and the political firestorm[105] that the case produced. It is not well remembered for its affirmance of the principle that the role of the jury is to apply the law to the facts of the case to determine the guilt or innocence of the accused, but that it does not have the power to make determinations of the law itself. The determination of the law is for the court to make, and the court's determination of the law is obligatory on the jury. More significantly, although the court and the defense disagreed on the issues of the power of the jury, both were in complete congruence on the power of the judiciary to declare an act of Congress unconstitutional. Although Chief Justice John Marshall's decision in *Marbury v. Madison* is given credit for the establishment of judicial review, the Callender case makes clear that the principle of judicial review did not originate with Marshall, and that *Marbury v. Madison* was not a novel decision in 1803.[106]

But Callender's conviction was no help to the Federalists in 1800. Rather than decreasing publications of pamphlets and articles attacking the Federalists, it helped increase them.[107] None of the sedition trials resulted in what the Federalists had hoped for. In the end, the Federalists lost the elections of 1800 for the House and Senate, as well as the Presidency. It is clear from a review of these cases that sedition charges were brought to silence vocal political opposition to President Adams and the Federalist party. And Justice Chase and his interpretation of the Sedition Act all but guaranteed convictions on such charges. Callender's attorneys were correct that there was a difference between political opinion and objective facts, and that the Sedition Act, as applied, punished both.

As the Federalists in Congress have received the consternation of history, so has the Federalist judiciary.[108] Although the Supreme Court never formally ruled on the constitutionality of the law, the Federalist Bench supported and enforced the law in various trials. To be balanced, however, the error of the judiciary lay, not in its failure to declare the law unconstitutional, but in how the trials were conducted: the practical reversal of the burden of proof from the government to the defendant, how evidence of sedition was introduced, how sedition was proved to juries, and the irregularities of how juries were empanelled. These facts aside, history has judged the Sedition Act as an unconstitutional violation of the First Amendment. Although today, more than a century later they certainly would be, in the eighteenth century, the ability of the government to outlaw and punish seditious libel was at the very worst open to debate as permissible under the American constitution and at best an accepted practice under English common law and western governmental theory.

The Internal Security Acts of 1798: Hindsight Does Not Make Them Unconstitutional

Eighteenth-century law accepted the notion that a government had the legal right to protect itself against seditious libel and that punishment of such libel was required to protect the government against the fostering of rebellion. *Blackstone's Commentaries*, the predominant legal text and explanation of English common

law and Western legal traditions, made clear that seditious libel was punishable and that such punishment did not violate the freedom of the press.[109] Further, while the question of whether Congress lacked the power to govern the activities of the press was not completely settled, many held it to be settled that the government had the right to, the power of, and the responsibility for self-protection, under specific clauses of the Constitution or under the inherent powers thereof.[110] Madison disagreed and argued that the First Amendment provided an absolute denial to Congress of any power over the press or power to criminalize libelous attacks in the press, because no such power was "express[ly] delegated, and if it be not both necessary and proper to carry into execution an express power—above all, if it be expressly forbidden by a declaratory amendment to the Constitution—the answer must be that the Federal Government is destitute of such authority."[111] The Federalists answered that the Constitution did not say Congress shall make no law respecting the press, as it did with the exercise of religion. The First Amendment only stated that Congress shall not abridge the liberty of the press. Thus, the Federalists argued, Congress was not specifically proscribed from addressing seditious libel in the press.[112] Directly citing Blackstone, the Federalists argued that

> the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published . . . [E]very freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he published what is unlawful, mischievous, or illegal, he must take the consequences of his own temerity. To punish . . . dangerous or offensive writings . . . of a pernicious tendency, is necessary for the preservation of the peace and good order of government and religion, the only foundation of civil liberty.[113]

The Federalists argued that Blackstone's view of the law in regard to seditious libel and the ability to prosecute the press for such action was not voided by the passage of the First Amendment.[114] In 1794, answering a formal question from the Secretary of State on the legality of the prosecution of a New York newspaper for libeling the British Ambassador, Attorney General William Bradford wrote, "I am of the opinion that those paragraphs are *prima facie* libelous, and [may] be made . . . the subject of a *criminal* prosecution. . . . To represent in the public prints such an officer as a contemptible person . . . is, no doubt, a publication that may be made the subject of legal prosecution."[115] In 1797, Attorney General Charles Lee, answering a similar question by the Secretary of State regarding libel of the Ambassador of Spain, justified the submission of the incident for the prosecution of the editor of the newspaper. Citing Blackstone, Lee explained that the law of libel prohibited "malicious defamation of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule."[116] Although he considered the letters published by the editor to be libelous, he explained that "[a]s yet, in the United States, the line between the freedom and the licentiousness of the press has not been distinctly drawn by judicial decision."[117] Citing Lord Mansfield for the proposition "that the liberty of the press consists in printing without previous license, subject to the consequence of law" Lee concurred with Mansfield that under the law, there is "no infringement of the liberty of the press to bring a printer before the tribunal of justice to answer for his publications:—if innocent in themselves, he will not be punished; if otherwise, the injury should be redressed."[118]

This understanding of the law was advocated as settled under state law during the debates over the passage of the Sedition Act.

As one Congressman argued, "in the several states... the legislators and judicial departments of those States had adopted the definitions of the English law, and had provided for the punishment of defamatory and seditious libels."[119] Madison answered by asserting that the Blackstone description of the law was not consistent with the nature of the constitutional system of limited powers. Nor were Blackstone's views consistent with the inherent understanding that the government was not infallible and was subject to constant review by the people, as elected representatives of them for the purpose of governance. More importantly, Madison explained that protection against prior restraint alone was no protection to the operation of the press, because "a law imposing penalties on printed publications would have similar effect with a law authorizing a previous restraint on them. It would be a mockery to say that laws might not be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."[120] On this point history has made Madison the victor, for his warnings of a "chilling effect" found resonance in the landmark Pentagon Papers case in 1971.[121]

Although it did not do so uniformly, the Federalist judiciary generally upheld the view that the federal judiciary had the authority and jurisdiction to punish offenses under federal common criminal law,[122] which included seditious libel. In the case of *United States v. Worrall*,[123] which involved an allegation of attempted bribery of Tench Coxe, the Commissioner of the Revenue, Philadelphia Circuit District Judge Richard Peters, held that

> Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary, and an inseparable, concomitant. But the existence of the Federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the State tribunals, or the offenders must escape with absolute impunity. The power to punish misdemeanors, is originally and strictly a common law power; of which, I think, the United States are constitutionally possessed. It might have been exercised by Congress in the form of a Legislative act; but, it may, also, in my opinion be enforced in a course of Judicial proceeding. Whenever an offence aims at the subversion of any Federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this Court, by virtue of the 11th section of the Judicial act.[124]

Interestingly, it was Justice Chase who rejected the doctrine of a federal common law for criminal cases. While he supported the enforcement of the Sedition Act of 1798, he did not support the theory that sedition could be punished under common law without a specific act of Congress authorizing the punishment of sedition. Sitting as the Circuit Judge, Justice Chase wrote in the same case that

> ... in my opinion, the United States, as a Federal government, have no common law; and, consequently, no indictment can be maintained in their Courts, for offences merely at the common law....
>
> But the question recurs, when and how, have the Courts of the United States acquired a common law jurisdiction, in criminal cases? The United States must possess the common law themselves, before they can communicate it to their Judicial agents: Now, the United States did not bring it with them from England;

> the Constitution does not create it; and no act of Congress has assumed it. [Although] it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction: but Judges cannot remedy political imperfections, nor supply any Legislative omission. [I]f Congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.[125]

Justice Chase's opinion was not uniformly accepted by his colleagues on the federal bench or even on the Supreme Court at the time.[126] He was vindicated fourteen years later, however, when the doctrine of a federal common law for criminal crimes was formally rejected by the Supreme Court[127] in *United States v. Hudson and Goodwin* in 1812.[128]

Although there was debate on the legitimacy of a federal common-law criminal jurisdiction, the Sedition Act of 1798 settled a separate legal debate in regard to the common law of libel regarding whether truth was a complete defense. The fault of the Bench during the sedition trials lay in how it limited the power of the truth defense to the point of irrelevancy. Justice Chase made it quite clear that once a technical falsehood was established in any part of the speech or writing, the only way truth could be a defense would be if the seditious statements were proved true in their entirety. The error was not in the failure to declare the Sedition Act unconstitutional, because the prevailing legal understanding of freedom of speech allowed for the punishment of sedition against the government. Blackstone's view was regarded as correct through the first two decades of the twentieth century. The error committed by Chase and the federal bench in these cases was the disregarding of the distinction between politically exaggerated opinions and total intentional factual falsehoods with malicious intent—that is, sedition.

The Internal Security Acts of 1798: Some Concluding Observations

What lessons are learned through the Sedition Act of 1798? When a nation is threatened by internal and external threats, its natural inclination is to restrict freedoms and locate enemies, both real and exaggerated.

The Founding Fathers, the authors of the Declaration of Independence, the drafters and ratifiers of the Constitution and the Bill of Rights, found themselves on different sides of the meaning of the First Amendment when they were forced to implement principles of government in the real world, rather than on the pages of newspapers in calm debate. The state of politics presented them with the possibility of sedition, treason, and invasion from the most powerful army in the world. The Federalists were confronted with an opposition party that found intellectual and political sympathy with the government of guillotine. The law was debatable on whether the First Amendment had changed the common-law understanding and legality of the law of seditious libel. The founding generation was faced with divergent theories of the American democratic system and the role of the "people" in a democracy. War—either with France or Britain—was at its door. In 1800, civil war between the states supporting the Federalists and those supporting the Republicans was not an idle possibility.

But the nation held together because both parties supported the Constitution, its principles, and the American experiment.[129] The Federalist lost the election in 1800, governmental power was transferred, and not a bullet was fired, not a head was lost, no army moved, and no mob assembled at the Bastille. The system held.

The events of the sedition trials have been integrated in our political and historical memory and into the meaning of the First

Amendment. Before the Sedition Act and the trials of 1798–1800, the meaning of the First Amendment had not crystallized regarding whether it prevented punishment for what was printed, whether it prevented government intrusion into the actual publishing of the press, or both. The history of the Sedition Act of 1798 initiated, rather than settled, the issue of the meaning of the First Amendment in times of national crisis. The power of the government to punish speech when such speech interfered with government policy in times of war would not be settled for more than a century and a half after the demise of the Sedition Act of 1798.

History has judged the Federalist judiciary harshly for enforcing the Sedition Act, as an example of judicial acquiescence in—if not complicity with—violations of constitutional rights. In defense of the federal judiciary, aside from the fact that the Federalists had a plausible legal and philosophical justification for the passage of the Sedition Act, the judiciary had not yet developed into the institution it would become over the next century and a half. It would be three more years after the demise of the Sedition Act before the Marshall Court would assert its powers of judicial review and the ability to declare an act of Congress unconstitutional. It would be well after the Civil War cases of 1860s that the Supreme Court would fully establish itself as an equal branch of government and the plenary arbiter on the issues of governmental power and constitutional interpretation. In 1798, the federal judiciary was not viewed as and had not yet become the institutional constitutional bulwark against presidential and/or congressional overstepping of constitutional boundaries that it is today. The Supreme Court itself ruled in 1827 that the constitutional system of elections, not judicial pronouncement, was the answer in the event of abuse of power by the President. That year, the Court held that "[t]he remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. . . . [T]he frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."[130] The Supreme Court would not begin to define the meaning of the First Amendment in times of war until the second decade of the twentieth century.[131] And it would be well into the middle of the twentieth century before the federal judiciary and the Supreme Court would be appealed to as the primary branch of government responsible for the protection and defense of individual civil liberties and constitutional rights, in times of peace or war.

ENDNOTES

[1] *Durand v. Hollins*, 8 Fed. Cas. 111, 112 (Cir. Ct. S.D.N.Y. 1860) (Case no 4,186).

[2] Andrew A. Lipscomb and Albert Ellery Bergh, eds., **The Writings of Thomas Jefferson**, vol. XII (Washington, D.C.: The Thomas Jefferson Memorial Association of the United States, 1903) at 418.

[3] Joseph R. Fornieri, **The Language of Liberty: The Political Speeches and Writings of Abraham Lincoln** (Washington, D.C.: Renery Publishing, Inc., 2003) at 581.

[4] Hugh Blair Grigsby, **The History of the Virginia Federal Convention of 1788**, vol I. (Richmond, VA: Virginia Historical Society, 1891) at 130. In his defense of the Constitution, Madison responded to Patrick Henry's assertion that the Constitution was a threat to individual liberty. In his response, Madison acknowledged how the strength of a republic was also its greatest threat. He observed

> I must take the liberty to make some observations on what was said by another gentleman [Henry]. He told us this Constitution ought to [be] rejected because it endangered the public liberty. Give me leave to make one answer to that observation: let the dangers which this system is supposed to be replete with be clearly pointed out; if any dangerous and unnecessary powers be given to the general legislature, let them be plainly demonstrated; if powers be necessary, apparent danger is not a sufficient reason against conceding them. He has suggested that licentiousness has seldom produced the loss of liberty; but that the tyranny of rulers has almost always effected it. Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations. On a candid examination of history we shall find that turbulence, violence, and abuse of power, by the majority trampling

> on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause produced despotism. If we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes. If we consider the peculiar situation of the United States, and what are the sources of that diversity of sentiment which pervades their inhabitants, we shall find great danger to fear that the same causes may terminate here in the same fatal effects which they produced in those republics. This danger ought to be wisely guarded against. Perhaps in the progress of this discussion it may appear that the only possible remedy for those evils, and the means of preserving and protecting the principles of republicanism, will be found in that very system which is now exclaimed against as the parent of oppression.

Id .at 130–31.

[5]**Federalist Papers**, no. 51.

[6]Benjamin Franklin, "Pennsylvania Assembly: Reply to the Governor, November 11, 1755," in Leonard W. Labaree, ed., **The Papers of Benjamin Franklin**, vol. 6 (Yale University Press: New Haven, Conn., 1960) at 2412.

[7]Armin Rappaport, **A History of American Diplomacy** (Macmillan: New York, 1975).

[8]Marshall Smelser, "George Washington and the Alien and Sedition Acts," *The American Historical Review* 59(2) (January 1954): 332.

[9]The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Constitution, Art. II, Sec. II, Clause II.

[10]James Morton Smith, "Background for Repression: America's Half-War with France and the Internal Security Legislation of 1798," *Hunting Library Quarterly* 18 (November 1954): 37.

[11]David McCullough, **John Adams** (Simon & Schuster: New York, 1971).

[12]Richard Shenkman, **Presidential Ambition: How the Presidents Gained Power, Kept Power, and Got Things Done** (Harper Collins: New York, 1999).

[13]Congress created the Department of the Navy on April 30, 1798. On May 3, Washington was called back to command the American military (the War Department and the newly created Department of the Navy). Alexander Hamilton received a commission of general and second-in-command of the American military under Washington. Acts passed by the United States Congress during the Quasi-War included "An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof" on June 13, 1798; "An Act to Authorize the Defense of the Merchant Vessels of the United States against French Depredations" on June 25, 1798; "An Act to Declare the Treaties Heretofore Concluded with France, no Longer Obligatory on the United States" on July 7, 1798; "An Act Further to Protect the Commerce of the United States" on July 9, 1798; "An Act for Establishing and Organizing a Marine Corps" on July 11, 1798; and "An Act to Amend the Act Entitled 'An Act to suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof'" on July 16, 1798.

[14]The Federalists attacks on Republicans as being disloyal for their opposition to the foreign policy of the Federalists in the face of internal and external threats are not unlike the attacks of Republican commentators on Democrats soon after the terrorist attacks on September 11, 2001 and attempts by Democrats to temper the suggested domestic policies of President Bush. As history and scripture observe, there is noting new under the sun.

[15]*American Experience*, "Alexander Hamilton" (television broadcast, May 14, 2007), Brighton, MA: WGBH Educational Foundation.

[16]Nathan Schachner, "Alexander Hamilton Viewed by His Friends: The Narratives of Robert Troup and Hercules Mulligan," *The William and Mary Quarterly* 4(2) (April 1947): 203–25.

[17]*American Experience*, "Alexander Hamilton" (television broadcast, May 14, 2007), Brighton, MA: WGBH Educational Foundation.

[18]Arthur H. Garrison, "The Theory and Application of Terrorism: A Review of Historical Development," in Brett Bowden & Michael T. Davis, eds., **Terror: From Tyrannicide to Terrorism** (Brisbane: University of Queensland Press, 2008) at 21–41.

[19]1 **Opinion of the Atty. Gen.** 71, 72.

[20]When in the history of the press has opinion and fact ever been purely separated? One man's sedition is always another man's truth; thus a "political" truism—that there has never been a time when the press was not despised for what it prints. In politics, the "bias" of the press is completely in the eye of the person whose ox has been gored. Conversely, the press is "unbiased" and is doing its job in the eye of the person witnessing his enemy's ox being gored and whose own ox is praised or left alone.

[21]Today we would call this a legal resident alien.

[22]Thomas Carroll, "Freedom of Speech and of the Press in the Federalist Period: The Sedition Act," *Michigan Law Review* 18 (May 1920): 615.

[23]The Alien Enemies Act (official title: "An Act Respecting Alien Enemies") was enacted with no expiration date and remains in effect as 50 U.S.C. §§ 21–24. The Naturalization Act (official title: "An Act to Establish a Uniform Rule of Naturalization") was enacted with no expiration date but was repealed in 1802. The Alien Friends Act (official title: "An Act Concerning Aliens") was enacted with a two-year expiration date. The Sedition Act (official title: "An Act for the Punishment of Certain Crimes against the

United States") was enacted with an expiration date of March 3, 1801.

[24]Geoffrey R. Stone, **Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism** (W.W. Norton & Company: New York, 2004); James Morton Smith, **Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties** (Cornell University Press: Ithaca, N.Y., 1956); Frank Maloy Anderson, "The Enforcement of the Alien and Sedition Laws," *Annual Report of the American Historical Association* 1912: 115–26.

[25]*Id.*

[26]*Id.*

[27]"The Trial of Matthew Lyon for a Seditious Libel, Vergennes, Vermont 1798," 6 *American State Trials* 687 (October 1798): 690.

[28]Stone at 49.

[29]"The Trial of Matthew Lyon" at 690.

[30]*Id.* at 691.

[31]*Id.*

[32]*Id.* at 693.

[33]*Id.*

[34]*Id.* at 694.

[35]"The Trial of Anthony Haswell for a Seditious Libel, Windsor, Vermont 1800," 6 *American State Trials* 695 (May 1800): 699.

[36]*Id.* at 696.

[37]*Id.* at 699.

[38]"The Trial of Thomas Cooper for Seditious Libel, Philadelphia, Pennsylvania 1800," 10 *American State Trials* (April 1800): 774.

[39]Stone at 54.

[40]Smith at 308.

[41]*Id.*

[42]*Id.*

[43]*Id.* at 309.

[44]*Id.* at 312–13.

[45]"The Trial of Thomas Cooper for Seditious Libel" at 774.

[46]*Id.* at 782–83.

[47]*Id.* at 786.

[48]*Id.*

[49]*Id.* at 790.

[50]*Id.*

[51]*Id.* at 790–91.

[52]*Id.* at 791.

[53]*Id.* at 794.

[54]*Id.* at 798.

[55]*Id.* at 799.

[56]*Id.* at 801.

[57]*Id.*

[58]*Id.* at 807.

[59]*Id.* at 803.

[60]*Id.* at 804.

[61]*Id.* at 806.

[62]*Id.*

[63]*Id.* at 808.

[64]*Id.*

[65]*Id.* at 812.

[66]"The Trial of James Thompson Callender for Seditious Libel, Richmond Virginia, 1800," 10 *American State Trials* (May 1800): 813.

[67]*Id.* at 859.

[68]Smith at 334.

[69]Stone at 61.

[70]*Id.*

[71]*Id.*

[72]Smith at 336.

[73]*American Experience*, "Alexander Hamilton" (television broadcast, May 14, 2007), Brighton, MA: WGBH Educational Foundation.

[74]Cited in Stone at 61–62.

[75]*Id.* at 62.

[76]*Id.*

[77]Cited in Smith at 339–40.

[78]*Id.* at 340.

[79]*Id.* at 341–42.

[80]*Id.* at 342.

[81]"The Trial of James Thompson Callender" at 819–21.

[82]*Id.* at 814–15.

[83]It was his judicial performance in the Fries trial that led to the impeachment trial of Chase in 1805. *See generally* William H. Rehnquist, **Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Jackson** (William Morrow & Co.: New York, 1992).

[84]Stone at 61; Smith at 335.

[85]"The Trial of James Thompson Callender" at 814.

[86]*Id. See also* Stone at 62; Smith at 346.

[87]"The Trial of James Thompson Callender" at 825.

[88]*Id.*

[89]*Id.* at 826.

[90]*Id.* at 830.

[91]*Id.* at 862.

[92]*Id.*

[93]*Id.*

[94]*Id.* at 863.

[95]*Id.* at 864.

[96]*Id.* at 854–65.

[97]*Id.* at 866.

[98]*Id.*

[99]*Id.* at 875.

[100]*Marbury v. Madison*, 1 Cranch 137 (1803).

[101]"The Trial of James Thompson Callender" at 869.

[102]*Id.* at 870.

[103]*Id.*

[104]*Id.* at 874.

[105]Smith at 352.

[106]*See* Alexander Hamilton's assertion and defense of judicial review in **Federalist Papers** no. 78.

[107] *Id.* at 358.
[108] Stone at 68.
[109] Carroll at 615.
[110] *Id.* at 624–27.
[111] *Id.* at 628, citing Madison.
[112] *Id.* at 629.
[113] *Id.* at 630–31, citing Blackstone.
[114] *Id.* at 634.
[115] 1 **Opinions of the Atty. Gen.** 52, 52–53 (emphasis in original).
[116] 1 **Opinions of the Atty. Gen** 71, 72.
[117] *Id.* at 72.
[118] *Id.*
[119] Carroll at 632.
[120] *Id.* at 635, citing Madison.
[121] *New York Times v. United States*, 403 U.S. 713 (1971).
[122] Anderson at 120.
[123] *United States v. Worrall*, 2 U.S. 384 (1798).
[124] *Worrall*, 2 U.S. at 395.
[125] *Worrall*, 2 U.S. at 393–94.
[126] Robert von Moschzisker, "The Common Law and Our Federal Jurisprudence: I," *University of Pennsylvania Law Review and American Law Register* 74(2) (December 1925): 109–30.
[127] Gary D. Rowe, "The Sound of Silence: *United States v. Hudson & Goodwin*, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes," Yale Law Journal 101(4) (January 1992): 919–48.
[128] *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812).
[129] Stone at 71.
[130] *Martin v. Mott*, 25 U.S. 19, 31–32 (1827).
[131] Geoffrey R. Stone, **War and Liberty: An American Dilemma, 1790 to the Present** (W.W. Norton: New York, 2007).

Henry Clay and the Supreme Court

JEREMY M. MCLAUGHLIN

I. Introduction

Henry Clay's tombstone reads: "I know no North, no South, no East, no West." This transcendence of boundaries seeped into many aspects of Clay's life, especially his professional career. Clay did not confine his life's work to one area, or even one branch of the nascent government that he held so dear. Undoubtedly, his most significant contributions came from his time spent in Congress. When *Atlantic Monthly* recognized Clay as number 31 out of the top 100 most influential Americans, it described him thus: "One of America's great legislators and orators, he forged compromises that held off civil war for decades."[1] And historians often discuss Clay's executive-branch aspirations as he made multiple unsuccessful attempts for the Presidency. But the contributions Clay made as a lawyer and an advocate before the United States Supreme Court are often overlooked.[2] Often ignoring personal predilections contrary to his argument, Clay was a fierce advocate on behalf on his client and lodged powerful arguments in significant cases.

Clay began his legal career in Kentucky. His mindset of obfuscating geographical boundaries likely stemmed from residing in a Western frontier state. His residency there also gave him the chance to develop expertise in certain areas of law, such as land disputes and banking, which would serve as the basis for a majority of the cases he argued before the Court. Arguing during the first half of the nineteenth century gave Clay the chance to influence substantive areas of developing constitutional law. The principles developed in some of his cases serve as the foundations for cases decided by the Court today.

This paper focuses on this lesser-known portion of Clay's life. To better understand what made him distinctively Clay, I first examine Clay's background and early legal practice. This provides a foundation for understanding both Clay's personality and how his early legal pursuits gave him expertise in areas that would later help him before the High Court. I then touch upon the highlights of his political career and any political aspects that later

had an impact on his Supreme Court practice. Finally, I examine Clay and the Court. After laying out a brief picture of the Court before which Clay argued, I sketch out some advocacy characteristics that can be lifted from various reports of Clay's legal proceedings. All of this leads up to seeing Clay's advocacy animate itself before the Court as I examine his key cases before the tribunal.

II. Early Development

A. Background

Amidst the Revolutionary War, Henry Clay, the seventh of nine children, was born on April 12, 1777.[3] Directly experiencing the war had a profound effect on Clay and undoubtedly contributed to his strong sense of patriotism and aversion to war. Immediately following Clay's father's sudden death, troops attacked "the house of [his] mother, and [ran] their swords into the newly made graves of [his] father and grandfather."[4] Sixty years later, Clay stated that "the circumstance of that visit is vividly remembered, and it will be to the last moment of my life."[5]

Clay was born in Hanover County, Virginia, which locals referred to as the "slashes," connoting its low and marshy soil.[6] As a child, Clay was often spotted riding barefoot on the back of a pony, carrying supplies from the nearby mill back to his family.[7] Thus, he became known as the "Millboy of the Slashes," a term he would use later in life to dramatize being a self-made man.[8] Clay's local trips also took him to places other than the mill—namely, the local courthouse. There he observed renowned Hanover orators, including Patrick Henry, inspiring in him a love for oratory and trips to the field, barn, or forest where he would practice tirelessly to emulate the orators that he observed.[9] Clay later acknowledged that this developmental period was directly responsible for his success in politics (and presumably in the legal field).[10]

Captain Henry Watkins, Clay's stepfather, perceived the talents Clay possessed. Presumably believing it better for him than the move

Henry Clay was the seventh son of nine children born to Reverend John and Elizabeth Hudson Clay. As a small child, he witnessed British troops ransacking the family home in Ashland, Kentucky (pictured).

Clay's early legal career was based in Richmond, Virginia, where he passed the bar in 1797. Pictured is a memorial the city of Richmond erected to honor Clay in 1865, thirteen years after his death.

to Kentucky that the family was about to make, Watkins convinced a friend of his to make a place for Clay as a clerk in the High Court of Chancery at Richmond.[11] Chiding from fellow clerks regarding his "country bumpkin" appearance quickly ceased after Clay proved himself with his sharp retorts, diligent work, and comradeship.[12]

Soon, Clay's work habits and observable intellect attracted the attention of George Wythe, Chancellor of the High Court. Wythe, now nearing seventy, was among the most learned jurists in Virginia and had taught the likes of Thomas Jefferson, John Marshall, and James Monroe.[13] Suffering from rheumatism or gout and unable to write, Wythe sought Clay's assistance as a scribe. As was becoming a common theme in Clay's life, he quickly impressed the Chancellor. For the next four years, Wythe took Clay under his wing as Clay labored through translations of Greek classics and lessons in law, literature, history, and social grace.[14] Wythe also supported Clay in his passion for oratory by encouraging the formation of a debating society for public speaking.[15] This experience greatly honed Clay's oratorical skill and garnered him an impressive reputation in Richmond society.[16] Wythe's final act was to arrange for Clay to study law under the direction of Virginia Attorney General Robert Brooke. After a year of "irregular exertions,"[17] Clay received his bar certification in November 1797 at the age of twenty.[18]

B. Early Legal Practice[19]

After receiving his law license, Clay decided to follow his family to Kentucky, where the legal landscape looked far more promising than the already prestigious bar of Virginia. Shortly after his arrival, he became well known in social circles and joined a debating club.[20] One of Clay's first orations in the club quickly heightened his reputation, as onlookers rose to their feet, cheering his masterful display.[21] Clay was keenly aware of his intelligence, and vanity often got the best of him as he tried to display it for others in a bold and egotistical manner.[22] Nevertheless, recognizing the immense potential in the new lawyer, prominent area attorneys such as John Breckinridge used Clay for assistance on cases.[23]

Within the first couple of years of living in Lexington, Clay met and married Lucretia Hart on April 11, 1799.[24] By all accounts,

Lucretia was not a particularly attractive woman, but she is consistently described as a loyal wife and dutiful mother to the eleven children the couple would have.[25] The marriage also provided Clay with a tremendous asset, as the Hart family was part of the Kentucky upper class.[26]

Once Clay started taking his own cases,[27] they often dealt with criminal matters.[28] His success in these initial cases can largely be attributed to his theatrical powers and his ability to relate to the jury.[29] Glyndon Van Deusen explains that oratorical skills, rather than the rule of law, carried the day in Kentucky courts of the time, and this set a perfect stage for Clay, who did not have a deep grasp of the criminal law.[30] With Clay as counsel, jurors gazed "into a face that could mirror every emotion, and they felt the spell of a voice whose magic subdued the most obdurate heart."[31] Records indicate that out of a random selection of thirty of his earliest cases, Clay lost only one.[32]

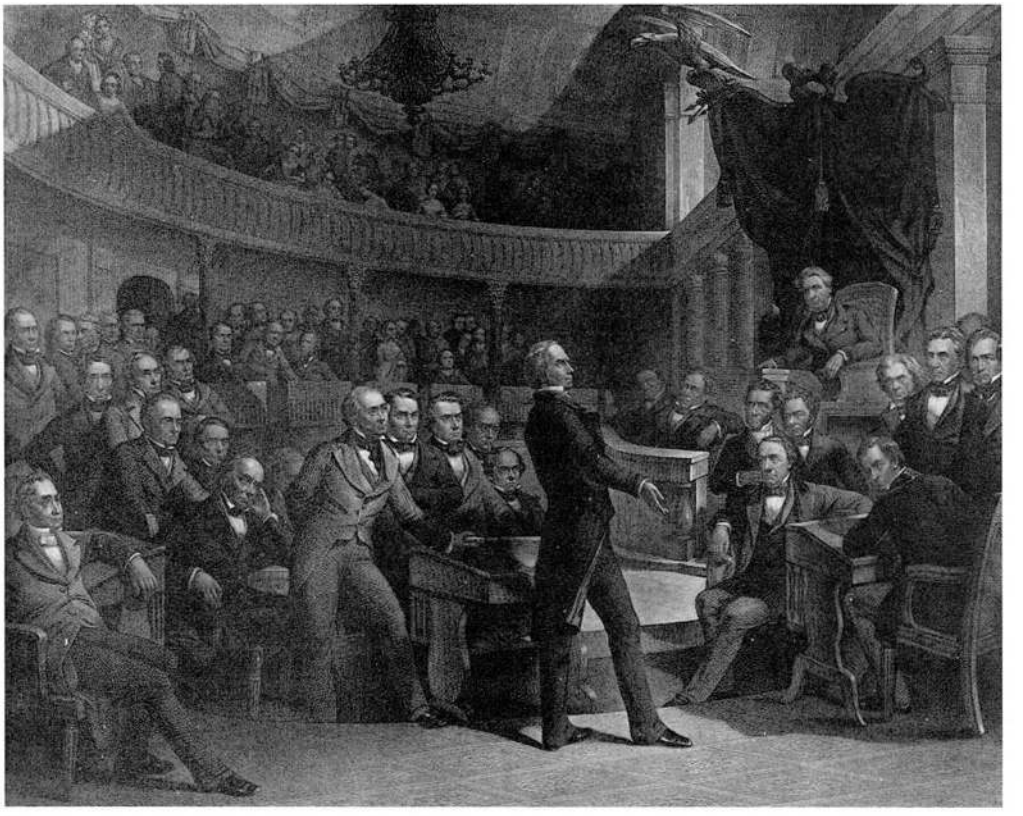
Having risen to the top of the state bar, Clay soon became involved in the myriad of land-dispute cases that plagued the Western frontier.[33] He proved himself extremely apt in handling these disputes, having been personally involved in several,[34] and his unmatched expertise in land issues would later enhance his reputation at the Supreme Court bar.[35] Indeed, years later, after receiving Clay's report on the public lands, Chief Justice Marshall responded that he read it "with attention" and noted that he "concur[red] entirely" with Clay's sentiments and urged that it "be approved by a great majority of Congress."[36]

With Clay's rising popularity and prestige came increased wealth, which brought Clay's less desirable qualities to the forefront. He was known among his contemporaries as an inveterate gambler throughout his life.[37] John Quincy Adams remarked that "'[i]n politics, as in private life, Clay is essentially a gamester,'"[38] and Andrew Jackson commented that Clay was a "'typical western gambler.'"[39] There is also little doubt that Clay was very fond of alcohol and was known for his frequent social romps. But since he was no longer surrounded by Virginia's aristocracy, this common-man behavior only heightened his popularity among the Westerners.[40] Indeed, his popularity was so great that he was elected professor and later trustee of Transylvania University in Lexington.[41] And this was only the humble beginning of his life in elected posts.

C. Political Career

Undoubtedly, Clay is most widely known for his political accomplishments. During his formative years in Lexington, Clay made a name for himself by engaging in debates dealing with the political questions of the day. These helped him carry the day in 1803 when he was elected to the Kentucky legislature, where he served several prosperous years, only to eventually be elected speaker of the lower house.[42] Then, when Senator John Adair resigned his post in the U.S. Senate, the legislature overwhelmingly elected Clay to serve out the remainder of Adair's term.[43]

Clay was sworn into the Senate on December 29, 1806,[44] and his initial trip to Washington was largely unceremonious. He had no ambition to be re-elected to the Senate, preferring the turbulence of the lower house to the "solemn stillness of the Senate Chamber."[45] He wanted to spend this time enjoying the excitement of a new city and to make money; clients had supplied him with three thousand dollars to represent their interests before the U.S. Supreme Court.[46] Nevertheless, Clay, unlike many first-time Senators, did not shy away from delivering rousing speeches on the Senate floor.[47] Moreover, in defending his position, he did not hesitate to use his wit and deliver "biting" responses to his opponents.[48] In keeping with his histrionic style, Clay did not hesitate to use props—such as a handkerchief, eyeglasses, or a snuffbox—to effectively deliver his speeches on the chamber floor.[49] As was typical, Clay made an overall great impression on his colleagues: Senator John



Clay was appointed to the U.S. Senate from Kentucky at age twenty-nine. He was later elected to the U.S. House of Representatives, serving as its Speaker in the Twelfth through Sixteenth congresses. In this picture, Clay addresses the U.S. Senate, with Daniel Webster, his political ally and occasional opponent before the Supreme Court, seated to his left.

Quincy Adams remarked that the "new member from Kentucky . . . is quite a young man—an orator—and a republican of the first fire."[50]

Clay's term expired after one year, and he returned to Kentucky, where he was reelected to the state legislature.[51] Then, in 1810, the legislature again elected Clay to fill out the term of a resigning Kentucky U.S. Senator. Now teeming with goals of higher office, he happily returned to Washington with a more deeply held sense of beliefs: "intense nationalism . . . commitment to government encouragement and support for domestic manufacturers and internal improvements."[52] An "active unionist," Clay also sought to unify the country with the advancement of strong foreign policies.[53] One of Clay's most important arguments during this term was his fierce criticism of rechartering the Bank of the United States (BUS).[54] With the tie-breaking vote of the Vice President, Clay won the debate.[55]

Pleased with his handling of the BUS issue, Kentuckians granted Clay's wish to serve in the lower chamber, electing him to the U.S. House of Representatives in 1811, where he was immediately chosen Speaker.[56] Over the next several years, Clay transformed the Speakership into an unprecedentedly powerful position, as he used it to ensure success for his political will.[57] Even John Randolph, political opponent of Clay's, conceded that the "Speaker of the House of Representatives [had become] the second man in the Nation."[58]

Upon Clay's return to Congress, the country became embroiled in a debate about whether to go to war with Great Britain. Clay

fiercely advocated for President James Madison to take action, delivering some of his most powerful and moving speeches—speeches that made many fear he had eclipsed the administration as the leadership of the party.[59] Towards the end of the war, Clay, already aspiring to be Secretary of State—in his view, a sure way to the Presidency—was given a chance to try his diplomatic hand. Madison sent him as part of the American contingent to negotiate a peace treaty with the British.[60] Despite frequent outbursts between Quincy Adams and Clay, and despite Clay's occasional outlandishly petty behavior, the contingent managed to negotiate the Treaty of Ghent, which, as Clay explained, "certainly reflect[ed] no dishonor on us."[61]

Amidst fervid patriotism, the next political battle Clay faced dealt with an old issue: the national bank. Since the closing of the first BUS, state banks had flourished, causing wide-ranging problems. So, in 1816, Clay reversed his previous position and advocated the rechartering of the BUS, discounting the arguments he had originally advanced to defeat it. As to his previous argument that the Constitution did not provide the authority to create a bank, Clay advanced a theory of constitutional interpretation mostly unheard of for his time: "The force of circumstances and the lights of experience may evolve to the fallible persons charged with [the Constitution's] administration, [demonstrating] the fitness and necessity of a particular exercise of constructive power today, which they did not see at a former period."[62] The Bank began operating in 1817 and would have frequent encounters with Clay. Ultimately, Clay would play a prominent role in its destruction.

Throughout the next several years, Clay busily criticized President Monroe and his foreign policy. In part, this is likely attributable to his disdain at not being chosen Secretary of State.[63] When Speaker Clay became vindictive, little in his path was spared. In delivering a speech harshly criticizing Jackson's military exploits against the Indians in the Southeastern colonies, Clay received shouts, applause, and days of praise after "one of the ablest speeches ever delivered in the House."[64] Unbeknownst to Clay at the time, this speech sparked the beginning of an intense political rivalry and hatred between himself and the future eighth President.

In 1820, much of the political debate surrounded issues of the Missouri Compromise. Clay, of course, had strong views on the slavery question. Though he held an abundant number of slaves, he regarded the institution as the "deepest stain" on the "character of our country."[65] He steadfastly believed that slaves should be slowly emancipated and recolonized in Africa.[66] These are views he had his entire political career, and they likely stemmed from the influence of Wythe, Madison, and Jefferson.[67]

After a three-year retirement from political life, during which Clay worked to improve his finances, he returned to Congress in 1823.[68] His time away from Congress was spent bolstering his legal practice and securing for him some cases that he would argue in the U.S. Supreme Court.[69] But that was not Clay's primary focus. During his time away from political life, he decided it was time to start implementing his burning ambition to be elected President.

The election of 1824 resulted in none of the four candidates—Jackson, Adams, William Crawford, and Clay[70]—having a majority, so the election was thrown into the House of Representatives.[71] Having received the fewest votes, Clay was excluded from consideration and instead had the ironic and "painful duty . . . [of presiding over] deciding between the persons who are presented to the choice of the H. of R."[72] The House voted for Adams as President, despite Jackson having received a majority of the popular vote. Immediately after the election, Adams offered Clay the position of Secretary of State.[73] The political scene roared with accusations of a corrupt bargain between Adams and Clay.[74] Clay's countermajoritarian vote for Adams, coupled with talks of his conspiracy, would

plague him the rest of his life. Future political opponents did not hesitate to reinvigorate these charges, and it is likely this that denied him the office that he so avidly sought: the Presidency.[75] Clay would later admit that his acceptance of the office was the stupidest mistake of his life.[76] At the end of Adams' presidency, Adams sought to bestow continued prominence on his Secretary of State by appointing him to the Supreme Court.[77] Clay, however, turned down the request.[78]

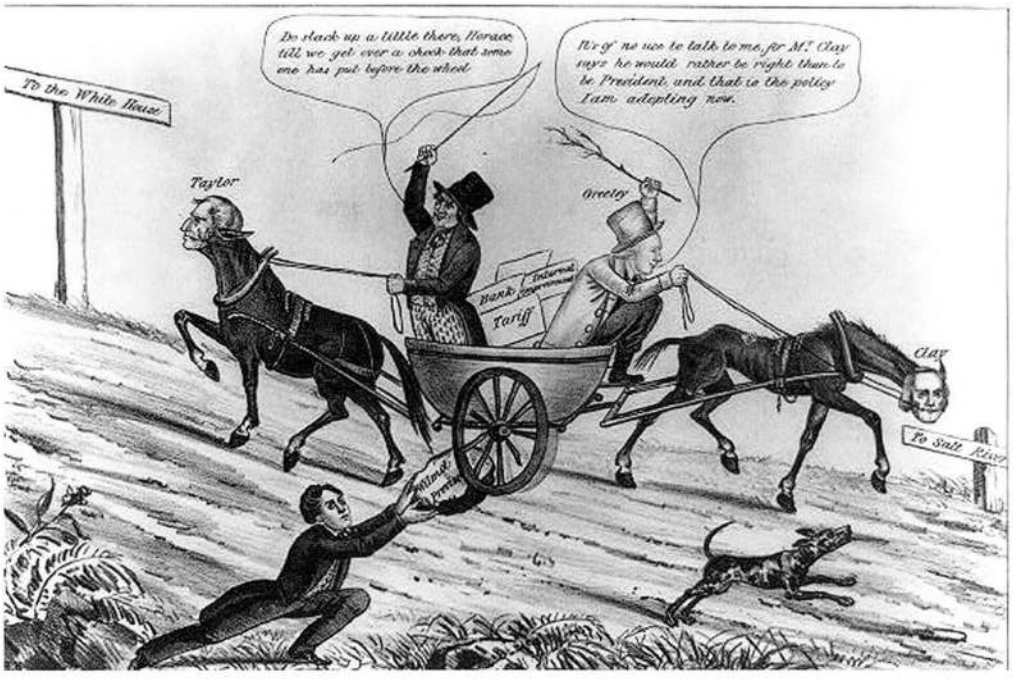
By now, Clay had clearly become a national fixture in American politics. Despite losing presidential elections in 1832 and 1844 and the party nomination in 1840 and 1848, Clay continued to have a prominent political career both in the House and in subsequent elections to the Senate. After the debacle with the election of 1824, the fiercest hatred existed between Jackson and Clay[79]; thus, anti-Jackson tactics defined much of Clay's ensuing career. Indeed, this led to a coalition between Clay and Daniel Webster as they fought against many Jacksonian policies.[80] For example, Webster praised a speech delivered by Clay as "a clear and well stated argument ... certainly at the head of all [Clay's] efforts" and could not countenance that "General Jackson will ever recover from the blow."[81] At times, though, the two oratorical giants did clash and the result was often "one of the great pleasures afforded Washington society during" that period.[82] For example, one of their most widely watched debates dealt with a tariff bill in the Senate. Webster delivered a characteristically moving speech, but he was outdone by the "far superior debater" from Kentucky, who succeeded in passing the bill.[83] Clay himself recognized as much by stating that Webster had "gained nothing" from the debate and that spectators assured Clay that he had "completely triumphed."[84]

A final noteworthy showdown occurred between the Jacksonians and Clay over the issue of, unsurprisingly, the BUS. Jacksonians despised the Bank and saw it as standing for aristocratic monopoly and control. The Bank's charter was to expire in 1836, but, hoping to embarrass the President and defeat his re-election, Clay led Congress in passing a bill rechartering the Bank four years before that date.[85] At the urging of his Attorney General, Roger Taney, however, Jackson vetoed the bill.[86] But the Bank had originally been chartered to exist for four more years. So, again acting on Taney's recommendation, Jackson took action to remove the government's deposits from the Bank, hoping to permanently kill the institution.[87] When Jackson's Treasury Secretary would not comply with his commands, Jackson replaced him with Taney.[88] The "Great Triumvirate" of Clay, Webster, and John C. Calhoun joined forces on the Senate floor, eloquently lambasting the administration for its unconstitutional acts.[89] After a debate of unprecedented length, the Senate rejected Taney's appointment and censured the President.[90]

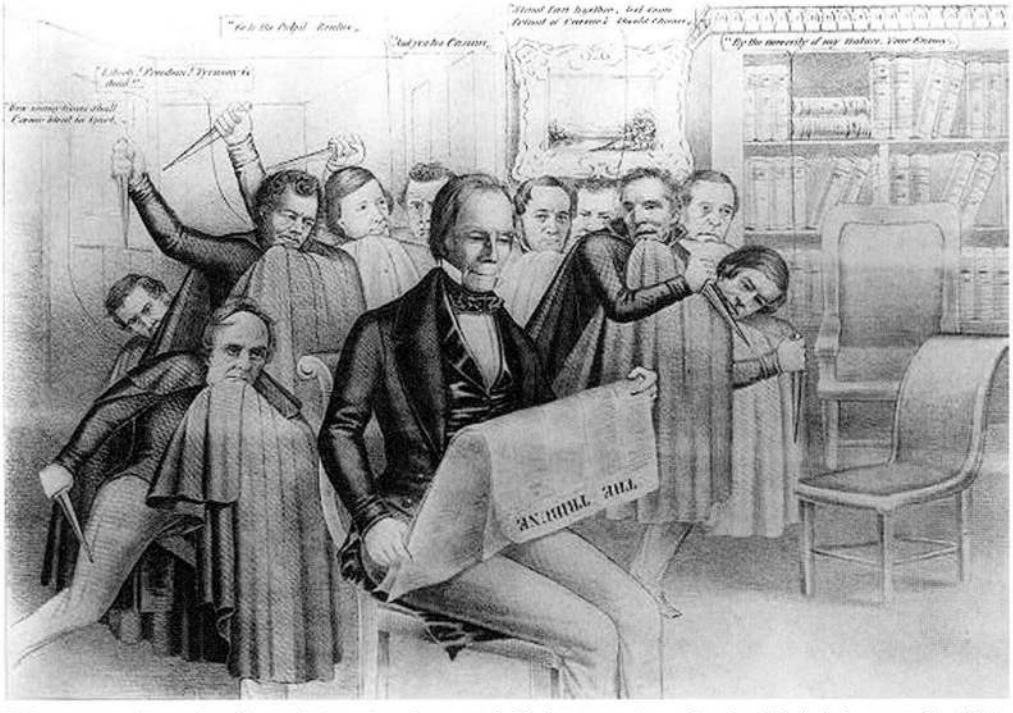
In the aftermath of this intense political showdown, the Whig party emerged with Clay as its leader. The party stood in staunch opposition to Jackson and emulated many of Clay's personal views.[91] Though Clay would never ride his party's ticket to the Presidency, both William Henry Harrison and Zachary Taylor were successful in their efforts.[92]

The strengthening opposition to Jackson did not stop his pursuit of his goals. In 1835, Jackson nominated Taney as an Associate Justice on the Supreme Court, which the Clay-controlled Senate promptly rejected.[93] In 1836, however, with the death of Chief Justice Marshall and with Jacksonian Democrats having seized control of the Senate, Taney was confirmed as the new Chief Justice.[94] Clay would now have to argue several of his cases before a Chief Justice whom he had voted against on multiple occasions.[95]

One of Clay's final political acts, the one for which he is perhaps most famous, granted him the name "Great Compromiser." By the mid-nineteenth century, the United States was consumed with the slavery question and with debating the terms of admittance for several



Clay vied unsuccessfully for the Whig party's presidential nomination in 1848. This cartoon shows Horace Greeley, one of Clay's most influential Northern supporters, driving the party wagon downhill toward political doom (the horse has Clay's face) while Uncle Sam whips a horse with Taylor's face uphill to victory.



This cartoon shows the disappointment and anger of Clay's supporters after he failed to become the Whig party's presidential candidate. He is pictured in his library while treacherous conspirators stalk the unsuspecting statesman.

new states, such as California. Clay's intense love of the Union compelled him to seek a solution amenable to both sides. He presented his solution—which called for eight different resolutions dealing with different aspects of slavery—to the Senate in January 1850.[96] After nearly nine months of intense debate in the Senate, Congress enacted almost all of Clay's resolutions.[97] For the time being, Clay had saved the nation. Indicating the faith that his fellow politicians had in Clay, years later Senator Foote remarked that "'[h]ad there been one such man in the Congress of the United States as Henry Clay in 1860-61 ... there would, I feel sure, have been no civil war."[98]

Superlatives describing the masterful displays Clay delivered on the floors of Congress could fill volumes. Equally prominent among historical material are details of Clay's strong nationalistic views and the positive results of those for the American people. Indeed, serving as a leading statesman during the formative years of the country enabled Clay to play a prominent role in legislation that still has effects today. But Clay did not leave his mark solely in the halls of Congress. It must be remembered that he was, first and foremost, a lawyer. As passionate in his legal arguments as in his political ones, Clay lobbed equally impressive and consequential displays before the Supreme Court.

III. Clay and the Supreme Court

A. Clay's Stage: The Court He Faced

1. The Courtroom

Fortunately for Clay, who often served as a Senator or Congressman while representing clients before the Court, he did not have far to travel for his arguments. For Clay's entire legal career, the Court met in the Old Supreme Court Chamber in the Capitol building. Indeed, this

Known as the "Great Compromiser," Clay helped pass several antislavery resolutions in 1850 that kept the country from going to pieces over divisive issues. Pictured are the politicians who worked on the Compromise of 1850, with Clay sitting to the left of center.

would prove very helpful for Clay's arguments after the 1830 January Term. As of that Term, the Court promulgated a rule that it would begin calling cases for argument based on the order in which they stood on the docket.[99] If counsel were not present or prepared, the case would go to the bottom of the docket absent some satisfactory showing.[100] Clay's proximity to the Court surely helped him prevent his cases from being cast to the bottom of the docket.

The chamber's proximity to Clay was probably its only positive characteristic. Quite the opposite of the Court's awe-inspiring building today, the chamber was cramped and uncomfortable.[101] Fortunately, the bar at this time was quite homogeneous, and thus the advocates were somewhat accustomed to the less than desirable conditions. Three windows behind the counsel table served as the chamber's main source of light, and the low-arched ceiling further hampered conditions.[102] Arguments would typically begin by eleven o'clock, by which time most of the Justices had wandered out to their seats and put on their black robes in the courtroom.[103] For high-profile cases, the lack of seating was obvious, as spectators squeezed beside and around the Justices and attorneys and in the aisles to see the arguments.[104]

The development of the Court rules illuminates a Court that was increasingly relying on written materials for the cases before it. This reliance started in 1795 and would continue through Clay's career. In 1795, the Court demanded a statement with the material points from each side of the case.[105] Twenty-six years later, just before Clay had some of his most significant arguments, the Court heightened this requirement by calling for a "printed brief or abstract" of the case, complete with all the materials and points of law and fact upon which each party intended to rely.[106] Finally, the Court addressed full printed arguments when it noted in 1833 that it would receive such materials if either side chose to submit them, and later instructions provided that if submitted, they would stand on equal footing as if an appearance were made by counsel.[107]

Examination of a few of Clay's more prominent cases raises doubts as to how strictly the Court enforced its rules. Rule 15, promulgated in 1801, explained that where a defendant fails to appear, the plaintiff could nevertheless proceed.[108] It was precisely for the defendant's lack of counsel, however, that Clay got the Court to rehear *Green v. Biddle*.[109] Another rule, promulgated before Clay's rise, provided that only two attorneys could argue for each party in a case.[110] But in just the five cases below, Clay appeared with more than one co-counsel in three of them (*Osborn v. Bank of the United States*, *Ogden v. Saunders*, and *Groves v. Slaughter*).[111]

One rule Clay did legitimately manage to escape was the rule limiting oral arguments to two hours per counsel. That rule certainly would have proved detrimental to the advocate's routine; for example, it took six days to argue *Green v. Biddle*.[112] But this rule was not enacted until 1848.[113] Indeed, this rule would have been detrimental to a majority of the Supreme Court bar at the time. As the rules indicate, there was only a gradual development in the reliance on written materials in the Court. During the practices of the time, written materials were not needed, because oral argument was a principal part of handling business for the Court.[114] The populace of the time strongly supported this, as visitors sought the entertainment of the arguments in the cramped chamber.[115] Given that a solid body of law had yet to develop for the country, references to Blackstone, Coke, and English common law were frequent, alongside references to American volumes of law—for instance, by Joseph Story.[116]

2. The Justices

Two predominant characteristics formed the basis of many appointments to the Supreme Court, especially the Marshall Court: geography and political affiliation.[117] This was a time

when the Court was still struggling to mark its territory on the national scene. It must be remembered, though, that other factors were also still coming to fruition in the country. There was still a good deal of rancor about the group of unelected judges issuing binding judgments, so diversifying the Court's personnel to represent the views of various geographical regions helped validate the Court's ruling. At the same time, various Presidents were determined to see their visions come to pass and thus needed Justices that were sympathetic to their political affiliations. This resulted in a practice similar to today's Court. Advocates knew of the judicial leanings and influence of particular Justices and could advance arguments accordingly. While today's knowledge of the Justices is largely based on their legal writings, Clay and his contemporaries could base their knowledge on a Justice's political conduct, as well as on his geographic roots. These divergent backgrounds produced relatively few sharp divides in the Court's legal expositions, however, due in large part to the unprecedented influence of John Marshall.

In all of Marshall's tenure, there were only three constitutional cases that did not bear his imprint.[118] One of those cases was *Green v. Biddle*, from which Marshall recused himself because of family connections to the matter.[119] In his absence, Clay faced Justices Story, Bushrod Washington, Gabriel Duvall, and Thomas Johnson (two other Justices were ill). From Massachusetts and appointed by James Madison (though he was Madison's fourth choice),[120] the most prominent of this bunch was undoubtedly Justice Story, who was second only to Marshall in terms of judicial influence. Story was indeed unbelievably accomplished, even by modern standards. Among other things, he was a thirty-four–year member of the Court, a sixteen-year professor at Harvard Law School, author of thirteen legal commentaries, and author of several legislative bills.[121] On the Court, Story had generally warm relations with all of his colleagues except Johnson and Henry Baldwin, which helped add to the cohesiveness of the Court.[122] In a case such as *Green*, where Marshall was absent, Story was indeed the Justice whom advocates were hoping to win over.

Both Justices Washington and Johnson were nevertheless prominent members of the Court, if not to the levels of Story and Marshall.[123] Having relatively extensive formal legal training, Washington, like Clay, served under the tutelage of Chancellor Wythe in Virginia.[124] Once on the Court, Washington undertook his duties seriously and sought to strengthen the Court's role. He and Story would often correspond during their circuit duties, keeping each other informed of the cases they had decided and any important matters they saw arising.[125] Washington remained a devout Federalist throughout his career and thus strongly adhered to most of Marshall's opinions for the Court and on the Court's proper role.[126] Johnson, on the other hand, was not a Marshall prototype. This is not surprising, as Johnson was appointed by Jefferson, a man who largely despised the work of Marshall's Court. Johnson certainly dissented more than any other Justice during this time of unprecedented cohesiveness,[127] but he never reached the level of disruption that he sought in halting the efforts of the Court.[128] This fact was much to the dismay of his prime advocate, Jefferson.[129] Perhaps due to his different legal ideologies, or perhaps due to his caustic nature, or perhaps as a result of both, Johnson never developed close ties among his colleagues.[130]

For Clay's next major case, *Osborn v. Bank of the United States*,[131] Marshall heard the case and wrote the opinion. Little can be said in a cursory fashion about Marshall's influence on the Court. Throughout his tenure as Chief Justice, Marshall transformed the national stature and power of the Court. A strong believer in Federalist policies, Marshall not only wanted the Court to become a coequal branch of government, but he also wanted the

Court itself to speak strongly. These goals explain his strong discouragement of separate opinions from the Court. The development of cohesiveness did not come with a lack of cordiality, however.[132] Rather, all accounts emphasize how Marshall's sense of humility, humor, and flexibility helped produce the harmony within the Court.[133]

Justice Thomas Todd, recovering from sickness, also returned to the Court to hear arguments in *Osborn*.[134] Todd was the representative Justice from the West and hailed from Kentucky.[135] In *Osborn*, Todd decided for his fellow Kentuckian, despite the strong opposition against their position from their home state. Nonetheless, Clay could not always find support in his fellow statesman, for Todd was a strong adherent to the Court's consolidationist operations and only dissented from Marshall once on a constitutional issue.[136] So, as was the case for so many Justices, the key to winning Todd's vote was to win Marshall's. Being from Kentucky also helped Todd—and thus the Court—in dealing with the plethora of land-title cases before it, since his prior legal practice had given him much exposure to these issues.[137]

Todd died before Clay's next significant case, *Ogden v. Saunders*,[138] and was replaced by another Kentuckian, Robert Trimble.[139] Though Trimble only served on the Court two years before dying, he played a role in this significant case. Trimble fell in step with most of the Marshall Justices, but he did not hesitate, where his conscience demanded, to part ways with the Chief. In *Ogden*, for the first and only time in his career, Marshall found himself in dissent in a constitutional case. Trimble was among the majority, which issued seriatim opinions.[140] Many of Trimble's contemporaries thought that he would have emerged as a strong voice on the Court had his service not been limited to only a few years by his early death. This is supported by the fact that during the 1827 and 1828 Terms, Trimble was second only to Marshall in issuing majority opinions.[141] In a Court dominated by Marshall and with able jurists such as Story, this was no small feat for a new Justice.[142]

By the time of Clay's next case, *Briscoe v. Bank of Kentucky*,[143] the biggest change in personnel was Taney's assumption of the Chief Justiceship. As discussed above, Clay unsuccessfully put forward no small effort to deny this position to Taney, though he later came to retract his admonitions—whether that retraction was genuine or not.[144] Unlike his predecessor, Taney was a well-known supporter of states' rights and Jacksonian policies. Additionally, in contrast to his predecessor's Court, Taney's Court was an ideologically fractured one.[145] For example, still on the Court was Justice Story, who more than any other embodied the ideals of the prior era.

Few of the Justices that sat for Clay's two major cases during this period are extensively noteworthy. For instance, Justices John McLean and Baldwin are renowned, not for their contributions to the Court, but rather for their political aspirations and interests in matters outside the judicial realm.[146] On the other hand, Justices James Wayne and Philip Barbour did contribute to the Bench.[147] Both of these Justices were decidedly in Taney's camp as defenders of Jacksonian policies and typically ruled in favor of states' rights and against the Bank of the United States.[148] A final noteworthy change occurred in the Court for Clay's last two cases. Due to concern at the growing number of states in which the Justices had to preside as circuit judges, two more seats were added to the Court during Jackson's presidency.[149] Justices John Catron and John McKinley took these two seats, and Clay faced both of them during his arguments in *Groves v. Slaughter*.[150]

During his array of arguments, Clay faced no fewer than sixteen different Justices. Earlier in his career, the Court was typically more cohesive. Gradually, however, divergent opinions arose, and Justices were no longer so concerned about speaking with one voice. For Clay the advocate, this demanded arguments of the highest quality, so that even Justices with

divergent approaches would adopt his position. The details of Clay's advocacy abilities certainly illuminate how he approached the stage before him and garnered a reputation as one of the great advocates of his time.

B. Advocacy Characteristics

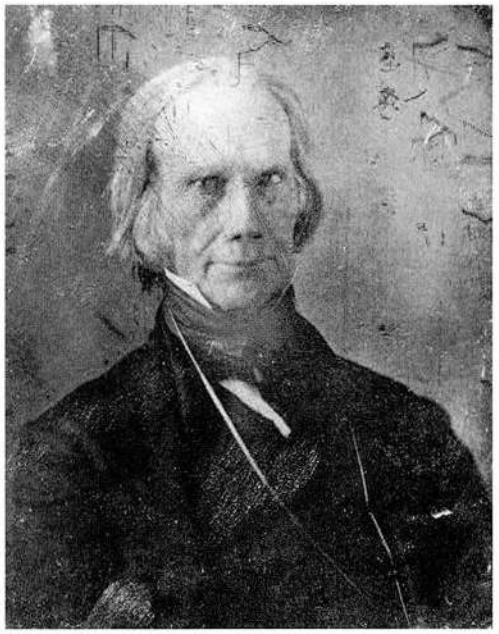
Both in court and on the Senate floor, Clay was a performer. He possessed a supreme ability to "stampede" audiences with the authority of his presentation.[151] When he lodged an argument, the delivery was distinctively Clay. His speaking and advocacy style was different from other great orators of the time. For example, Webster could outmatch Clay in the art of declamation, but Clay would often outshine Webster in the art of debate.[152] Though Webster is rightfully regarded as one of the most prominent advocates before the Court, "[h]e never thundered with the wild vehemence of Clay."[153] Three elements enabled Clay to command respect for his positions: a deep loyalty to his client; the intellectual force of his argument; and, his theatrical yet warm delivery.

Lawyering was Clay's chief source of livelihood. He knew that to succeed, he needed to passionately argue for his clients' interests. And he utilized any means necessary to try and secure a victory for his client. For instance, he ventured to the Virginia legislature to try and secure a compromise for his client in *Green v. Biddle*,[154] and he sought to use his political influence to secure a Court nomination that would advance his client's interest in *Groves v. Slaughter*.[155] In all of his cases, he argued ardently to defeat his opposition. He enthusiastically advanced the merits of his clients' position as if they were his own.[156] Being uncharacteristically modest, Clay once described his own performance in an argument by noting that "his nature was warm, his temper ardent, his disposition enthusiastic."[157] Of course, one would expect this kind of dedication out of any modern lawyer. What makes Clay's unyielding dedication unique is the particular juxtaposition of his political life and his cases.

This was a time when governments and institutions were defining their role in the new republic, and Clay knew that some of his cases would set the direction for the new government. This awesome responsibility did not distract Clay from his lawyerly dedication, however. For example, though Clay once urged Congress not to renew the charter for the BUS, he later helped that same Bank secure victories in the Court, and though he fought politically for strengthening the federal government, he argued for Kentucky's right to enter a contract without congressional approval. Furthermore, from the beginning of his political career, Clay hoped slowly to eviscerate the institution of slavery, but this did not prevent him from winning a case upholding the validity of a sales contract for slaves. In short, though Clay was astutely aware that the political consequences for many of his cases could be adverse to his personal beliefs, an observer in the courtroom with counsel Clay would never know.

Regardless of how well a speech is delivered, it cannot make up for a lack of substance. This was not a problem that plagued Clay. The intellectual force of his arguments was unquestionable during his lucid examinations of legal questions. Whether speaking to a jury of Kentuckians or to Justices of the Supreme Court, Clay deconstructed his argument into distinct, simple points to which everyone could relate. Robert Remini states the point well: "[H]e made uncommon good sense when he spoke. He persuaded listeners; he did not bamboozle them."[158] In court proceedings, Clay knew the critical point on which his opponent's case turned and took little time in discrediting it.[159] If necessary, he would not hesitate to directly attack his adversary if he thought it would help his point.[160]

The third and final element of Clay's presentation was his reliance on histrionics. The gaunt, six-feet-tall advocate would emphasize his points, dramatically yet gracefully, with various movements of his hands, legs, torso, and head.[161] Along with his body, he used dramatic effect in his enchanting bass voice,



Clay was a brilliant oral advocate. One observer marveled at "his magic manner, the captivating tones of his voice, and a natural grace, singular in its influence, and peculiarly his own." He is photographed here as an old man in the 1850s by Mathew Brady.

which drew in the listener as Clay's voice rose to high pitches before sinking to a low whisper.[162] In referring to Clay's voice, a contemporary asked, "Whoever heard one more melodious?"[163] These pyrotechnics engaged the audience, so that even when Clay uttered a hushed aside, they listened intently "so as not to miss these delicious morsels."[164] For the emotional Clay, crying was not out of the question in passionately delivering a point.[165] This emotional performance cast Clay in a friendly, compassionate light, such that his jurors and jurists could more easily relate to his points. In essence, he had an acute understanding of psychology and knew how to convincingly excite his audience.

Clay's abilities were well known throughout the nation. Throngs of people would appear to hear him speak. Newspapers covering the otherwise unremarkable case of *Houston v. City Bank of New Orleans*[166] in 1848 detailed the fervor surrounding Clay's appearance:

> At an early hour, the avenues leading to the Capitol were thronged with crowds of the aged and young, . . . all anxious to hear, perhaps for the last time, the voice of the sage of Ashland. On no former occasion was the Supreme Court so densely packed. . . . It has been often said, and truly, that he never was and never could be, reported successfully. His magic manner, the captivating tones of his voice, and a natural grace, singular in its influence, and peculiarly his own, can never be transferred to paper.[167]

Another report of the argument relayed that

> [i]t mattered not to the audience, however, how dry or intrinsically uninteresting the subject. It was Mr. Clay they wished to hear. . . . They hung upon his words as if each was an inspiration. [The years] have passed over him without diminishing the brilliancy of his eye or his towering form.[168]

A final story reported that "Mr. Clay exhibited as much vigor of intellect, clearness of elucidation, power of logic and legal analysis, as he ever did in his palmiest day."[169]

It should be noted that there is no universal consensus on all aspects of Clay's legal abilities. Some would look beyond Clay's theatrics and question the depth of his knowledge, especially when discussing a complex legal doctrine.[170] Even Webster, close political ally and sometimes co-counsel to Clay, once commented that Clay was really "no lawyer" and "no reasoner."[171] Clay himself helped promulgate this view by commenting on his educational laziness as a youth.[172] Notwithstanding the criticism, however, Clay often succeeded in his advocacy roles and was aided by the fact that winning arguments in the courts of the time—even the Supreme Court—were often based on common-law principles and common sense.[173] A closer look at some of Clay's chief cases helps animate Clay the lawyer.

C. Major Cases

During Clay's legal career, he argued twenty-three cases before the Supreme Court, winning thirteen of them.[174] The cases below represent those dealing with particularly important issues at the time of the case, or those that still significantly affect jurisprudence today. Of the five cases discussed, Clay won all but the first. Details on Clay's other cases are much sparser.[175]

1. Green v. Biddle, 21 U.S. 1 (1823)

Land issues were Clay's unquestioned specialty, which benefited him before a Supreme Court docket preoccupied with such cases.[176] To understand the circumstances of this case, one needs to understand the circumstances of Kentucky's independence. The state had previously been a part of neighboring Virginia. During that time, in exchange for military service and money, Virginia recklessly made large, ill-defined land grants in its Western lands.[177] Since many Virginian families, including that of Chief Justice Marshall,[178] made a living by trading Kentucky lands, some assurances were necessary in order to gain independence.[179] This assurance came in the form of an agreement between the states: "All private rights and interests of lands within the said district [Kentucky], derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in [Virginia]."[180] After independence, however, Kentucky wanted to encourage settlement in the state, so the legislature promulgated laws requiring compensation for past improvements made by a Kentucky farmer being displaced by a Virginian claimant under the state agreement.[181]

Remarkably, these conflicting laws went unchallenged until decades later, when Virginian John Green sued Kentuckian Richard Biddle. Green sought to eject Biddle and claimed that the interstate compact voided the Kentucky law and thus Biddle was not entitled to compensation.[182] When the case made its way to the Supreme Court in January 1821, Biddle appeared without an attorney.[183] Justice Story delivered the opinion of the Court, finding the Kentucky laws unconstitutional by violating that state's agreement with Virginia.[184] Within a week, Clay intervened as *amicus curiae*, urging the Court to rehear the case; this was the first *amicus* intervention in Supreme Court history.[185] Since the titles of "numerous occupants of land" would be "irrevocably determined" by the Court's decision, he argued, it should have the benefit of counsel on both sides.[186]

The Court agreed to rehear the case, but not before Clay tried to utilize his powers of compromise. First, he convinced the Kentucky legislature to appoint himself and George Bibb as commissioners to Virginia.[187] The two addressed the Virginia legislature, proposing that Virginia either accept Kentucky's fair laws or establish an independent commission to settle the disputes (the compact between the states required such a commission).[188] Virginia rejected both options, as well as a later effort by Clay and Benjamin Watkins Leigh, a Virginian, to establish a commission.[189] All Clay had left was his argument combating Justice Story's opinion in the 1821 case, which had provoked severely adverse reactions throughout the Western frontier.

In Story's first opinion, he mainly relied on common-law principles of land regulation, citing no constitutional authority voiding Kentucky's laws. During re-argument, Green's counsel supplied this missing link: the Contract Clause.[190] The interpretation they urged was novel; previously, the Clause had been invoked only to protect private parties from a state, not one state from another.[191] But Clay did not attack this novel theory. Instead, he lodged a states'-rights argument,[192] undercut the enforceability of the agreement by pointing out that Congress had not expressly approved the interstate compact as constitutionally required,[193] and highlighted the fact that Virginia itself had failed to adhere

to the compact when it refused to appoint a commission.[194] After emphasizing this last point, which called the Court's jurisdiction into question, he appealed to "the political considerations and consequences," stressing that the Court should use the "most deliberate caution" in deciding cases between two states because the authority of the Court depended "upon the prudence with which this high trust is executed."[195]

Perhaps heeding Clay's warnings about the consequences of its decision, the Court delayed its decision for a year. Indeed, the Court seems to have struggled mightily with the questions before it, intimating that the Justices wanted the result to uphold the validity of the laws.[196] But in 1823, Justice Washington delivered an opinion that again invalidated the Kentucky law, though making a more moderate argument about the Court's ability to scrutinize state legislation.[197] Washington rejected Clay's arguments and found that Congress had implicitly approved the agreement by approving Kentucky's statehood.[198] Moreover, relying on *Fletcher v. Peck*,[199] the Court adopted the theory for which the case would later be famous: "[T]he duty . . . of this Court . . . [is] to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them."[200]

The effects of the decision were monumental, and sharp criticism quickly surfaced. Shortly after the decision, Virginia invoked a states'-rights argument in another unrelated case before the Court, prompting a lamentation from Clay to longtime Virginian correspondent Francis Brooke:

> When, in the case of Cohans and Virginia, [Virginia's] authority was alone concerned, she made the most strenuous efforts against the exercise of power by the Supreme Court. But when the thunders of that Court were directed against poor Kentucky, in vain did she invoke Virginian aid. [The Court's decision] cripples [Kentucky] more than any other measure ever affected the independence of any State in this Union, and not a Virginia voice is heard against the decision.[201]

The complaints mainly came in two forms.[202] First, the Court had decided a major constitutional case with a minority of the Judges,[203] and of the four present, only three joined the main opinion.[204] The second criticism was in the form of states'-rights arguments that the Court was legislating communities' municipal codes.[205] Under the consultation of Clay and John Rowan, the Kentucky legislature published a remonstrance against the decision,[206] and the U.S. Senate undertook debate about possible revisions to the Court's personnel, jurisdiction, and internal procedures.[207] These efforts understandably startled the Chief Justice, who wrote Clay that it is a "most dangerous thing[]" to alter a law in the heat of passion.[208]

The loss of the case was not due to a lack of superior advocacy. Indeed, after oral arguments, Justice Story wrote to the absent Justice Todd: "Your friend Clay has argued before us with a good deal of ability and if he were not a candidate for higher offices, I should think he might attain great eminence at this Bar. But he prefers the fame of popular talents to the steady fame of the Bar."[209]

In the end, no drastic actions were taken against the Court. Later cases handled by Clay indicate that the Court learned some political lessons from this case. Overall, Clay took his loss in stride and tried to temper his state's political reactions.[210] Of course, this could partly be attributable to the fact that Clay was largely arguing against his personal predilections. In *Green*, he found himself arguing for states' rights contravening his highly nationalistic views, and also arguing for squatters' rights despite his strong belief in land titular rights. But, as noted above, Clay's fierce commitment to his client—especially when the rights of his home state were involved—was a driving force for the advocate.

2. Osborn v. Bank of the United States, 22 U.S. 738 (1824)

It was not long until Clay's next significant appearance in the Old Supreme Court Chamber. This case dealt with another hot-button issue in Kentucky: the Bank of the United States. But this time, as longtime counsel for the Bank and friend of Nicholas Biddle, its president, Clay was on the wrong side vis-à-vis his Kentucky constituents.

This case arose out of Ohio, where a slipping economy created a financial crisis that many debtors, as they had done in other states, blamed on the Bank. To effectively doom the institution, the state imposed a $50,000 annual tax on the Bank and empowered Ralph Osborn, the state auditor, to seize the money in the event of a refusal to pay.[211] Osborn later took such action, directing his agents to seize over $100,000 and deposit it with the state treasurer.[212] Prior to this, the Bank had predicted Osborn's actions and obtained a temporary injunction against seizure of the money.[213] Shortly thereafter, Osborn's agents, ignoring the federal injunction, retrieved the money and were imprisoned for trespass and for violating the order.[214]

The Bank then sought damages from the state officials, which resulted in a ruling in favor of the Bank.[215] Rejecting settlement offers after the officials refused compliance,[216] the case went to federal circuit court, which found that Ohio had no authority to tax the Bank.[217] Ohio promptly appealed this decision to the Supreme Court, questioning whether Ohio could constitutionally tax the Bank and whether the Eleventh Amendment prevented the Bank from bringing a claim against the state in federal courts. The Bank retained Clay, and after a few days of argument, the Court consolidated the case with one from Georgia and sought re-argument on the jurisdictional question concerning the provision in the Bank's charter authorizing it to sue in federal courts.[218] For this re-argument, Webster and John Sergeant joined Clay in defending the Bank.[219]

In both sets of arguments, Clay focused on the question of whether the federal courts had jurisdiction in Marshall's Court; Clay understandably felt that *McCulloch* was secure.[220] His argument stressed that the suit was brought against Osborn individually and that the state was the "party omitted."[221] Relying on the Court's decision in *United States v. Peters*,[222] he argued that "the suit concerns the public acts of an officer of the State government, who is one of the defendants, [and] does not make the State itself a necessary party."[223] Thus, he concluded the Eleventh Amendment did not bar the suit. Then, arguing that the charter of the Bank granted jurisdiction to the federal courts, Clay remarked that the language was "free from all ambiguity" and the purpose was to correct this very defect—denying the Bank the ability to sue in federal courts—in its prior charter.[224] Moreover, Congress had constitutional authority to bestow this jurisdiction. Congress had passed the law chartering the Bank, meaning that "but for the *law*, the *case* would never have existed," and thus this was a case "arising under" the laws of the United States.[225] After all, "the power to create a faculty of any sort, must infer the power to give it the means of exercise."[226]

The Supreme Court, via Chief Justice Marshall, agreed entirely with Clay. Marshall cursorily explained that where an officer of the state is named in the action's title, he cannot claim immunity under the Eleventh Amendment.[227] That a state had an interest in the outcome was inapposite; the state itself had to be named in the record for immunity to apply.[228] The Court perceived no ground on which to sustain Osborn's claim that Congress could not bestow jurisdiction upon the federal courts, and it upheld the constitutionality of that action in chartering the Bank. It formulated a test for determining when the "Arising Under" Clause granted jurisdiction: "[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original case, it is in the power of Congress to give [federal]

jurisdiction, although other questions of fact or law may be involved."[229] Echoing *McCulloch*, the opinion concluded by affirming the power of Congress to create the Bank and denying Ohio's right to tax it.[230] Though agreeing with the Court regarding the validity of the Bank, Justice Johnson dissented, expressing concern about the broad reading given the "Arising Under" Clause and seeing no reason why the Bank could not first litigate its conflicts in state courts before appealing to the Supreme Court.[231]

Naturally, the Bank was overjoyed with the decision, since it did not have to initially fight its battles in typically unsympathetic state courts. Thus, the decision is credited with establishing the theory of protective jurisdiction.[232] But the decision rightfully alarmed states'-rights supporters, as it effectively ruled that no contested federal question need exist for federal jurisdiction to attach to the Bank. Even in suits not dealing with the Bank, once a federal issue was present, the federal courts could incidentally decide other nonfederal issues of the case.[233] Clay, who had argued with "more than ordinary ability," had seemingly settled the questions surrounding the Bank's propriety once and for all.[234] *Osborn* continues to carry major implications today, sometimes serving a foundational purpose in a case.[235] Indeed, between 1981 and 1996, it was cited twenty-six times by the Supreme Court.[236]

3. Ogden v. Saunders, 25 U.S. 213 (1827)

In 1808, George Ogden, a New York resident, assigned a bill of exchange to Lewis Saunders, a nonresident.[237] Later, Ogden, relying on a state bankruptcy law from 1806, declared bankruptcy and did not pay Saunders.[238] Though the Court had struck down a state bankruptcy law in *Sturges v. Crowninshield*[239] because it applied retrospectively, the law at issue here applied prospectively and discharged state debtors from debts to out-of-state creditors.[240] The Court had yet to address the constitutionality of prospective state bankruptcy laws, and thus there was great interest in the case. The *New York Statesman* proclaimed that next to one other case of the Term, it "will be of more importance to the future welfare of the State than any other which will be" argued.[241] It explained that "if Congress declines passing any bankrupt law and the States are prohibited from adopting laws for themselves, the commercial state of the country will present a spectacle not found in history."[242]

After Saunders prevailed in a suit he brought in federal court, Ogden appealed to the Supreme Court, pressing the validity of the state bankruptcy law.[243] In February 1824, Clay, along with Charles Haines and Ogden himself, argued the case against Webster and Henry Wheaton.[244] Though Clay was generally in favor of federal power, he also recognized the disparity of the situation, since there was no national bankruptcy law. Indeed, he was seeking to remedy this situation in Congress.[245]

Webster and Wheaton argued that Congress had the exclusive authority to impose "uniform" bankruptcy laws, and thus states had no authority in this realm, regardless of whether such laws were prospective or retrospective.[246] Clay's chief goal was to distinguish the immediate case from *Sturges* and argue that states were prevented only from enacting retrospective bankruptcy laws.[247] He stressed that though some powers of Congress are exclusive by their terms, the power to pass bankruptcy legislation is not such a power, and thus a state can enact one "provided such law does not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law."[248] Webster argued that the obligation of a contract was an obligation to the "principles of natural justice."[249] Clay quickly retorted that no such power invoking natural law "has been recognised and reserved in our constitution."[250] Instead, the obligation was to the actual contract entered into, subject to state law.[251] Clay finally commented on the terrible practical effects of a ruling

adverse to his client by warning that "if the Court should pronounce the State bankrupt codes invalid, and Congress should refuse to supply their place by the establishment of uniform laws throughout the Union, the country would present the extraordinary spectacle of a great commercial nation, without laws on the subject of bankruptcy."[252]

After arguments, the Court could not reach a consensus and thus carried over the case for several Terms. In the intervening Terms, Justice Todd died. Clay knew that Todd had disagreed with Clay's recent efforts on state bankruptcy legislation.[253] Given that Todd had been the Justice from Kentucky, Clay had even more than his usual influence in securing his replacement. As such, Clay took the opportunity to have John Quincy Adams appoint Trimble, whom Clay believed would help the Court decide in favor of his client.[254] When re-argument occurred in 1827, Clay, who was now busy with duties as Secretary of State, did not participate.[255] When the Court finally issued its opinion, it became clear that Clay's maneuverings had paid off: Preserving the *Sturges* precedent, Trimble joined with a majority of the seriatim opinions, which accepted Clay's distinction on the timing of the law, upholding state bankruptcy laws that only applied prospectively.[256]

It was the first and only time in the Marshall Court that Marshall was in dissent and unable to forge a majority in a constitutional case.[257] He took the Court to task, arguing that "superior strength may give the power, but cannot give the right."[258] In addition, the Court, in a part of the case often overlooked,[259] also held that the New York law could not discharge this specific contract, as Saunders was an out-of-state resident:

> [W]hen ... the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.[260]

Short of a long legal analysis, the opinions in the case are hard to capture, as the Justices were far from unified in their justifications. In spite of the disparate opinions, however, the case was an important one, as it was the first obligation-of-contracts case in which the Court upheld a state debtor law against constitutional attack.[261] And though Clay lost the specific case for his client, the ruling complied with his political beliefs: States could enact bankruptcy laws, but the Court limited the applicability of such laws.

4. Briscoe v. Bank of Kentucky, 36 U.S. 257 (1837)

Given his long career of legal service to the BUS, it was unsurprising that Clay would argue another important banking case before the Supreme Court, now under the direction of Chief Justice Taney. The case, in which Clay was not originally counsel, was initially argued in 1834, but given absences, it resulted in a 3–2 decision.[262] Likely learning a lesson from *Green*, the decision announced that unless absolutely necessary, the Court would not decide constitutional questions "unless four judges concur in opinion, thus making the decision that of a majority of the whole court" and thus set the case for re-argument.[263]

The case dealt with a loan made by the Bank of Kentucky[264] to John Briscoe in the form of state bank notes that the bank had received from debtors.[265] Attempting to avoid repayment of these notes, Briscoe argued that they were essentially bills of credit, which the state was constitutionally forbidden from issuing based on Article I, Section 10 of the Constitution.[266] Critical to his argument was his proposition that the bank was the agent of the state, as all of its stock was owned by

the state.[267] Notably, in the early 1820s Clay himself held many of these notes, which he was unsuccessful in redeeming.[268] But, being a dedicated advocate, this fact did not interfere with the defense of his client.

Clay's chief goal in argument was distinguishing *Craig v. Missouri*,[269] a recent Marshall Court decision finding that loan certificates were considered bills of credit and thus unconstitutional.[270] Even though Clay had recently lobbied against Taney's Chief Justiceship, he thought the realignment of the Court was in his favor.[271] Two of the *Craig* dissenters—Thompson and McLean—were on the Bench, as well as Taney, Barbour, and Wayne, all Democratic appointees and presumably states'-rights advocates. So here was the nationalistic Clay advocating states' rights—a position native to his political adversaries now looking at him from the other side of the Bench. These striking positions do not surface today in a legal climate where elected representatives—especially those at Clay's level—do not argue cases.

Clay's argument focused on distinguishing the Kentucky notes from the Missouri bills of credit and stressing the disastrous effects of a negative decision for the bank. Though the state owned all the stock and appointed all the directors of the bank, Clay argued that the bank was a separate institution because its official acts were in its own name, not that of the state.[272] Thus, when performing the official act of issuing notes, the bank was issuing notes of the corporation, not of the state. He also lamented on policy reasons for a decision in his favor and thus urged a strict reading of the "bills of credit" constitutional text. Pointing out that the bank's notes resembled those used by state banks throughout the nation, he predicted that it would be "disastrous" were the court to rule against him, since "large and prosperous commercial operations of our country are carried on by bills of exchange, notes, and bank notes."[273] To avoid such a quandary, he argued, the Court should insure that "all will be safe" by "keep[ing] to the plain meaning of the terms of the constitution, and . . . not seek[ing], by construction, to include in its prohibitions" the notes here in question.[274]

In an opinion by Justice McLean, a *Craig* dissenter, the Court found that the notes were not bills of credit. Narrowing the holding of *Craig* and adopting Clay's state-bank distinction, the Court explained that a bill of credit had to be "issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."[275] The Court also seemed to pay heed to Clay's premonitions of disaster. Given that Jackson had nearly dismantled the BUS, state banks were becoming more economically vital. McLean acknowledged this, counseling against a decision that would strike "a fatal blow against the State banks, which have capital of near four hundred millions of dollars and which supply almost the entire circulating medium of the country."[276] Justice Story issued a powerful dissent, arguing that the state merely had its agent, the bank, issue the notes, and that they were bills of credit, since they were "designed to circulate as currency."[277] Seeking to "vindicate [Marshall's] memory," Story made frequent references to the late Chief Justice, noting that he would be in agreement on the question.[278]

Most agree that neither Clay's arguments nor the Court's opinion in *Briscoe* are watertight. One can imagine that Clay knew it was a stretch to argue that the bank was independent of the state. After all, this paralleled *Osborn*, in which Clay had argued that since Congress chartered the bank, it had the ability to affect its operations. Without a doubt, however, Clay knew the members of the Court that he was addressing and was confident that they would latch onto his distinction for both practical and politically ideological reasons. In fact, the opinion in *Briscoe*, which some charged as the beginning of the destruction of Marshall and his court, caused little uproar among most. Ironically, though not unexpectedly, most of the criticism came from Clay's own Whig party.[279]

5. Groves v. Slaughter, 40 U.S. 449 (1841)

Clay's final significant case before the High Court dealt with the issue of slavery, which by now had taken center stage in national politics. In an effort to keep capital within the state, the Mississippi constitution of 1832 forbade the introduction of slaves as merchandise for sale.[280] In 1836, Robert Slaughter, a non-Mississippi resident, entered the state and sold a group of slaves to Moses Groves, who subsequently refused to pay for the slaves, claiming that the sales contract was illegal under the state constitution.[281] In federal court, Slaughter prevailed once the court found that the constitutional provision was not self-executing and, at the time of the sale in question, the legislature had not enacted an implementing statute.[282] Without this implementing statute, the court declared, the provision was ineffective and thus did not bar the interstate transactions. Groves appealed to the Supreme Court. Not only did the Court have to decide whether the note itself was void, but it also had to grapple with whether the constitutional provision itself was an unconstitutional restriction on Congress's interstate commerce power. The enormity of the question beckoned the nation's "most talented counsel to the case": arguing on behalf of Slaughter were Clay, Webster, and Walter Jones.[283]

Throngs of people, including many "distinguished counselors ... and scores of men eminent in other professions," packed the courtroom.[284] Many had come "to mark the contrast between Mr. Clay's and Mr. Webster's mode of address."[285] The New York paper reported that "Mr. Clay spoke for some three hours, and with a patient audience to the end. With a jury, he would be irresistible. With grave Judges to address, of course he is less successful; but many who heard him today pronounced his argument to be a very able one."[286] Indeed, a Massachusetts report noted that Clay's argument was "one of the most forcible legal arguments that I ever heard. ... Before he had done he established the position fully, to my satisfaction, and I am inclined to believe also, to that of most of his auditors, whatever effect it might have had upon the Court."[287] Finally, the *Southern Patriot* fell in favor of Clay, calling his performance "a splendid argument."[288]

Jones opened the argument for the team, contending that the state constitutional provision was self-executing and that the later implementing statute did not abrogate the provision because, as the Court had previously held, the Contract Clause of the federal Constitution prohibited state laws affecting agreements retrospectively.[289] He then deferred to "the Ajax and the Achilles of the bar" to argue the constitutional questions involved.[290] Picking up where Jones left off, Clay began his argument elaborating on the effects of a decision for Groves. He maintained that millions of dollars were at stake for contracts between Mississippians and out-of-state sellers and that a ruling in favor of Groves would eviscerate these debts.[291] He then contended that Congress had the "exclusive" right to regulate interstate commerce.[292] The effect of Mississippi's provision, he argued, was to "annihilate" commerce, which was a far cry from "regulation." States could only control "the condition of slaves within their borders."[293] Webster finished the argument by stressing that per *Gibbons v. Ogden*, Congress had exclusive regulatory power, and that in the absence of regulation, commerce was to be wide open and uninhibited by the states.[294] Notably, both Clay and Webster regarded slavery as a property right that should be accorded constitutional protection in commerce between the states.[295]

The Court, per Justice Thompson, sided with Slaughter and upheld the contracts, explaining that the state constitutional provision was not self-executing and thus required the implementing statute in order to become effective.[296] The Court avoided addressing the tumultuous issues of federal commerce power and the legal status of slaves. Though conceding it was not necessary for the resolution of

the immediate case, however, Justice McLean thought it "fit and proper" to express his opinion on the broader questions, since they had been argued extensively over seven days.[297] Thus, in a short opinion he expressed his belief that states have the right to regulate slavery within their own borders "to guard [their] citizens against the inconveniences and dangers of a slave population."[298] This exposition prompted reluctant statements from Taney (agreeing that states could regulate slavery without congressional interference) and Baldwin (finding Congress's regulatory powers to be exclusive but, relying on the police powers of the states, finding slave introduction to be a state matter).[299] Thus, though the Court had decided the issue on narrow grounds, the multitude of judicial opinions on the slave issue helped ignite the debate throughout the country.

IV. Conclusion

Clay died of tuberculosis in June 1852, but he "died with no enemies."[300] He had developed a presence that was distinctively his own. He reached the highest levels of national stature, and was greatly admired due to his common-man roots. There was something about Clay that enabled people to relate to him and appreciate even his faults. Perhaps one of the best indications of this is that upon his death, the "most popular man in America" was grieved through an unprecedented number of congressional eulogies, and was the first to lie in state at the U.S. Capitol.[301] America had lost its hero.

Volumes of books discuss the significant contributions that Clay made in the development of early American government and politics. A decidedly smaller volume, however, discuss Clay's advocacy. But Clay's contributions to legal developments are not overlooked because they are insignificant, but rather because he was so dedicated in so many areas that they are simply outshone. Clay held back nothing in advocating his clients' positions. Clay's personal and political beliefs were brushed aside when it came to the good of his clients. Clay was good and he knew it. He drew on his natural intelligence to dissect arguments into commonsense solutions and then used his unrivaled ability to dramatically and confidently deliver his point. And without question, his delivery left a mark each and every time. It left a mark on a Court that often ruled in his favor in cases that still affect us today, and it left a mark on a populace that would wait for hours just to see the oratorical fireworks of the master himself—the sage of Ashland.

ENDNOTES

[1]"The Top 100," *Atlantic Monthly*, Dec. 2006, at 64.

[2]Even Justice Sandra Day O'Connor admitted that she was "surprised" to learn that Clay "played a part in influencing the Supreme Court." Sandra Day O'Connor, Associate Justice of the Supreme Court, Address at the Henry Clay Memorial Foundation in Lexington (Oct. 4, 1996), *available at* http://www.henryclay.org/sc.htm (last visited Dec. 1, 2008).

[3]Glyndon G. Van Deusen, **The Life of Henry Clay** 1, 4 (1937).

[4]*Niles' Weekly Register*, Oct. 29, 1842 (reporting Clay's speech in Indianapolis on Oct. 5, 1842).

[5]*Id.*

[6]Samuel M. Schmucker, **The Life and Times of Henry Clay** 9 (1860).

[7]Robert V. Remini, **Henry Clay: Statesman for the Union** 5 (1991).

[8]*Id.* Remini credits Clay with introducing the term "self-made man" into common parlance. *Id.* at 2. During speeches later in life, Clay dramatized the despair of his youth, explaining that he was brought up in total poverty and inherited only "infancy, ignorance, and indigence." 18 **Annals of Cong.** 1311. Most biographers have rejected this description and attributed it to his flair for rhetorical dramatics and his desire to use his common-man roots as a political asset. His family were certainly not members of the aristocracy, but they had a larger-than-average house for the region and ample possessions. Van Deusen succinctly stresses the point: "No man was poverty-stricken who possessed seventeen Negroes, five horses, twenty-two head of cattle, and two chair carriages." Van Deusen, *supra* note 3, at 6 (describing Clay's stepfather's possessions; Clay's father died when Clay was four years old).

[9]Van Deusen, *supra* note 3, at 9.

[10]Letter from Clay to Lucretia Clay, March 6, 1840, *in* 9 **The Papers of Henry Clay** 395 (James F. Hopkins et al., eds., Lexington, Ky., 1959) [hereinafter **Papers**].

[11]Remini, *supra* note 7, at 9.

[12]*Id.*

[13]Van Deusen, *supra* note 3, at 10–11.

[14]The influence Wythe exerted over the young Clay cannot be overstated. A year before his death, Clay described the relationship: "'To no man was I more indebted by his instructions, his advice, and his example.'" Remini, *supra* note 7, at 10 (quoting a letter from Clay to Benjamin Blake Minor, May 3, 1851, *in* **Clay Papers Project** (University of Kentucky, Lexington, Ky.)). Perhaps it is because Wythe "[i]n almost every particular. . .was the father [] Clay had never had" that Clay named his first son Theodore Wythe Clay. *Id.*

[15]Schmucker, *supra* note 6, at 14.

[16]Henry Clay, *in* 1 **The Works of Henry Clay** 47 (Calvin Colton, ed.) (New York, 1857). Colton was a friend of Clay's and thus was able to relay much firsthand knowledge about occurrences. *See also* Van Deusen, *supra* note 3, at 19 n 8.

[17]*Niles' Weekly Register*, July 9, 1842 (reporting Clay's speech in Lexington, June 9, 1842). These were "irregular" because Clay had previously talked about how he had to put forward little effort to succeed intellectually.

[18]License to Practice Law, *in* 1 **Papers**, *supra* note 10, at 2–3.

[19]Primary sources about Clay's legal practice—including Supreme Court work—are sparse, in large part because the editors of Clay's papers left out all but his most significant legal papers. *See* Peter Knupfer, "The Return of Henry Clay," 20 *Reviews in American History* 321 (1992) (book review).

[20]Van Deusen, *supra* note 3, at 19.

[21]Letter from Clay to A. Wickham, January 17, 1838, *in* 9 **Papers**, *supra* note 10, at 131. For more on the specifics of Clay's advocacy and debating style, *see infra* Part III.B.

[22]Maurice G. Baxter, **Henry Clay, The Lawyer** 15 (2000).

[23]Memorandum of suits given to Clay by Breckinridge, February 20, 1800, *in* 1 **Papers**, *supra* note 10, at 22.

[24]Van Deusen, *supra* note 3, at 23.

[25]*Id.*

[26]Schmucker, *supra* note 6, at 28–29.

[27]He was admitted to the Kentucky bar on Mar. 20, 1798. *See* Record of Permit to Practice Law, March 20, 1798, *in* 1 **Papers**, *supra* note 10, at 3.

[28]Remini, *supra* note 7, at 19; Schmucker, *supra* note 6, at 18–21.

[29]*Id.*

[30]Van Deusen, *supra* note 3, at 28.

[31]*Id.* at 28–29.

[32]Baxter, *supra* note 22, at 32.

[33]*Id.* at 13.

[34]Along with Clay's burgeoning law practice, he undertook an active role in land speculation. Remini, *supra* note 7, at 22. While greatly increasing Clay's personal wealth, this undertaking also led to several lawsuits over land rights. Van Deusen, *supra* note 3, at 30–31.

[35]Baxter, *supra* note 22, at 80. *See also infra* Part III.C.1.

[36]Letter from Chief Justice Marshall to Clay, May 7, 1832, *in* **The Private Correspondence of Henry Clay** 339 (Calvin Colton, ed.) (Cincinnati, 1856) [hereinafter **Correspondence**].

[37]Van Deusen, *supra* note 3, at 25.

[38]5 **Memoirs of John Quincy Adams** 59 (Charles F. Adams, ed.) (Philadelphia, 1874–77) [hereinafter **Adams**].

[39]Quoted in Remini, *supra* note 7, at 23.

[40]*Id.*

[41]*Id.* at 32.

[42]Van Deusen, *supra* note 3, at 33 and 49; Remini, *supra* note 7, at 40. The main political debate out of which Clay arose as a star dealt with the rechartering of the Kentucky Insurance Company. Foreshadowing future arguments he would make on behalf of the Bank of the United States, Clay, beginning to detach from the position of the common class, ferociously advocated on the chamber floor that the Insurance Company's charter should be renewed. Clay's passionate speeches on the subject caused William Littell to comment that "'who shall rouse him up? The sound of his voice is terrible; yea, it is like the voice of many waters. He hath . . . humbled the mighty in the dust.'" Remini, *supra* note 7, at 39.

[43]Schmucker, *supra* note 6, at 32.

[44]Interestingly, at the time of his swearing-in, Clay was only twenty-nine years old, which is below the constitutionally mandated thirty-year age requirement for Senators.

[45]Letter from Clay to James Monroe, November 13, 1810, *in* 1 **Papers**, *supra* note 10, at 498.

[46]Van Deusen, *supra* note 3, at 45. For a discussion about his role in the Court, *see infra* Part III.

[47]In this first Senate term, Clay introduced his view of internal improvements, which would later be dubbed his "American System" and which he promoted throughout his entire career. This "system" advocated promoting the interests of America over foreign countries by using federal legislation to implement development of infrastructure. This was a novel concept at the time. Van Deusen, *supra* note 3, at 33.

[48]Remini, *supra* note 7, at 49.

[49]*Id.* Though he would use a nearby snuffbox for dramatization, Clay did not overindulge in his taste for snuff out of fear of what it would do to his vocal cords. Clay knew that the tenor of his voice was a highly effective tool for his arguments.

[50]1 **Adams**, *supra* note 38, at 444.

[51]Remini, *supra* note 7, at 52. During this stint in the legislature, Clay engaged in a duel with Humphrey Marshall, brother-in-law of the Chief Justice and fierce political opponent of Clay's. Neither man was seriously injured.

[52]*Id.* at 59.

[53]Doron Ben-Atar, "Retreating Revolutionaries," 24 *Diplomatic History* 336 (2000) (reviewing James E.

Lewis, Jr., **The American Union and the Problem of Neighborhood** (1998)).

[54]At the time, Clay charged that the Bank had abused its powers, that power to create it was not specifically granted in the Constitution, and that his constituents had directed him to vote against it. Schmucker, *supra* note 6, at 43. Infamously, Clay would later recant his position.

[55]Van Deusen, *supra* note 3, at 68.

[56]*Id.* at 77.

[57]Remini, *supra* note 7, at 151. *See generally* Randall Strahan, et al., "The Clay Speakership Revisited," 32 *Polity* 561 (2000) (detailing Clay's leadership strategy in advancing his national policy goals and political ambitions).

[58]Letter from Langdon Cheves to Clay, July 30, 1812, *in* 1 **Papers**, *supra* note 10, at 700.

[59]Van Deusen, *supra* note 3, at 94; Remini, *supra* note 7, at 100.

[60]Remini, *supra* note 7, at 103.

[61]Letter from Clay to James Monroe, December 25, 1814, *in* 1 **Papers**, *supra* note 10, at 1007. *See generally* Remini, *supra* note 7, at 109–21.

[62]Speech delivered in Lexington, *in* 2 **Papers**, *supra* note 10, at 199–205.

[63]Remini, *supra* note 7, at 156.

[64]4 **Adams**, *supra* note 38, at 224.

[65]Speech to the American Colonization Society in Washington, D.C., Jan. 1827, quoted in Schmucker, *supra* note 6, at 24.

[66]Remini, *supra* note 7, at 181.

[67]*Id.* Indeed, when Clay first moved to Kentucky, the state was debating aspects of its constitution, and Clay, writing under the pseudonym Scaevola, published articles advocating adoption of this system. Schmucker, *supra* note 6, at 22. Even in 1849, when Kentucky held a convention to discuss amendments to its constitution, Clay again urged adoption of gradual emancipation. *Id.* at 206. Ahead of his time, Clay's urgings were never adopted.

[68]Remini, *supra* note 7, at 219.

[69]*See infra* Part III-C.

[70]Indicating how pervasive his desire for the presidency was, Clay even used oral arguments in the Supreme Court to launch attacks at John Q. Adams, one of his rivals and then Secretary of State. Charles Warren, 1 **The Supreme Court in United States History** 582 (1926) [hereinafter **Supreme Court**].

[71]Van Deusen, *supra* note 3, at 177.

[72]Letter from Clay to Peter Porter, Dec. 7, 1824, *in* 3 **Papers**, *supra* note 10, at 892.

[73]Remini, *supra* note 7, at 267.

[74]Most historians agree that there probably was no "bargain" between Adams and Clay. *See* Remini, *supra* note 7, at 270; Van Deusen, *supra* note 3, at 195, Schmucker, *supra* note 6, at 74. Regardless of who Clay voted for, he was the most likely candidate for Secretary of State. Remini, *supra* note 7, at 271.

[75]Schmucker, *supra* note 6, at 75. *Accord* Knupfer, *supra* note 19, at 322 ("There is no denying that Clay's relentless plotting ... tarnished his image with the voters and made it hard for the people to trust him with the presidency.").

[76]Speech in Lexington, June 9, 1842, *in* 9 **Papers**, *supra* note 10, at 708–16.

[77]Remini, *supra* note 7, at 339.

[78]*Id.*

[79]Remini, *supra* note 7, at 273.

[80]*See, e.g., Id.* at 325.

[81]Letter from Daniel Webster to Clay, Aug. 22, 1827, *in* **Correspondence**, *supra* note 36, at 170.

[82]Remini, *supra* note 7, at 432.

[83]*Id.* at 431; Schmucker, *supra* note 6, at 116.

[84]Letter from Clay to Francis Brooke, Feb. 28, 1833, *in* 8 **Papers**, *supra* note 10, at 628.

[85]Timothy S. Huebner, **The Taney Court** 35 (2003).

[86]*Id.* After the veto, BUS president Nicholas Biddle wrote to Clay about the effects of Jackson's action: "[S]ince the President will have it so, he must pay the penalty of his own rashness ... I am delighted with it ... It has all the fury of a chained panther, biting the bars of his cage. It is really a manifesto of anarchy." Hoping that Jackson's actions would infuriate Americans and cause him to lose the election, Biddle opined that Clay was "destined to be the instrument of that deliverance, and at no period of your life has the country ever had a deeper stake in you." Letter from Nicholas Biddle to Clay, Aug. 1, 1832, *in* **Correspondence**, *supra* note 36, at 341.

[87]Remini, *supra* note 7, at 444.

[88]*Id.*

[89]*Id.* at 447. The effects of these speeches echoed throughout the world. In a letter from Delhi, Erastus Root wrote to Clay: "I have read your speeches on the removal of the Deposits ... I perceive in them that force of argument and that commanding eloquence which I was wont to witness in former days, in the efforts of Henry Clay, in the cause of liberty and the Constitution." Letter from Erastus Root to Clay, Jan. 12, 1834, *in* **Correspondence**, *supra* note 36, at 375. In a letter from Biddle to Webster, he stressed that the fate of the nation rested in the hands of this triumvirate. Remini, *supra* note 7, at 447 n.33. Biddle was keenly aware that though Clay and Webster were often political allies, they both had ambitions within their party that could lead to splintering. Carl B. Swisher, **Roger B. Taney** 256 (1961).

[90]Remini, *supra* note 7, at 456.

[91]Huebner, *supra* note 85, at 209.

[92]*Id.*

[93]*Id.* at 36.

[94]*Id.* In this dual appointment, Philip Barbour was confirmed to fill the vacant Associate Justice seat. Peter Irons, **A People's History of the Supreme Court** 144 (1999). But his appointment caused far less controversy than that

of Taney, upon whose confirmation Webster complained to a friend that "Judge Story thinks the Supreme Court is gone, and I think so, too." *Id.*

[95]According to a fellow Senator, after Taney had been on the Bench for a number of years, Clay retracted his negative views of Taney. Clay approached Taney and explained that "there was no man in the land who regretted your appointment to the place you now hold more than I," but that he was "satisfied now that no man in the United States could have been selected, more abundantly able to wear the ermine which Chief Justice Marshall honored." *Quoted in* 2 **Supreme Court**, *supra* note 70, at 14–15.

[96]Remini, *supra* note 7, at 736.

[97]*Id.* at 758.

[98]*Id.* at 761.

[99]Sup. Ct. R. 36, **The Rules and Orders of the Supreme Court of the United States, from 1790 to 1849** (Washington 1850) [hereinafter **Rules**].

[100]*Id.*

[101]Maurice G. Baxter, **Daniel Webster and the Supreme Court** 17 (1966) [hereinafter **Webster**].

[102]*Id.* at 17.

[103]*Id.*

[104]*Id.*

[105]Sup. Ct. R. 8, **Rules**.

[106]Sup. Ct. R. 29, **Rules**.

[107]Sup. Ct. R. 40, 44, **Rules**.

[108]Sup. Ct. R. 15, **Rules**.

[109]*Green v. Biddle*, 21 U.S. 1 (1823). *See also* Part III.C.1., *infra*.

[110]Sup. Ct. R. 23, **Rules**.

[111]*See*, Parts III.C.2, 3, and 5, *infra*.

[112]1 **Supreme Court**, *supra* note 70, at 638 n.3.

[113]Sup. Ct. R. 53, **Rules**.

[114]Baxter, *supra* note 22, at 5.

[115]*Id.*

[116]*Id.*

[117]G. Edward White, "The Marshall Court and Cultural Change," *in* **The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States** 293 (1988) [hereinafter "Marshall Court"].

[118]*Id.* at 368.

[119]Baxter, *supra* note 22, at 40.

[120]"Marshall Court," *supra* note 117, at 358.

[121]One of Story's biographers explained that "the problem of selectivity ... haunts the efforts to describe Story's crowded and varied life." G. Dunne, **Justice Joseph Story and the Rise of the Supreme Court** 435 (1970).

[122]"Marshall Court," *supra* note 117, at 360.

[123]Gabriel Duvall was the fourth member of the Court for this case. Duvall's contributions to the Court, however, are markedly lacking and obscure.

[124]**The Supreme Court Justices: Illustrated Biographies, 1789–1993** (Clare Cushman, ed., 1993) [hereinafter **Justices**].

[125]"Marshall Court," *supra* note 117, at 348–49.

[126]*Id.* at 350–51.

[127]Indeed, Johnson dissented in *Green v. Biddle*. Though his opinion is labeled a concurrence, it reads much more like a dissent. From the beginning of his tenure, Johnson favored the prior practice of issuing seriatim opinions. "Marshall Court," *supra* note 117, at 342.

[128]*Id.* at 333.

[129]*Id.* at 338. Jefferson once wrote to Johnson for reassurances that the latter's political views were still in line.

[130]*Id.* at 342.

[131]*Osborn v. United States*, 22 U.S. 738 (1824).

[132]"Marshall Court," *supra* note 117, at 373.

[133]*Id.*

[134]Justice Thompson had joined the Court by this Term, but, like Duvall, he made very few noteworthy contributions to the Court.

[135]"Marshall Court," *supra* note 117, at 319.

[136]*Id.*

[137]*Id.* at 320.

[138]*Ogden v. Saunders*, 25 U.S. 213 (1827).

[139]"Marshall Court," *supra* note 117, at 303.

[140]**Justices**, *supra* note 124, at 99.

[141]*Id.*

[142]*Id.*

[143]*Briscoe v. Bank of Kentucky*, 36 U.S. 257 (1837).

[144]Interestingly, Taney was not the only member of the Court with whom Clay had previously battled politically. Justice Barbour, appointed in 1836 along with Taney, had served as Speaker of the House from 1821–1823, losing the office to Clay. Carl B. Swisher, "The Taney Period," *in* **The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States** 56 (1974) [hereinafter "Taney Period"].

[145]*Id.* at 39.

[146]*Id.* at 46–51.

[147]*See generally id.* at 53–58.

[148]*Id.*

[149]*Id.* at 58–59.

[150]*Groves v. Slaughter*, 40 U.S. 449 (1841).

[151]Remini, *supra* note 7, at 20. At the conclusion of several speeches in the Senate, while Clay stood smiling at his performance, the presiding officer had to order the galleries cleared in order to restore order amongst the cheering mobs. *Id.*

[152]*Id.* at 7.

[153]"Taney Period," *supra* note 144, at 85.

[154]*See infra* Part III.C.1.

[155]*See infra* Part III.C.5.

[156]Remini, *supra* note 7, at 7.

[157]George Bancroft, "A Few Words about Henry Clay," *Century Magazine*, July 1885, at 480.

[158]Remini, *supra* note 7, at 20.

[159]*Id.*

[160]*Id.* at 383.

[161] *Id.* at 21.

[162] Bancroft, *supra* note 157, at 480.

[163] Remini, *supra* note 7, at 21.

[164] *Id.* at 383.

[165] *Id.* at 182.

[166] *Houston v. City Bank of New Orleans*, 47 U.S. 486 (1848).

[167] *New York Tribune*, Feb. 12, 15, 1848, *quoted in* 1 **Supreme Court**, *supra* note 70, at 166.

[168] *Philadelphia North American*, Feb. 14, 1848, *quoted in* 1 **Supreme Court**, *supra* note 70, at 166.

[169] *Baltimore Republican*, Feb. 9, 1848, *quoted in* 1 **Supreme Court**, *supra* note 70, at 166.

[170] Baxter, *supra* note 22, at 32. But see Knupfer, *supra* note 19, at 319 (explaining that some recent scholarship has shown a "stronger appreciation" of Clay's intellectual power).

[171] P. Harvey, **Reminiscences of Daniel Webster** 217 (Boston, 1877).

[172] Van Deusen, *supra* note 3, at 14. See also *supra* note 17.

[173] Baxter, *supra* note 22, at 33.

[174] *Id.* at 111–12. Notably, he won nine of the eleven cases he argued before Kentucky's highest tribunal. *Id.*

[175] Adams, however, provides an interesting quip. He states that since both Clay and Webster were set to argue a case in the Court, he went to hear the arguments. His description of the case is telling about how contemporaries saw these two figures in the Court: "dry as dust, and the eloquence of the champions could not make it otherwise." 8 **Adams**, *supra* note 38, at 536.

[176] "Marshall Court," *supra* note 117, at 747. *See also supra* note 35 and accompanying text.

[177] Ruth Wedgwood, "Cousin Humphrey," 14 *Const. Comment.* 247, 249 (1997).

[178] Humphrey Marshall, brother-in-law of the Chief Justice, was an outspoken critic of Clay's role in the litigation, which eventually led to a duel between the two men. Neither man was injured. Baxter, *supra* note 22, at 6.

[179] Wedgwood, *supra* note 177, at 251.

[180] Baxter, *supra* note 22, at 38.

[181] *Id.*

[182] *Green v. Biddle*, 21 U.S. 1, 7 (1823).

[183] *Green*, 21 U.S. at 7.

[184] *Green*, 21 U.S. at 17. The opinion was unanimous with six Justices in attendance. Chief Justice Marshall recused himself because of his family's connection. Baxter, *supra* note 22, at 40.

[185] Reagan W. Simpson, **The Amicus Brief** 1 (1998).

[186] *Green*, 21 U.S. at 18.

[187] Baxter, *supra* note 22, at 39.

[188] Clay's address to the Virginia legislature, Feb. 7, 1822, *in* 3 **Papers**, *supra* note 10, at 161–70.

[189] Baxter, *supra* note 22, at 39–40.

[190] *Green*, 21 U.S. at 29 (Mr. Montgomery, for Green, argued, *inter alia*, that "[t]he framers of our constitutions, by the prohibitions against impairing the obligation of contracts, intended to protect all rights dependent upon contract from being diminished or destroyed; and they could not certainly have intended to leave . . . the remedy to the caprice of the State legislatures.").

[191] Baxter, *supra* note 22, at 42.

[192] *Green*, 21 U.S. at 42–43.

[193] *Green*, 21 U.S. at 40 (highlighting Art. I § 9 of the U.S. Constitution, Clay argued that "'[a]ny agreement or compact' are the words, and all contracts between the States, without the consent of Congress, are interdicted."). Though Green argued that congressional approval occurred in the general act of granting statehood to Kentucky, Clay argued that such an agreement would need "express" and "positive" consent. *Id.* at 41.

[194] *Green*, 21 U.S. at 46–48.

[195] *Green*, 21 U.S. at 57, 48–49.

[196] *Green*, 21 U.S. at 93–94 ("[W]e hold ourselves answerable to God, our consciences, and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. . . . [W]e have laboriously given to the case . . . that it might be favourable to the validity of the laws; our feelings being always on that side of the question.").

[197] "Marshall Court," *supra* note 117, at 351.

[198] *Green*, 21 U.S. at 85–87.

[199] *Fletcher v. Peck*, 10 U.S. 87 (1810).

[200] *Green*, 21 U.S. at 91–92.

[201] Letter from Clay to Francis Brooke, Aug. 28, 1823, *in* **Correspondence**, *supra* note 36, at 80.

[202] For a critique of the actual legal analysis in the case, see "Marshall Court," *supra* note 117, at 645–48.

[203] Chief Justice Marshall and Justices Todd and Henry Livingston were absent. It would later become known that the three absent Justices did, in fact, agree with the decision. 1 **Supreme Court**, *supra* note 70, at 640 n.2.

[204] *Id. See also* Letter from Clay to Francis Brooke, Mar. 9, 1823, *in* **Correspondence**, *supra* note 36, at 75 ("The dissatisfaction which will be felt by the people of Kentucky, with the decision, will be aggravated in no little degree, by the fact that the decision is that of three judges to one, a minority, therefore, of the whole court."). Humphrey Marshall authored several exposés lambasting the Court both for hearing the case in the first place and for its decision. Wedgwood, *supra* note 177, at 254–57.

[205] "Marshall Court," *supra* note 117, at 643.

[206] Kentucky General Assembly, A remonstrance to the Congress of the United States on the subject of the decision of the Supreme Court of the United States on the occupying claimant laws of Kentucky (1824).

[207] Wedgwood, *supra* note 177, at 257–58.

[208] Letter from Chief Justice Marshall to Clay, Dec. 22, 1823, *in* Wedgwood, *supra* note 177, at Appendix A.

[209] Remini, *supra* note 7, at 209, quoting William W. Story, 1 **Life and Letters of Joseph Story** 423 (Boston 1851).

[210] Baxter, *supra* note 22, at 44.

[211]"Marshall Court," *supra* note 117, at 525. The Court decided *McCulloch v. Maryland*, 17 U.S. 316 (1819), shortly after this law was enacted.

[212]*Id.*

[213]1 **Supreme Court**, *supra* note 70, at 529.

[214]*Niles' Weekly Register*, Oct. 4, 1819.

[215]1 **Supreme Court**, *supra* note 70, at 533. *See also id.* at 533 n.2 (detailing the proceedings through a Jan. 6, 1921 letter from Francis P. Blair to John J. Crittenden stating that "lawyers from every part of Ohio came to hear Clay speak.").

[216]The Ohio legislature had offered to reduce the penalty to $5,000. Clay counseled against this settlement, since it would effectively validate the action of taxing the Bank in the first place. Letter from Clay to Langdon Cheves [predecessor to N. Biddle as president], Jan. 31, 1821, *in* 3 **Papers**, *supra* note 10, at 20–21.

[217]"Marshall Court," *supra* note 117, at 526.

[218]The Bank awarded its counsel a generous fee. Clay wrote to Cheves: "I will thank you to place with the Cashier of the Bank the $2000, the residue of my fee for conducting the suit in Ohio, and that which the Bank has had the goodness to allow me for the Supreme Court." Letter from Clay to Cheves, Oct. 22, 1821, *in* 3 **Papers**, *supra* note 10, at 129.

[219]**Webster**, *supra* note 101, at 179.

[220]Though Clay seemed confident that he could "get along very well" with the jurisdictional question as well, he also indicated that he "never ceased to entertain the most serious apprehensions" about it. Letter from Clay to N. Biddle, Feb. 17, 1824, *in* 3 **Papers**, *supra* note 10, at 646–47. *See generally Osborn v. Bank of the United States*, 22 U.S. 738 (1823), *reprinted in* 1 **Landmark Briefs and Arguments of the Supreme Court of the United States** at 545–50; 555–61 (Philip Kurland and Gerhard Casper eds., University Publications of America 1978) [hereinafter **Landmark**].

[221]*Osborn v. Bank of the United States*, 22 U.S. 738, 796 (1923).

[222]*United States v. Peters*, 9 U.S. 115 (1809).

[223]*Osborn*, 22 U.S. at 797.

[224]*Osborn*, 22 U.S. at 805. The language in the first charter gave the Bank "a right to sue and be sued, in Courts of record, or any other place whatsoever." *Id.* In *Bank of the United States v. Deveaux*, the Court held that this did not confer upon the Bank the ability to sue in federal courts. The language in the new charter granted the Bank "power to sue and be sued in all State Courts having competent jurisdiction, and *in any Circuit Court of the United States*." *Id.* (emphasis in original).

[225]*Osborn*, 22 U.S. at 806 (emphasis in original).

[226]*Osborn*, 22 U.S. at 809.

[227]*Osborn*, 22 U.S. at 841–44.

[228]*Osborn*, 22 U.S. at 841–44.

[229]*Osborn*, 22 U.S. at 823.

[230]*Osborn*, 22 U.S. at 859–70.

[231]*Osborn*, 22 U.S. at 874–903 (Johnson, J., dissenting).

[232]Sharon L. Blake, "Toward a Clarification of the 'Arising Under' Clause of the United States Constitution: A Revival of the *Osborn* Test," 16 *U. Miami Inter-Am. L. Rev.* 139, 162 (1984–85) (arguing that in order to protect its newly formed bank from adverse state courts, Congress planted the federal jurisdiction directly in the charter).

[233]*Id.* at 150.

[234]**Webster**, *supra* note 101, at 30.

[235]*See generally, e.g.*, Blake, *supra* note 232 (critiquing a 1983 decision of the Supreme Court that heavily relied on *Osborn* to determine federal question jurisdiction).

[236]O'Connor, *supra* note 2.

[237]Irons, *supra* note 94, at 133.

[238]*Id.*

[239]*Sturges v. Crowninshield*, 17 U.S. 122 (1819).

[240]Irons, *supra* note 94, at 133.

[241]1 **Supreme Court**, *supra* note 70, at 687, *quoting New York Statesman*, Feb. 24, 1824.

[242]*Id.*

[243]Baxter, *supra* note 22, at 49.

[244]*Ogden v. Saunders*, 25 U.S. 213 (1827), *reprinted in* 2 **Landmark**, *supra* note 220, at 4–112.

[245]In 1840, Clay introduced federal bankruptcy legislation, but it was repealed in 1842. Baxter, *supra* note 22, at 52–53.

[246]*Ogden*, 25 U.S. at 215–21.

[247]The court reporter combined the arguments of the three counsels arguing for Ogden. For simplicity's sake, I will attribute to Clay any argument advanced on behalf of Ogden in 1824.

[248]*Ogden*, 25 U.S. at 227.

[249]*Ogden*, 25 U.S. at 221.

[250]*Ogden*, 25 U.S. at 312.

[251]*Ogden*, 25 U.S. at 309–10.

[252]*Ogden*, 25 U.S. at 237.

[253]Baxter, *supra* note 22, at 7.

[254]*Id.*

[255]*Id.* at 50.

[256]*Id.* at 651–52.

[257]"Marshall Court," *supra* note 117, at 651.

[258]*Ogden*, 25 U.S. at 345.

[259]**Webster**, *supra* note 101, at 117.

[260]*Ogden*, 25 U.S. at 369.

[261]*Ogden*, 25 U.S. at 395.

[262]"Taney Period," *supra* note 144, at 106.

[263]Wedgwood, *supra* note 177, at 261 n.56.

[264]For purposes of discussing this case, "bank" refers to the Bank of Kentucky.

[265]Baxter, *supra* note 22, at 70–71.

[266]*Id.* at 71.

[267]"Taney Period," *supra* note 144, at 27.

[268]Baxter, *supra* note 22, at 71.

[269]*Craig v. Missouri*, 29 U.S. 410 (1830).

[270]Baxter, *supra* note 22, at 72.
[271]*Id.*
[272]"Taney Court," *supra* note 144, at 107.
[273]*Briscoe v. Bank of Kentucky*, 36 U.S. 257, 285 (1837).
[274]*Briscoe*, 36 U.S. at 385.
[275]*Briscoe*, 36 U.S. at 314.
[276]*Briscoe*, 36 U.S. at 317.
[277]*Briscoe*, 36 U.S. at 331.
[278]*Briscoe*, 36 U.S. at 350.
[279]*See, e.g.*, Letter from Kent to Justice Story, *in* 2 **Supreme Court**, *supra* note 70, at 29 ("[T]he decision in *Briscoe v. The Bank of Kentucky* is ... alarming and distressing. ... It is in collision with the case of *Craig v. The State of Missouri*. ... I have lost my confidence and hopes in the constitutional guardianship and protection of the Supreme Court.").
[280]"Taney Period," *supra* note 144, at 365. The constitution provided an exception for new settlers to the state. Huebner, *supra* note 85, at 157.
[281]Huebner, *supra* note 85, at 157.
[282]"Taney Period," *supra* note 144, at 365. An implementing statute was subsequently passed by the legislature in 1837. *Id.*
[283]Huebner, *supra* note 85, at 157.
[284]*New York Express*, Feb. 19, 23, 1841, *quoted in* 2 **Supreme Court**, *supra* note 70, at 68.
[285]*Id.*
[286]*Id.*
[287]*The Massachusetts Spy*, Feb. 24, 1841, *quoted in* "Taney Period," *supra* note 144, at 366–67.
[288]*Southern Patriot*, March 4, 1841, *quoted in* 2 **Supreme Court**, *supra* note 70, at 69 n.1.
[289]*Groves v. Slaughter*, 40 U.S. 449, 477–84 (1841).
[290]*Groves*, 40 U.S. at 477.
[291]*Groves*, 40 U.S. at 486–87.
[292]*Groves*, 40 U.S. at 489.
[293]*Groves*, 40 U.S. at 489.
[294]Groves, 40 U.S. at 494 ("Freedom of regulation, is regulation. Not declaring how action shall take place, allows the action to be performed.").
[295]**Webster**, *supra* note 101, at 210. Clay also used the argument to express his thoughts on the proper process for selecting judges. While cautioning that he did not intend to cast doubt on the "integrity" of the Mississippi judges, he noted that he "hope[d] never to live in a State where judges are elected, and where the period for which they hold their offices is limited, so that elections are constantly recurring." *Groves*, 40 U.S. at 486.
[296]*Groves*, 40 U.S. at 500–503. Notably, the Court was construing a provision of the state constitution that had yet to be interpreted by that state's highest tribunal. *See* "Taney Period," *supra* note 144, at 334. A decade later, the Mississippi supreme court interpreted the provision to be unenforceable without an implementing statute. In a power grab over defining state legal matters, the U.S. Supreme Court rejected that interpretation. *See Rowan v. Runnels*, 46 U.S. 135 (1847); Huebner, *supra* note 85, at 158.
[297]*Groves*, 40 U.S. at 504.
[298]*Groves*, 40 U.S. at 508.
[299]"Taney Period," *supra* note 144, at 369–70.
[300]Remini, *supra* note 7, at 124.
[301]*Id.* at 782–83.

Contesting Commerce: *Gibbons v. Ogden*, Steam Power, and Social Change

THOMAS H. COX

The U.S. Supreme Court case *Gibbons v. Ogden* (1824)[1] represents one of the most significant yet least understood cases in the history of American jurisprudence. Most accounts depict the case as a constitutional showdown between former New Jersey Governor Aaron Ogden and his estranged business partner, a Georgian businessman and planter named Thomas Gibbons. Ogden charged Gibbons with operating a steamboat on the Hudson River in violation of the Fulton–Livingston Steamboat monopoly that controlled steam travel in the state of New York. In March 1824, Chief Justice John Marshall ruled for the Supreme Court that Gibbons' federal coasting license trumped a state grant issued to Ogden by the Fulton–Livingston syndicate.[2]

As the first Supreme Court case to uphold congressional power over interstate commerce, *Gibbons* joined the ranks of other landmark Marshall Court cases that promoted federal power over states' rights. Yet unlike *Marbury v. Madison* (1803)[3] and *McCulloch v. Maryland* (1819),[4] *Gibbons* was widely popular with large groups of Americans at the time it was handed down.

This study asserts that *Gibbons* became such a unique precedent because it involved attempts by three different groups of Americans to control the development of steam power, a scientific wonder of the age that many believed could bring social process through technological innovation. The origins of *Gibbons v. Ogden* were grounded in a series of legal disputes between early steamboat entrepreneurs. From the 1790s to the 1820s, businessmen such as Chancellor Robert R. Livingston, Robert Fulton, Gibbons, and Ogden sued each other in state and federal court over their steamboat monopolies and federal patents. In such legal controversies, steamboat promoters portrayed themselves as noble inventors struggling to bring the benefits of steam travel to ordinary Americans. They used these images not merely to sway judges and juries, but also to give their business reputations an additional veneer of legal respectability, a valuable commodity in

Wealthy New York patriarch Robert R. Livingston was a member of the Second Continental Congress, chancellor of the New York court system, and a well-known patron of science. He agreed to be a partner in the steamboat business to supplement his family fortune and to secure his reputation as a gentleman scientist.

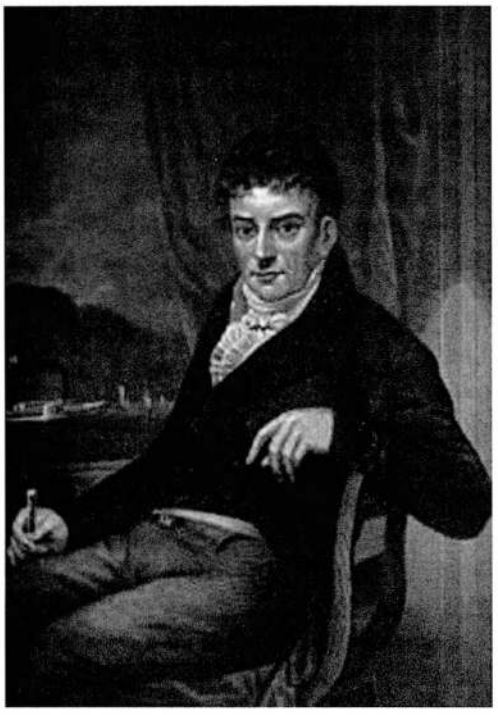
the cutthroat world of the early steamboat industry.

When such legal disputes entered state courts, judges such as New York Chancellor James Kent argued that state-granted monopolies could best encourage inventors to develop steam power on a local level. When litigants appealed their cases to the federal level, nationalistic-minded judges such as Marshall and William Johnson asserted that steamboat entrepreneurs engaging in free trade across state lines could best promote a national market economy and strengthen the cultural bonds of the Union.

In 1824, many Americans agreed with Marshall's views on free trade and federalism. Yet the original meaning of *Gibbons v. Ogden,* as a broad but popular decision, became subject to interpretation over time. In future decades, temperance workers, trustbusters, social progressives, civil-rights activists, labor activists, and gun-control enthusiasts would invoke *Gibbons* as a precedent for the regulation, not merely of commerce, but of social issues as well. By placing *Gibbons* within the context of its own time, this article explores the ways that a landmark Supreme Court case became a popular constitutional precedent that influenced long-term legal and social change.[5]

Gibbons v. Ogden sprang from America's first attempts to import steam technology from Great Britain in the late 1700s. In 1782, John Fitch, a working-class Connecticut engineer, built the first operational steamboat in North America. He soon encountered opposition from James Rumsey, a Virginia innkeeper and inventor who was backed by George Washington and Thomas Jefferson. Both Fitch and Rumsey secured federal patents for their steamboat plans in 1793. However, both inventors quickly realized that state-granted monopolies and pamphlets designed to influence public opinion were more practical methods of protecting their interests. Fitch won a crucial battle in his struggle against Rumsey in 1787, when he secured a New York legislative monopoly on all steam travel in state waters. Yet, plagued by business failures and alcoholism, Fitch committed suicide in Kentucky before he could make use of his New York grant.[6]

John Stevens, a New Jersey landowner who teetered on bankruptcy due to failed land speculation schemes, sought to regain his reputation by imitating Fitch's experiments. In 1797, Stevens struck up a partnership with Nicholas Roosevelt, a brilliant but impulsive engineer. After several failed attempts to create a workable steamboat, Stevens persuaded his brother-in-law, Robert R. Livingston, to join the partnership. Livingston was the patriarch of one of New York State's oldest, largest, and wealthiest families, a member of the Second Continental Congress, chancellor of the New York court system, and a well-known patron of science. Livingston felt that a successful steamboat business would supplement his family fortune and secure his reputation as a gentleman scientist who had brought steam



A shameless self-promoter, Robert Fulton (pictured) charmed wealthy patrons into funding his scientific schemes. He hoped to secure both federal patent rights for his steamboat plans and his reputation as a western visionary who had revolutionized river transportation on the Mississippi. Robert R. Livingston was skeptical of Fulton's grandiose visions, however, and insisted on a New York company based on his steamboat monopoly.

power to the people of New York. In 1798, Livingston accordingly pressured his allies in the New York legislature to grant him—but not his partners—Fitch's still valid 1787 steamboat monopoly.[7]

After repeated failures with Stevens and Roosevelt, Livingston traveled to France in 1802 to negotiate with Napoleon Bonaparte for American access to the Mississippi River. While in Paris, Livingston formed a partnership with a gifted young engineer named Robert Fulton. A shameless self-promoter, Fulton excelled at using his wit, charm, and scientific knowledge to attract wealthy patrons. He hoped to secure federal patent rights for his steamboat plans and solidify a reputation as a western visionary who had revolutionized river transportation on the Mississippi. Livingston remained skeptical of Fulton's grandiose visions, however, and he insisted on a New York company based on his steamboat monopoly.[8]

Livingston's political clout won out in the short run, for in spring of 1807 Fulton journeyed to New York to create the North River Steam Boat Company and construct a prototype vessel steam-powered. On August 17, 1807, Fulton led a group of potential investors and Livingston family members up the Hudson on the maiden voyage of his experimental *North River Steam Boat*. While they were stopping at Livingston's Clermont estate, the Chancellor announced the engagement of Fulton to his niece, Harriet Livingston. Several days later, Fulton remarked to his friend, poet Joel Barlow, that "[t]he power of propelling boats by steam is now fully proved." Cloaking his success in the language of patriotism, the jubilant inventor maintained, "Although the prospect of personal emolument has been some inducement to me, yet I feel infinitely more pleasure in reflecting on the immense advantages that my country will draw from the invention."[9]

Angered that Livingston had taken on a new partner, Stevens threatened to legally undermine the New York monopoly by securing a federal coasting license and running his own steamboat on the Hudson River. He asked Livingston, "[W]ill a Jury in the State of New Jersey be much inclined to give very heavy damages for the infringement of a law granting a monopoly so injurious of the public?"[10] In response, Livingston grudgingly offered his brother-in-law a one-fifth partnership for nine thousand dollars, provided that Stevens confined his steamboat service to the New York and New Jersey coastline. He also pressured Stevens to quickly accept the offer with the knowledge that Fulton held a federal patent on his steamboat. To raise the stakes even higher, Livingston reminded Stevens of his financial responsibilities, which "every man of honor considers a sacred obligation," in repaying several bank notes that the Chancellor had previously endorsed.[11]

Despite these veiled threats, Stevens hesitated to accept the offer of partnership. Fulton and Livingston upped the ante by granting the Chancellor's brother, John R. Livingston, the rights to construct and run a steam ferry between New York City, Staten Island, and New Brunswick. Livingston also anonymously published a letter in the *American Citizen* titled "A Friend to Useful Invention and Justice," which rhetorically asked "Did Stevens have a federal patent that could prevent competition from other vessels?" Furthermore, "Didn't Fulton and Livingston have a federal patent and a state monopoly?" The article damaged Stevens' reputation and forced him into bankruptcy.[12]

Stevens was suspicious and requested a copy of Fulton's alleged patent from U.S. Patent Office Chief William Thornton. A former partner of Fitch's, Thornton informed Stevens that Fulton possessed merely a patent for a simple steam-powered pole boat, not for a paddle-driven steamboat. Stevens was furious and penned his own article for the *American Citizen* that exposed Fulton and Livingston's duplicity. He also asserted that "[i]t is the genius and tendency of monopoly to *discourage* and *defeat*, instead of *encouraging* improvements."[13] Fulton consoled Stevens with the promise that "the race of science is a noble exertion of humane faculties, and he who fastest runs should win," while secretly applying for a new federal patent. However, Thornton cunningly registered a steamboat patent for himself before issuing one to Fulton eleven days later.[14]

In spring 1809, Roosevelt and his father-in-law, famed architect Benjamin Henry Latrobe, sought an interview with Fulton. Aware that his steamboats' designs drew heavily from Roosevelt's experiments with paddlewheels, Fulton quickly suggested a partnership to develop steamboats on the Mississippi River. Fulton and Livingston also hastily came to terms with Stevens. They promised to limit their steamboat services to the Hudson, Ohio, and Mississippi rivers if Stevens would pursue options on the Delaware and Connecticut rivers. Facing complete insolvency, Stevens agreed to the arrangement, even though it meant acknowledging Fulton's patent rights.[15]

Fulton's Mississippi plans faced setbacks when the Indiana, Ohio, Kentucky, Tennessee, and Mississippi state and territorial legislatures denied their requests for monopolies on steam travel. Yet, with the help of Chancellor Livingston's younger brother, Edward Livingston, a leading New Orleans attorney, and William Charles Cole Claiborne, the Orleans territorial governor, the partners secured a steamboat monopoly over the lower Mississippi River in April 1811.[16]

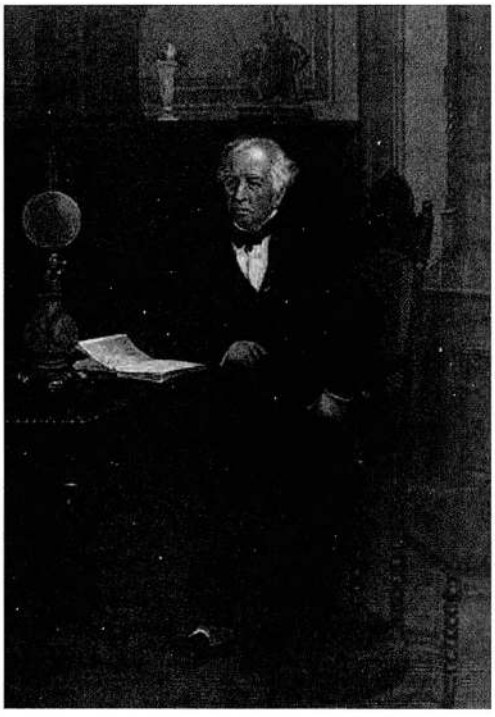
Although his patent rights and personal reputation remained in doubt, Fulton proceeded with his plans to create a Western steamboat company. In spring 1809, he commissioned Roosevelt to construct and pilot a steamboat from Pittsburgh, Pennsylvania, to New Orleans. Fulton also hired John Deveraux Delacy, a lawyer and land speculator, to incorporate steamboat companies on rivers in Virginia, the Carolinas, and Georgia. After an exploratory voyage down the Mississippi on a flatboat, Roosevelt and his wife, Lydia, returned to Pittsburgh to construct a four-hundred-ton steamboat, the *New Orleans*. Roosevelt faced numerous construction problems, channeled corporate funds into risky investments, and even bartered away his partnership with Fulton in return for a salaried position. Nevertheless, in 1811, Roosevelt and his family departed Pittsburgh aboard their newly completed vessel. The journey of the *New Orleans* down the Ohio and Mississippi rivers provided all the ingredients fit for a Washington Irving novel complete with displays of steam power before amazed locals and navigational problems caused by a massive earthquake. Yet, on January 10, 1812, the *New Orleans* safely arrived in the city that shared its name.[17]

With victory secured in the West, Fulton soon faced a new challenge from the East. In spring of 1811, a group of Albany businessmen led by James Van Ingen constructed

two steamboats, aptly named the *Hope* and the *Perseverance*, to challenge the New York steamboat monopoly. Fulton and Livingston promptly launched a suit in federal circuit court against the "Albanians." The inventors may have sought to pursue a federal lawsuit knowing that U.S. Supreme Court Justice Henry Brockholst Livingston, Chancellor Livingston's cousin, was scheduled to preside over the case.[18]

Cadwallader D. Colden, an attorney and close friend of Fulton, represented the monopolists at trial. On July 26, Colden asserted that the Albany Company's construction of the *Hope* and *Perseverance* on the Hudson River violated his clients' federal patent rights. Yet, wary of favoritism charges, Justice Livingston ruled that federal courts wielded no jurisdiction over cases in which both parties were residents of the same state. He furthermore asserted, "A court, constituted like this, is not to reason itself into jurisdiction from considerations of hardship, when a plain and safe rule is prescribed by the Supreme Court, which is, to examine on all occasions, what powers are committed to it, by the laws of the United States." State court remained the proper forum in which to resolve the dispute.[19]

In frustration, Fulton and Livingston launched another suit in the New York state supreme court. On November 18, 1811, Chancellor John Lansing, a rampant land speculator who secretly held financial ties to the Albanians, ruled that New York could regulate commerce but not steam travel. After all, steam engines merely combined natural elements, such as fire, air, and water, which could not be regulated by any legislative body. If a state court could regulate steam power, then it could also control sailboats or rowboats. Under such circumstances, "[w]ould it consist with the intent of the constitution of the United State, that any portion of the citizens of an individual state, described by their age, their occupations, or estates, should have the exclusive right of using the navigable waters of each state?" He did not think so, and accordingly declared the steamboat monopoly unconstitutional.[20]



Chief Justice James Kent, a staunch Federalist and social conservative, handed down a decision in *Livingston v. Van Ingen* that upheld the steamboat monopoly. Kent held that the Founders had created a federal government of limited, enumerated powers.

The public reacted favorably to Lansing's decision. At a New York State Artillery Regiment dinner, opponents of the monopoly raised a toast to "[c]ommerce, the main spring to the whole: may it meet no impediment but the winds, no resistance but the waves." A *New York Columbian* article similarly boasted, "The excellence of the accommodations and the certainty and rapidity of the passage, on this great thoroughfare, are unquestionably without parallel and example in the habitable globe."[21]

Fulton and Livingston pinned their hopes on one final appeal with the New York Court of Errors. A more conservative body than the New York supreme court, the Court of Errors consisted of both state supreme court justices and senators, many of whom were landowners sympathetic to Chancellor Livingston's monopoly rights. At trial, their

counsel, Thomas Addis Emmet, tried a new legal strategy. He argued that the New York legislature had granted his clients a monopoly, not for inventing the steamboat, but rather for importing valuable steamboat technology into the Empire State. Attorney Abraham Van Vechten countered for the defense that state regulation of commerce would create endless legal confusion. Furthermore, "[t]he appellants claim this monopoly against all the world, and the respondents, though not patentees, have a right to call their claim into question."[22] Emmet retorted that a fragile, young nation such as the United States needed to import foreign technology to fulfill its national destiny. Emmet asked, "Has not the *steam-boat* cleared the *Hudson* of the bar of ignorance and prejudice, and conferred an equal benefit on the public?" As such, if a state court were to strike down the monopoly, "[s]uch a breach of good faith would level genius, public honor and integrity in the dust."[23]

On March 12, 1812, the Court of Errors delivered a series of seriatim opinions in favor of Fulton, Chancellor Livingston, and the North River Steamboat Company. Justices Joseph Yates, William Van Ness, and Smith Thompson defended the New York steamboat monopoly as a legitimate expression of state power no different from a state monopoly on stagecoach travel, public roads, or other internal improvements. All eyes in the courtroom then turned towards Chief Justice James Kent to see how he would rule.[24]

Kent was a staunch Federalist and supporter of the U.S. Constitution. But he also believed strongly in common-law property rights and strict constitutional interpretation. As a social conservative, Kent also worried about the rising generation of professional politicians and pragmatic businessmen, whom he considered a threat to civic virtue. Not surprisingly, Kent handed down a decision in *Livingston v. Van Ingen* that upheld the steamboat monopoly. In his opinion, Kent observed that the Founders had created a federal government of limited, enumerated powers. Although commerce was a nebulous issue, it would be a "monstrous heresy" to strike down a state monopoly because it *might* conflict with federal power. He concluded that the principle of limited government "ought to be kept steadfast in every man's breast; and above all, it ought to find an asylum in the sanctuary of justice." The state senate reinforced Kent's decision by a unanimous 30-to-0 vote to uphold the monopoly and grant the injunction.[25]

Fulton and Livingston were now armed with a legal victory that sustained their monopoly rights. Yet they continued to face problems from all directions. In spring of 1812, Fulton fired Delacy and Roosevelt for embezzlement. As a final insult, Fulton offered Roosevelt's position to his own father-in-law, Henry Latrobe. Ironically, Chancellor Livingston apprehended Fulton soon afterward for secretly skimming profits from the steam ferry *Jersey* for his wife, Harriet. The estranged partners quickly reunited, however, to fend off another challenge from Stevens, who now sought monopoly rights from the North Carolina legislature. Fulton retaliated by threatening to publish his steamboat plans and "take my reward in the honor of having extended steam boats to every navigable water in the United States." Stevens could avoid this fate only by painting in large letters "Livingston's and Fulton's Patent" on the top beams of his engine frames.[26]

In addition to conflicts with Stevens, Fulton received a request from Colonel Aaron Ogden for a license to operate steamboats in New York waters. Ogden was no stranger to the intricacies of either state politics or steam technology. In the 1790s, he had parlayed his Continental Army service into a successful political career as Governor of New Jersey. As a Federalist in an increasingly Republican state, however, Ogden retired from politics in 1804 and returned home to Elizabethtown, New Jersey, to build a reputation as a successful steamboat promoter. He invested his fortune in a steamboat named the *Sea Horse* and partnered with Thomas Gibbons. In contrast

to Ogden's patriotic credentials, Gibbons was a former Loyalist from Georgia who had fled north to escape charges of dueling and political corruption. But the Southerner was extremely wealthy, and he owned a large private dock facility in Elizabethtown.[27]

Wary of such competition, Fulton demanded an exorbitant fee from Ogden to participate in the New York steamboat monopoly. The Colonel indignantly declined and used his contacts in the New Jersey legislature to secure his own steamboat monopoly. In spring 1811, he also journeyed to Albany to petition the New York legislature to end the Fulton–Livingston monopoly. In a six-hour speech, Emmet brilliantly defended Fulton as the victim of a noble, but naïve heart. The attorney chided his client, "You expect too much from your well-earned reputation and the acknowledged utility to mankind of your life and labors." The New York senate agreed and voted 51 to 43 to uphold the monopoly.[28]

Fulton's victory in court was mitigated by the death of Chancellor Livingston in February 1813. While Fulton squabbled with his heirs and sons-in-law, Robert L. Livingston and Edward P. Livingston, John R. Livingston launched his own petition to the New Jersey legislature to rescind Ogden's steamboat monopoly. New Jersey officials agreed to hold hearings into the matter on January 24, 1815.[29]

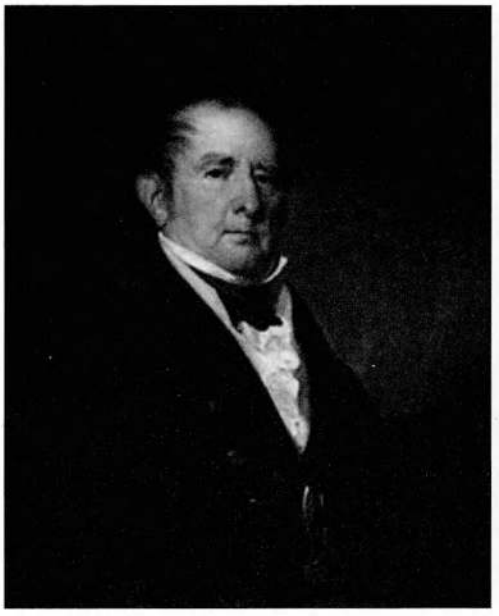
Fulton and Emmet journeyed to Trenton, New Jersey, to find a rogues' gallery of former associates eager for revenge. Over the next several days, Delacy, Roosevelt, Stevens, and Ogden all testified that Fulton had stolen his paddlewheel and steamboat designs from previous inventors. When Fulton circulated a letter detailing paddlewheel experiments that he had purportedly written in 1793, Ogden held the letter up to the light to reveal a 1796 watermark.[30]

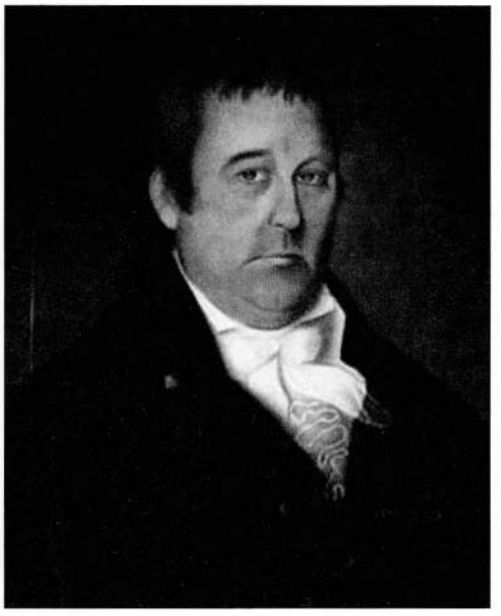
Ogden's lawyer, Joseph Hopkinson, sensing weakness, asked Fulton what need he had for a state monopoly if his federal patent claims were valid. Fulton burst out that "Regardless of how the legislature ruled, he would seize the *Sea Horse* and personally shoot Ogden if he ventured on to the Hudson." Hopkinson, taking a conciliatory stance, admitted that his opponent deserved some measure of credit. Yet Fulton was not a heroic scientist, but an unscrupulous "capitalist" who used fraud and perjury to advance his interests.[31] Despite this devastating critique, in early February 1814, Jeffersonian Republicans and their allies in the New Jersey Assembly and Council rescinded the steam boat monopoly by margins of 21–18 and 7–6, respectively.

On his victorious journey home, Fulton stopped at the Jersey City shipyard to inspect his recently completed steam frigate, *Fulton*. Fulton and several friends attempted to walk back to New York City across the frozen Hudson River. When Emmet fell through the ice, Fulton became soaked in an attempt to save his friend. The young inventor contracted pneumonia and died several weeks later. The following May, John R. Livingston granted Ogden a license to run steam ferries from New York City to Elizabethtown in return for six hundred dollars annually.[32]

Ogden and Gibbons' steam ferry business, armed with legal protection, began to expand. Disagreements over their business and domestic disputes within the Gibbons household, however, soured the partners' relations. In 1812, Gibbons had given in trust to his only daughter, Ann, and her husband, John M. Trumbull, half of his ferry service shares and control of his dock facilities in Elizabethtown. When Ogden demanded a cheaper lease agreement for use of the landing from the Trumbulls, Gibbons retaliated by attempting to destroy the Colonel's business interests and reputation.[33]

Two days after Christmas in 1815, Gibbons sponsored a town meeting to discuss plans to dredge the Elizabethtown creek, build a new drawbridge, and establish a publicly owned steamboat company. A state-chartered bank capitalized at sixty thousand dollars would fund these projects. Such a plan would cripple the privately owned Elizabethtown





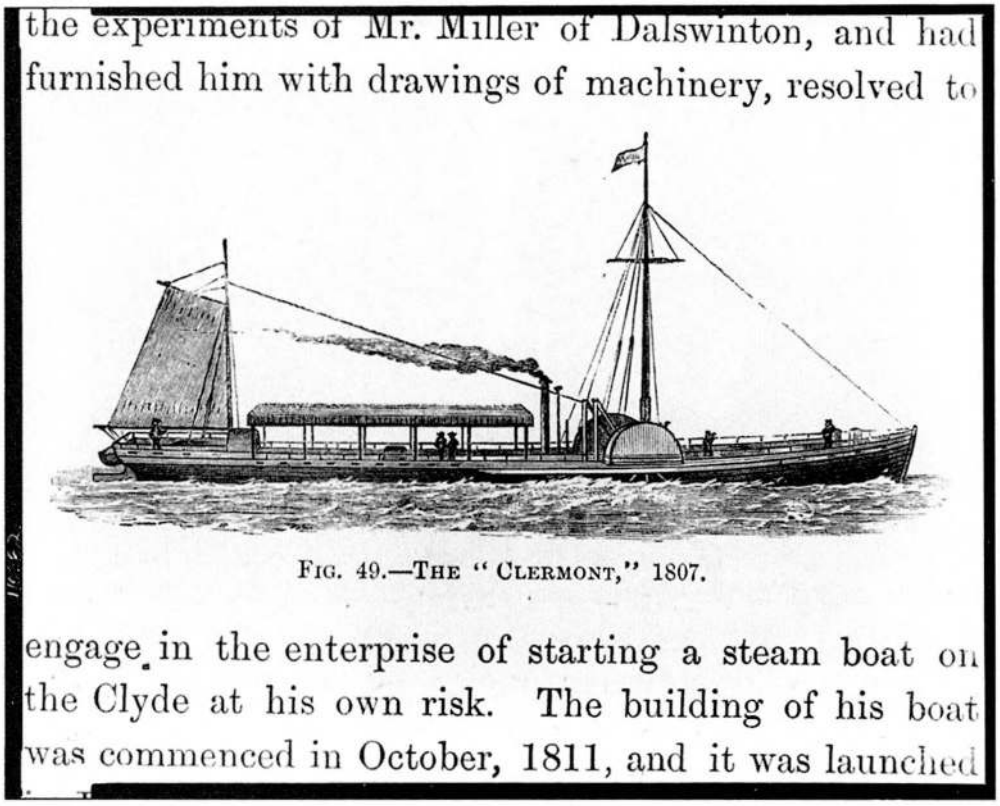
In the 1790s, Aaron Ogden (left) parlayed his Continental Army service into a successful political career as Governor of New Jersey. Finding himself a Federalist in an increasingly Republican state, however, Ogden retired from politics in 1804 and returned home to Elizabethtown, New Jersey, to become a successful steamboat promoter. His business partner, Thomas Gibbons (right), was a former Loyalist from Georgia who had fled north to escape charges of dueling and political corruption. Gibbons was wealthy enough to buy a large private dock facility in Elizabethtown.

Bank, Ogden's primary source of income and credit. On February 3, 1816, Ogden convened his own town meeting to "remove from the minds of the people in this Town, improper impressions in regard to his private transaction with Thomas Gibbons." When the Colonel asked the assembled townsfolk if they intended to challenge his ferry service, he received a chorus of denials.[34]

While Ogden struggled with Gibbons in Elizabethtown, the Livingstons fought a losing battle to defend their steamboat interests on the Mississippi River. In 1814, Edward Livingston sued Henry Miller Shreve, a riverboat captain and engineer, in federal district court for running his steamboat *Enterprize* on the Mississippi in violation of the Louisiana steamboat monopoly. In two separate cases, U.S. district court Judge Dominick Hall ruled that Louisiana could not regulate a public highway such as the Mississippi River.[35]

To help bolster the fortunes of the Livingston and Fulton families, and to shore up his own legal interests in preserving the New York monopoly, Ogden petitioned Congress in February 1816 on behalf of Harriet Fulton and her children for a liberal extension of Fulton's steam-engine patents. Alarmed by this turn of events, Gibbons hired attorney Fernando Fairfax to distribute to various congressmen a pamphlet titled "A Memorial ... Against the Extension of Patents Granted to Robert Fulton," which depicted Fulton as the usurper of Fitch's patent claims. This attempt failed, and in April Congress agreed to extend Fulton's patent rights.[36]

In July 1817, Ogden retaliated by having Gibbons arrested on board the *Sea Horse* for fraudulently selling him a defunct bank note. A humiliated Gibbons informed Ogden that "to arrest me, and hold me to bail, on the fancied existence of a note, for a paltry sum of $2,000 is conduct unwarrantable in a Gentleman of the Law."[37] Consumed with fury, Gibbons reported Ogden and Trumbull to John McDowell, a local Presbyterian



Robert Fulton's *North River Steam Boat* (later referred to as the *Clermont*) was conceived in 1807, proving that boats could be consistently powered by something other than wind and manpower.

minister, for discussing legal strategy on the Sabbath.[38]

In late July 1816, Trumbull convinced his mother-in-law to visit Elizabethtown. Before Ann Gibbons could even unpack her luggage, however, an enraged Gibbons forced her from their house. She sought sanctuary from the Trumbulls, received legal advice from Ogden, and hired attorney Richard Stockton to initiate divorce proceedings. Such a procedure would publicly humiliate Gibbons, as legal separations were notoriously rare at the time and required state legislative permission.[39]

Gibbons was infuriated by these attacks on his character, and he approached Ogden's house on July 16, 1816, to settle matters personally, armed with a horsewhip. As the Colonel was not at home, Gibbons tacked a printed handbill to his front door. The document accused Ogden of plotting on the Sabbath "like Nicanor upon Judas," labeled the colonel "RASCALLY," and challenged him to a duel for his interference in Gibbons's family affairs. That Gibbons took the time to print a handbill and waited nearly six weeks before delivering it suggested a deliberate spectacle to tarnish Ogden's reputation. Ogden did not rise to the provocation, but delivered a written apology and filed trespass charges against Gibbons in state court.[40]

Gibbons avoided arrest by taking an impromptu vacation in Saratoga Springs, New York. He was undistracted by the scenic resort town and channeled his anger into a pamphlet calculated to destroy the reputation of his perceived enemies. The treatise condemned Trumbull for seducing "the only daughter of the defendant within his walls," and Ann Gibbons Trumbull and Ann Gibbons for supporting Trumbull. It concluded, "Trumbull ought

to be hanged for the injustice he has done his children. Amen."[41] Gibbons threatened to distribute fifty copies of the document to family and friends unless his wife promised to drop her divorce suit. Ann Gibbons relented, but Trumbull obtained several of the pamphlets and promptly sued Gibbons for libel in New York Chancery Court.[42]

On June 1, 1817, Ogden and Trumbull separately called on Gibbons and begged him to visit his daughter. Momentarily putting aside his anger, Gibbons found Ann Trumbull dying from a failed pregnancy. Shortly before her death, Gibbons promised that he would provide for her children. In September 1817, true to his word, Gibbons sought custody of William and Thomas Trumbull from the New Jersey Orphan's Court. When Trumbull objected, Gibbons claimed he was merely fulfilling Ann Trumbull's dying wishes. Gibbons bellowed, "Taking a death Bed figure to your aid, you and Aaron Ogden made me make a covenant with death . . . You are now endeavoring to make me disannul that covenant made at the gates of Death; it shall not be so."[43] Gibbons, eager to seek revenge on Ogden, purchased a steamboat named the *Stoudinger* and hired a young sloop captain named Cornelius Vanderbilt to ferry passengers from Elizabethtown to New York City in competition with Ogden's *Sea Horse*.[44]

In late May, *Gibbons v. Trumbull* appeared before New York State Supreme Court Justice Ambrose Spencer in New York City. Emmet, speaking for Gibbons, depicted his client as an elderly gentleman who had merely succumbed to righteous anger in lashing out at his opponents. The prosecution countered that Gibbons had deliberately written the pamphlet over several weeks, coldly manipulated his wife, and tarnished the honor of his own family. Justice Spencer concurred that the pamphlet was "a production fraught with so much indecency, immorality, and he might almost add, of blasphemy." The jury ruled accordingly in Trumbull's favor and demanded that Gibbons pay fifteen thousand dollars in damages.[45]

Having lost to Trumbull, Gibbons sought to lure Ogden and his New York monopoly license into a confrontation in federal court. In 1818, Gibbons ordered Vanderbilt to take the steamboat *Bellona* on repeated trips directly to New York City. On October 20, 1818, Ogden took the bait and filed a motion in New York Chancery Court. Chancellor James Kent issued an injunction against Gibbons the next day.[46]

Bound by the terms of the injunction, Gibbons signed a contract with U.S. Vice President Daniel D. Tompkins, who also held a license from the Fulton–Livingston syndicate. Tompkins' steamboat, *Nautilus,* would rendezvous with Gibbons' *Bellona* at Great Kills Harbor on Staten Island and exchange passengers and cargo. To save expenses, Vanderbilt ran the *Bellona* from New Jersey to New York City whenever feasible.[47]

Ogden quickly learned of this plan and demanded that the New York sheriff arrest Gibbons and Vanderbilt for violation of the monopoly. After six weeks of dodging New York City officials, on July 4, Vanderbilt quietly surrendered to authorities on the New York waterfront. When brought before Chancellor Kent, Vanderbilt produced a signed contract from Tompkins allowing him to rent the *Bellona* to travel from Staten Island to New York City every Sunday for the month of June, including the date of his capture. Kent was caught in an embarrassing situation and had no choice but to free Vanderbilt.[48]

In spring 1821, Gibbons forced Ogden, who was financially desperate, into an uneasy truce. Ogden agreed to transport passengers on board his vessel *Atlanta* from New York to Elizabethtown, where they would be transferred to Gibbons' *Bellona* for a voyage to New Brunswick. John R. Livingston was afraid of such an alliance, and he sued Gibbons and Ogden in New York Chancery Court. In two separate rulings, Chancellor Kent dismissed charges against Ogden because he still possessed a license from the

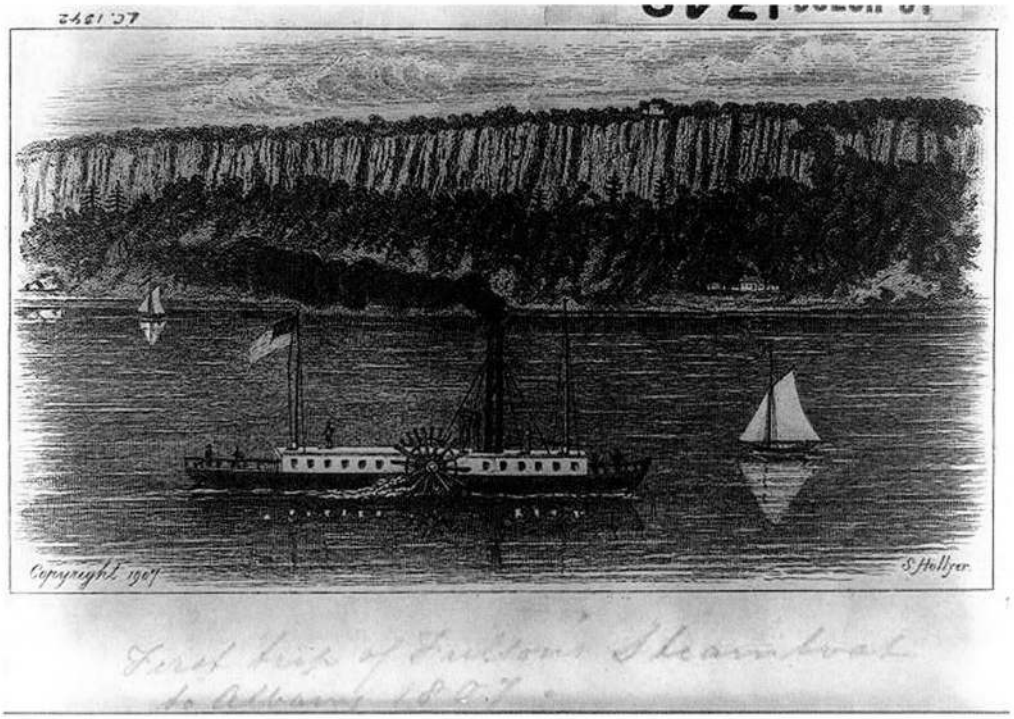
Fulton–Livingston syndicate and issued yet another injunction against Gibbons.[49]

Even as Gibbons played Ogden against Livingston, he secretly prepared a suit in New York Chancery Court against his former partner. In September 1819, Gibbons' attorney, William Henry, argued that Ogden's 1815 monopoly license controlled only steam travel from New York City to Elizabethtown Point. Gibbons' vessels were not technically in violation of Ogden's contract, as they resupplied at a nearby dock called Halstead's Point. On October 6, Chancellor Kent ruled that a federal coasting license possessed by Gibbons merely enrolled his vessel for federal taxation purposes and did not conflict with the New York monopoly law. Furthermore, Ogden's monopoly rights could only generate profit if they included access to the entire Elizabethtown shore. In retaliation, Gibbons petitioned the New Jersey legislature for a new monopoly law. On February 25, the legislature passed a law that barred New Yorkers from steam travel in state waters. Under the terms of this act, Gibbons promptly secured injunctions against both Ogden and John R. Livingston in New Jersey Chancery Court.[50]

Ogden fought back by asking Chancellor Kent for an arrest warrant against Gibbons, with damages set at ten thousand dollars. In a tersely worded decision delivered on December 4, Kent stated that Ogden's license as an exclusive monopoly "meant to embrace the whole stream of intercourse" between Elizabethtown and New York. Kent admitted the vagueness of his previous ruling and ordered Gibbons to pay merely Ogden's legal fees and refrain from operating steamboats in New York waters. Ogden had greater success in obtaining five thousand dollars in damages for his trespass suit against Gibbons in the New Jersey Court of Common Pleas.[51]

In February 1821, Gibbons' appeal of Chancellor Kent's decision reached the Supreme Court in Washington, D.C. Gibbons had good reason to hope for a favorable ruling from Chief Justice John Marshall. As a Revolutionary War veteran, Virginia Federalist, Adams appointee, and biographer of George Washington, Marshall supported a strong federal government. Over the past twenty years, during his tenure as Chief Justice, the Supreme Court had played a central role in the economic and legal transformation of the young nation. Recent decisions such as *McCulloch v. Maryland* (1819)[52] and *Cohens v. Virginia* (1821)[53] had protected the Second Bank of the United States and the appellate jurisdiction of the federal courts from state control. Yet these cases had proved unpopular with large sections of the American public. A similar decision in *Gibbons v. Ogden* could undermine the already strained credibility of the Supreme Court.[54] As Joseph Story remarked to his colleague, Brockholst Livingston, "We have already had our full share of the public irritations, [and] have been obliged to decide constitutional questions, which have encountered much opposition—I had hoped for a little repose; but I perceive it is not to be allowed us. Whichever way we decide the Steamboat case, it will create a great sensation—We must content ourselves however in doing our duty & leave to time to decide the consequences."[55] Marshall may have shared Story's weariness but not his stoicism. For upon hearing the facts of the case, the Chief Justice ruled that, as Chancellor Kent had not given a final decree in the 1819 injunction that formed the basis for the current appeal, the Supreme Court could not hear the case.[56]

Gibbons quickly appealed the decision to the New York Court of Errors, where Chancellor Kent issued yet another injunction against him. Although Ogden dropped his suit against Gibbons to prevent further conflict, Gibbons nevertheless planned to "enjoin as many of the Steam Boats belonging to the monopolists as are required by the laws of N. Jersey, so long as the Citizens of N. Jersey are deprived their right of freely navigating the waters between the ancient shores of the States of N.Y. [and] N.J."[57]



On its first trip, Fulton's steamboat *North River Steam Boat* went up the Hudson River to Albany. It operated under a monopoly granted by the State of New York, which was later contested by Ogdens and Gibbons.

In fall 1823, *Gibbons v. Ogden* once again appeared before the Supreme Court. At that time, the public mood was, if anything, more hostile toward the Marshall Court than it had been before. In the recent federal circuit court case *Elkison v. Deliesseline* (1823),[58] Associate Justice William Johnson, a Jeffersonian appointee and frequent critic of Marshall, had struck down a South Carolina law passed in the wake of the Denmark Vesey Conspiracy. The measure in question imprisoned black sailors aboard their ships while in port. Johnson overturned the law as a violation of the Commerce Clause. This decision inflamed Southern states' rights supporters who were worried about possible federal control of the interstate slave trade.

Against this backdrop, the Supreme Court first heard arguments in the much anticipated "steamboat case" on the morning of February 4, 1824. Congressman Daniel Webster and Attorney General William Wirt served as lead counsel for Gibbons. In his opening arguments, Webster asserted that the Founders had created a Constitution to prevent economic conflicts between states. To give states concurrent power over interstate commerce now would lead to endless legal disputes. The New York monopoly was a moneymaking scheme, rather than a public safety measure. As such, Gibbons' federal coasting license provided unfettered access to New York waters.[59]

Former New York attorneys general Thomas Oakley and Thomas Addis Emmet spoke for Ogden. Oakley reiterated the claim that neither Livingston nor Fulton had ever claimed to be inventors of the steamboat. They had merely imported such useful technology into New York and received a monopoly over local steam travel for their noble efforts. Thus, the steamboat monopoly was not as a commercial regulation, but rather a navigation law akin to New York's quarantine, inspection, and licensing laws.[60]

Emmet followed by arguing that the New York courts had consistently upheld the

steamboat monopoly and that many states had similar monopoly agreements. The Founders had specifically granted Congress broad commerce power so that the states could practically regulate the local economic affairs of a growing, diverse nation. To micromanage the national economy from Washington, D.C. would lead to chaos and disunion. Congress had consistently upheld this notion by recognizing state-sponsored internal improvements, tax laws, and health measures. Emmet concluded that New York should take pride in its technological achievements. Emmet concluded with a quote from Virgil's epic the *Aeneid*, in which the hero Aeneas observes paintings in the palace of Carthage depicting the destruction of his come city of Troy and laments, "*Quae regio in terris nostri non plena laboris*?" (What region of the earth is not full of our calamities?) Whereas Aeneas had used the phrase to mourn the fact that the entire ancient world had heard of the fall of Troy, Emmet invoked the passage to remind his audience that countries throughout the modern world had witnessed New York's success in steam power.[61]

In response, Wirt reminded the court that regardless of any state commerce powers, Congress still held broad authority over commerce and patent rights. Because Fulton had frequently claimed to be the inventor of the steamboat, attempts by Ogden's lawyers to depict the New York monopoly as a public-safety measure were shallow attempts to bypass federal patent laws. Although states certainly held police powers, they surrendered control over interstate trade to Congress through their ratification of the Constitution. The Federal Coasting Act of 1793 therefore trumped the state monopoly.[62]

Wirt concluded by chiding Emmet for so poorly invoking the *Aeneid*. He reminded the court that Aeneas's statement had been made in a moment of despair while remembering the fall of Troy in a civil war that pitted Trojons against their distant Achean cousins. If the federal government allowed state economic rivalries to go unchecked, the United States might suffer a similar fate. Under such circumstances, "New-York shall look upon this scene of ruin . . . with shame and confusion—drooping under the weight of her sorrow, with a voice suffocated with despair, well may she then exclaim, '*Quis jam locus, Quae regio in terris nostri non plena laboris!*'"[63]

The delicate issues surrounding the case and the unexpected injury of Chief Justice Marshall postponed a decision in the *Gibbons* case for nearly a month. At last, on March 2, 1824, Marshall handed down a sweeping decision that declared the New York monopoly unconstitutional. The Chief Justice began by noting that, regardless of their own sovereignty, the states had granted the federal government broad grants of power by ratifying the Constitution. To limit Congress to its enumerated powers under the Constitution "would cripple the government, and render it unequal to the object, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent."[64]

The Commerce Clause of the Constitution clearly gave Congress the power to regulate interstate commerce. Furthermore, "[c]ommerce, undoubtedly, is traffic, but it is something more; it is intercourse," which could include trade between nations and trade between different parts of the same nation across state boundaries.[65] Although the state and federal governments could concurrently regulate commerce, states could do so only through their police powers. Congress had created the Federal Coasting Act in question to allow enrolled vessels to trade in American ports, regardless of state boundaries or the nature of their propulsion. The New York monopoly obviously conflicted with this act.[66] Marshall concluded with a swipe at "[p]owerful and ingenious minds" who sought to "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use."[67]

Despite a unanimous vote by the Supreme Court in the *Gibbons* case, Justice William Johnson insisted on a concurring opinion.

Johnson eschewed constitutional interpretations in general and insisted that the plain, concise language of the Constitution was designed "to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means."[68] The Framers had clearly given Congress broad commerce powers to stabilize trade between states. If Congress could not regulate both navigation and commerce, then it could not carry out its enumerated powers to control interstate trade at all. The Commerce Clause was therefore all that was needed to strike down the New York monopoly.[69]

Public reaction to the outcome of the case was overwhelmingly positive. Within a month of Marshall's decision, twenty steamboats—many from other states—cruised New York waters. Middling Americans, such as businessmen, merchants, artisans, and farmers, quickly took advantage of the cheaper fares and better service brought by the destruction of the monopoly. Northern papers, such as the *New York Commercial Advertiser*, reported that Marshall's decision "presents one of the most powerful effects of the human mind that has ever been displayed from the bench of any Court."[70] The *Elizabethtown Gazette* of Elizabethtown, New Jersey, similarly boasted, "The galling shackles with which a few lordly monopolists have, for some years past, contrived to fetter our navigation and intercourse with our sister state, have been at length broken by the Ithuriel spear, whose-all-powerful touch makes every unrighteous decision to crumble into dust."[71]

Many Southerners reacted favorably to the decision, although some planters worried that the case could prove a dangerous precedent regarding federal regulation of the interstate slave trade. For instance, the states' rights *Richmond Enquirer* stated that if Congress wielded complete power over interstate commerce, then "[t]he state Governments would molder into ruins, upon which would rise up one powerful, gigantic and threatening edifice."[72]

In May 1824, John R. Livingston, with the support of Gibbons, ran his steamboat, *Olive Branch*, between New York City and Albany. In the course of such voyages, Livingston stopped briefly at Jersey City, New Jersey to exchange passengers and cargo and to maintain the status of "interstate commerce."[73] The North River Steamboat Company filed suit against Livingston in New York Chancery Court. At trial, Emmet argued that Livingston's voyage had primarily taken place within New York state boundaries and therefore had violated the Fulton–Livingston monopoly. On June 16, Chancellor Nathan Sanford agreed that states should have spheres in which to regulate commerce. Nevertheless, the *Gibbons* case was now binding precedent and had to be obeyed.[74]

Despite this setback, the stockholders of the North River Steamboat Company made one last appeal to the New York Court of Errors. On February 28, 1825, before a packed courtroom, Chief Justice John Savage announced, "The state law is annihilated, so far as the ground is occupied by the law of the Union; and the supreme law prevails, as if the state law had never been made." In a startling reversal of *Livingston v. Van Ingen* a mere fourteen years earlier, Savage and twenty-eight state senators defeated two state supreme court justices and seven senators to deny the injunction.[75]

In March 1825, the *Albany Argus* reported, "Since the late decision of the court of errors, steam boats on our rivers have become as thick as blackberries."[76] After twenty-five years of domination over the waters of New York, the steamboat monopoly was finally dead. Yet the appearance of victory was deceptive, as Gibbons succumbed to diabetes and died less than two years later. Gibbons, bitter at Ogden and the Trumbulls until the end, maintained in his will that neither Trumbull nor his descendents would ever "acquire or inherit one cent of my estate."[77] Ogden, on the other hand, went bankrupt and served time

in a New York debtor's prison, where he became a cause célèbre as a Revolutionary War hero who had fallen on hard times. The elderly Ogden was eventually released and died peacefully at home in 1839, with his reputation as a gentleman intact.[78]

As Marshall's *Gibbons* decision left the issue of concurrent federal–state regulation unanswered, the issue appeared repeatedly before the Supreme Court over the next decades. For instance, in *Brown v. Maryland* (1827),[79] Marshall stated that Congress controlled goods during commercial transactions across state lines, but that when sold, such merchandise could be taxed by the states. Two years later in *Willson v. Black Bird Creek Marsh Company* (1829), the Marshall Court agreed that a dam constructed over a navigable branch of the Delaware River did not hinder interstate commerce.[80]

Throughout the Jacksonian era, the Taney Court cited *Gibbons* to argue that states had the right to regulate commerce for the local good in the absence of federal legislation. In the *License Cases* (1847),[81] the Supreme Court upheld several prohibition laws aimed at foreign immigrants. In *Cooley v. Board of Wardens* (1852),[82] Taney and his colleagues reaffirmed a Pennsylvania law that mandated the hiring of local pilots for ship voyages in state waters as a local, rather than a national, commercial matter.

Both the late nineteenth and the early twentieth centuries witnessed rapid industrial growth that held important repercussions for interstate commerce. With *Gibbons* and *Cooley* as precedent, the Supreme Court upheld federal commerce power over railroads in *Wabash Railway v. Illinois* (1886) and stockyards in *Swift v. United States* (1905), but it limited such authority over agricultural companies in *United States v. E. C. Knight Company* (1895) and child labor laws in *Hammer v. Dagenhart* (1918). Congress also began to slowly assert its commerce powers in 1887 with the creation of the Interstate Commerce Commission, the first federal agency designed to oversee trade between states.[83]

The Great Depression of 1929 and the subsequent presidency of Franklin Delano Roosevelt brought about drastic changes for the legacy of *Gibbons v. Ogden*. When the Supreme Court refused to uphold New Deal legislation such as the National Industrial Recovery Act in *Schechter Poultry Corporation v. United States* (1936), Roosevelt threatened to increase the number of Supreme Court Justices and introduce mandatory retirement for court members. Although this "court-packing" plan proved unpopular, the Supreme Court gradually accepted a broader definition of the Commerce Clause through decisions such as *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937).[84]

In the 1930s, New Deal scholars began to depict *Gibbons v. Ogden* as a harbinger for the rise of a regulatory state. In 1937, two years before his appointment to the Supreme Court, Felix Frankfurter published *The Commerce Clause Under Marshall, Taney, and Waite*. Frankfurter's work suggested that Marshall's *Gibbons* decision had tentatively promoted the doctrine that "the Commerce Clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority," which in turn reinforced the notion that "though we are a federation of states we are also a nation."[85]

Frankfurter's interpretation of *Gibbons v. Ogden* helped justify the expansion of congressional commerce power over a wide variety of subjects. In *United States v. Carolene Products Co.* (1938) Associate Justice Harlan Fiske drew from *Gibbons* to assert that Congress wielded complete power over interstate trade. The federal government could furthermore ban products it deemed harmful (in this case filled or skimmed milk) to protect the public health. The fourth footnote of Stone's decision suggested that in future cases the Supreme Court could use "more exacting judicial scrutiny" in examining cases in which "prejudice against discrete and insular minorities may be a special condition."[86]

In *Wickard v. Filburn* (1942), Justice Robert Jackson likewise upheld the 1938

Agricultural Adjustment Act on the precedent of *Gibbons*. Noting that Marshall had granted Congress broad commerce powers under *Gibbons*, Jackson stated that the Depression had created a need for "broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*."[87]

Twenty years later, in *Heart of Atlanta Motel, Inc. v. United States* (1964), Justice Thomas Campbell Clark adopted a similarly broad interpretation of *Gibbons* and the principles laid down in "footnote four" to strike down segregation laws in hotels that catered to interstate traffic. Clark ruled, "Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce." Recent increases in interstate traffic alone made segregation laws an undue burden on interstate commerce.[88]

Yet beginning in the 1990s, the Rehnquist Court launched a substantive attempt to sharply limit congressional commerce authority. In *United States v. Lopez* (1995), the Supreme Court struck down a federal statute based on the notion that possession of guns near public schools, if repeated throughout the nation, could have a negative impact on interstate trade.[89] Five years later, in *United States v. Morrison,* the Supreme Court invalidated a portion of the Violence Against Women Act, which provided for federal civil suits for victims of gender-motivated violence based on the contention that violence against women inhibited travel and commerce across state lines.[90] In both *Lopez* and *Morrison* the Rehnquist Court argued that state laws already provided for control of firearms near schools and punishment for those convicted of rape, making federal statutes in these areas based upon the authority of the commerce clause unnecessary. Yet even these precedents appeared to have limits for in *Gonzales v. Raich* (2005) the Court upheld a federal controlled substances act that banned the transportation of marijuana, even for medical purposes, across state lines.[91]

When looking back on *Gibbons v. Ogden* from the perspective of nearly two centuries later, one is struck by the ironies at work in its creation and enduring role as a binding precedent. Livingston, Fulton, Gibbons, and Ogden each invoked notions of civic virtue to promote their economic interests in state and federal court. Chancellor Kent and James Marshall likewise agreed that steam power could bring about social progress; they differed merely on which legal forum could best aid this development. Yet each of these individuals helped popularize the notion that government could regulate commerce on a number of levels to improve the world around them. Later generations of social reformers would draw from this legacy and invoke *Gibbons* to justify the regulation of alcohol, immigration, labor standards, minimum-wage laws, and civil rights. Although the Rehnquist and Roberts courts have moved toward a narrower interpretation of the Commerce Clause in recent years, *Gibbons v. Ogden* remains a vital precedent in the ongoing debates over the nature and scope of commerce regulation in American life.

ENDNOTES

[1] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

[2] Maurice Baxter, **The Steamboat Monopoly: *Gibbons v. Ogden*, 1824** (New York: Alfred A. Knopf, Inc., 1972) represents the most in-depth account of *Gibbons v. Ogden*. A succinct but informative discussion of *Gibbons v. Ogden* can be found in George Dangerfield, "The Steamboat Case," in John A. Garraty, ed., **Quarrels That Have Shaped the Constitution**, rev. and expanded ed. (New York: Harper & Row, 1987): 57–69.

[3] *Marbury v. Madison*, 5 U.S. 137 (1803).

[4] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[5] Edward C. Walterscheid, **To Promote the Progress of Useful Arts: American Patent Law and Administration 1798–1836** (Littleton, Colo.: Fred B. Rothman & Co., 1998): 40–54.

[6] John Fitch, **The Autobiography of John Fitch**, ed. Frank D. Prager (Philadelphia: American Philosophical Society, 1976): 154–65; Eric H. Robinson, "The Early Diffusion

of Steam Power," *Journal of Economic History* 34 (March 1974): 104–05.

[7]John Stevens to Robert R. Livingston, December 3, 1788, Randall LeBoeuf Collection, New York Historical Society; John Stevens to Robert R. Livingston, August 6, 1794, Robert R. Livingston Papers, New York Historical Society; Robert R. Livingston to John Stevens, August 30, 1795, Stevens Family Papers, New Jersey Historical Society; Robert R. Livingston to Nicholas Roosevelt, February 22, 1797, Robert Fulton Papers, New York Historical Society; Robert R. Livingston to Nicholas Roosevelt, December 8, 1797, Fulton Papers; Robert R. Livingston to Nicholas Roosevelt, December 14, 1797, Fulton Papers; George Dangerfield, **Chancellor Robert R. Livingston, 1746–1813** (New York: Harcourt, Brace, 1960): 1–29, 186–92; Archibald Douglas Turnbull, **John Stevens: An American Record** (New York: The Century Co., 1928): 35–58.

[8]Robert Fulton to Thomas Jefferson, December 3, 1807, Thomas Jefferson Papers, Library of Congress; Thomas Jefferson to Robert Fulton, December 10, 1807, Jefferson Papers; Cynthia Owen Philip, "Robert R. Livingston: Enthusiastic Inventor, Prudent Entrepreneur," *Hudson Valley Regional Review* 4 (March 1987): 74–80.

[9]Robert G. Albion, **Rise of New York Port** (Boston: Northeastern University Press, 1939): 7–27.

[10]John Stevens to Robert R. Livingston, December 28, 1808, Stevens Family Papers.

[11]John and Rachel Stevens to Robert R. and Margaret Beekman Livingston, February 6, 1808, Livingston Papers; Rachel Stevens to Robert R. Livingston, March 20, 1807, Stevens Family Papers; John Stevens to Robert R. Livingston, March 20, 1808, Stevens Family Papers; Robert R. Livingston to John Stevens, October 10, 1808, Livingston Papers.

[12]Contract between Robert R. Livingston and Robert Fulton and John R. Livingston, August 20, 1808, Robert Fulton Papers—Gilbert Montague Collection (New York Public Library); "A Friend to Useful Invention and Justice," *American Citizen* (October 27, 1808): 2. *See also* rough draft entitled "Fair Play," n.d., Livingston Papers.

[13]John Stevens, "To the Public," *American Citizen* (October 28, 1808): 2.

[14]William Thornton to John Stevens, October 11, 1808, William Thorton Papers, Library of Congress; William Thornton to William Brown, October 28, 1808, Thorton Papers; John Stevens to William Thornton, October 28, 1808, Thorton Papers; William Thornton to John Stevens, November 2, 1808, Thorton Papers; William Thornton to John Stevens, January 23, 1809, Thorton Papers; John Stevens, draft of reply to "A Friend to Useful Inventions and Justice," November 1811, Stevens Family Papers; Robert Fulton to John Stevens, December 6, 1808, Fulton Papers—Montague Collection; Horace Birney to John Stevens, February 19, 1809, Stevens Family Papers.

[15]Benjamin Henry Latrobe to Robert Fulton, February 7, 1809, Benjamin Henry Latrobe Papers, Library of Congress; Benjamin Henry Latrobe to Nicholas Roosevelt, February 7, 1809, Latrobe Papers.

[16]Robert R. Livingston to Edward Livingston, September 6, 1810, Livingston Family Papers, Clermont State Historical Site; W.C.C. Claiborne to Robert R. Livingston, July 26, 1811, **Official Letterbooks of W.C.C. Claiborne** (Mississippi State Archives).

[17]Robert Fulton, "Plan for Mississippi Steamboat Company," Fulton Papers—Montague Collection; Benjamin Henry Latrobe to Nicholas Roosevelt, February 7, 1809, in John C. Van Horne and Lee W. Formwalt, eds., **The Correspondence and Miscellaneous Papers of Benjamin Henry Latrobe**, vol. 2 (New Haven, Conn.: Yale University Press, 1987): 421–23; Benjamin Henry Latrobe to Robert Fulton, February 7, 1809, in Van Horne and Formwalt.

[18]Dangerfield at 418–19.

[19]*Livingston v. Van Ingen et al.*, 15 F. Cas 697 [No. 8420] (C.C.D.N.Y., 1811).

[20]*Livingston v. Van Ingen*, 9 Johns 507 (N. Y. Ch., 1811). In August 1810, Lansing had contacted William Thornton in Washington, claiming to represent a group of Albany businessmen that wanted to create a steamboat line on the Hudson River. Critical of Fulton and Livingston's legal claims, Lansing had suggested an alliance based on Thornton's patent claims and the economic resources of the Albany syndicate. The Albanians had freely accepted Thornton's plans and advice, but had declined his offer of a partnership. John Lansing to William Thornton, August 4, 1810, Thorton Papers; William Thornton to John Lansing, August 18, 1810, Thorton Papers; James Van Ingen to William Thornton, November 20, 1810, Thorton Papers; William Thornton to James Van Ingen, December 2, 1810, Thorton Papers; William Thornton to James Van Ingen, December 14, 1810, Thorton Papers; "John Lansing," in John A. Garraty and Mark C. Carnes, eds., **American National Biography**, vol. 13 (New York: Oxford University Press, 1999): 180–81.

[21]*New York Columbian* (November 21, 1811): 2; *New York Columbian* (November 23, 1811): 2.

[22]*Livingston v. Van Ingen*, 9 Johns 539–45 (N. Y. Ch., 1811).

[23]*Livingston*, 9 Johns at 553–58.

[24]*Livingston*, 9 Johns at 563–70.

[25]*Livingston*, 9 Johns at 573–89.

[26]Robert Fulton to Benjamin Henry Latrobe, August 18, 1812, LeBoeuf Collection; Robert Fulton, "Purchase of Hope," December 11, 1812, LeBoeuf Collection; Benjamin Henry Latrobe to Henry S. B. Latrobe, June 1, 1812, in Van Horne and Formwalt, vol. 3, at 278–79, 287–89, 363–66; Harriet Fulton to Robert R. Livingston, July 29, 1812, Livingston Family Papers, New York Public Library;

North Carolina State Legislature Grant to John Stevens, December 24, 1812, Stevens Family Papers.

[27]Aaron Ogden, **Autobiography of Col. Aaron Ogden of Elizabethtown** (Patterson, N.J.: The Printing Press and Publishing Co., 1893): 17–19; "State of New Jersey, An Act for the Protection of Steamboats Owned and Navigated by Citizens of this State," January 24–25, 1811, reprinted in John Ward, ed., "An Account of the Steamboat Controversy," **Proceedings of the New Jersey Historical Society**, vol. 9, **1860–1864** (Newark: New Jersey Historical Society, 1864): 5–6; "The Memorial of Aaron Ogden," December 23, 1811, "An Act for the Protection of Steamboats Owned and Navigated by Citizens of this State," January 25, 1812, "The Memorial and Petition of Aaron Ogden," October 29, 1813, and "An Act for the More effectual Enforcement of the Provisions contained in an Act, titled 'Protection of Steamboats Owned and Navigated by Citizens of this State,'" February 12, 1813, all reprinted in "Concerning Steamboats: Documents without Comments," in Ward, ed., "Account of the Steamboat Controversy," at 3–4, 8–9.

[28]New York State Legislature, **Report of the Committee to Whom Was Referred the Memorial and Petition of Aaron Ogden** (Albany, N.Y.: Author, 1814): 1–27.

[29]"The Petition of John R. Livingston and Robert J. Livingston to the Legislature of New Jersey Respecting Steam-Boats," in Ward, ed., "An Account of the Steamboat Controversy," at 1–30.

[30]Lucius Horatio Stockton, **A History of the Steamboat Case, Lately Discussed by Counsel Before the Legislature of New Jersey, Comprised in a Letter to a Gentleman at Washington** (Trenton, N.J.: privately printed, 1815): 3–15.

[31]*Id.* at 15–16.

[32]"Copy of Articles of Agreement between John R. Livingston and Aaron Ogden," May 5, 1815, reprinted in "Concerning Steamboats: Documents without Comments," in Ward, ed., "An Account of the Steamboat Controversy," at 24–25.

[33]George Johnson to Thomas Gibbons, March 2, 1812, Gibbons Family Papers, Drew University Library; George Johnson to Thomas Gibbons, May 28, 1812, Gibbons Family Papers; George Johnson to Thomas Gibbons, May 29, 1812, Gibbons Family Papers; Thomas Gibbons to Jonathan Dayton, June 23, 1812, Gibbons Family Papers.

[34]Thomas Gibbons to Aaron Ogden, December 26, 1815, "Resolutions of the Elizabeth Town Meeting, to the Legislature of the State of New Jersey, The Memorial and Petition of the Subscribers, Inhabitants of Elizabeth Town and Its Vicinity in the County of Essex Respectfully Showeth . . .", December 27, 1815, Affidavit of William Shute and William R. Williamson, New Jersey, Borough of Elizabeth, February 3, 1816, Gibbons Family Papers.

[35]"*Heirs of Fulton and Livingston v. Shreve,*" number 1013, 1817, LeBoeuf Collection.

[36]Extension of a Patent Right, February 27, 1816, Walter Lowrie and Walter S. Franklin, eds. *American State Papers: Miscellaneous* (Washington: Gales and Seaton, 1834) 2: 292–93; Thomas Gibbons to Fernando Fairfax, March 16, 1816, Gibbons Family Papers; Thomas Gibbons to Fernando Fairfax, March 22, 1816, Gibbons Family Papers; Fernando Fairfax, **Memorial of Fernando Fairfax Against the Extension [sic] of the Patents Granted to Robert Fulton for Improvements in Propelling Vessels by Steam** (Washington, D.C.: Edward De Krafft, 1816).

[37]Thomas Gibbons to David B. Ogden, June 1, 1816, Gibbons Family Papers.

[38]Thomas Gibbons to Reverend John McDowell, July 24, 1816, Gibbons Family Papers.

[39]Thomas Gibbons to Richard Stockton, July 26, 1816, Gibbons Family Papers; Richard Stockton to Thomas Gibbons, July 29, 1816, Walter Dormitzer Collection, New Jersey Historical Society.

[40]Thomas Gibbons to Aaron Ogden, May 30, July 25, July 26, 1816, in unpublished handbill, July 16, 1816, Gibbons Family Papers; Theodore Thayer, **As We Were: The Story of Old Elizabethtown** (Elizabeth: Grassman Publishing Co., 1964): 230.

[41]Thomas Gibbons, untitled pamphlet, quoted in New York State, "Report of A Trial for a Libel . . . on the 24th and 25th days of June, 1818 . . . *John M. Trumbull v. Thomas Gibbons*," *New-York City Hall Recorder* 7 (July 1818): 97–112.

[42]Thomas Gibbons to Mrs. Thomas Gibbons, November 7, 1816, Gibbons Family Papers.

[43]Gibbons Family Genealogy: 12, Gibbons Family Papers; Thomas Gibbons to John M. Trumbull September 23, 1817, Gibbons Family Papers.

[44]Memorandum of Agreement made by Thomas Gibbons and Cornelius Vanderbilt, June 26, 1818, Gibbons Family Papers; Meade Minnigerode, **Certain Rich Men** (New York: G.P. Putnam's Sons, 1927): 103–33.

[45]Thomas Gibbons to Peter Jay Munro, October 3, 1818, Gibbons Family Papers; *Gibbons v. Trumbull:* 98–112; *Niles' Register*, July 4, 1818: 325.

[46]*Gibbons v. Ogden* (1818), BM-0-109, New York Chancery Court Papers, New York County Clerk's Office.

[47]Agreement between T. Gibbons and Daniel D. Tompkins, May 13, 1819, Gibbons Family Papers; Daniel D. Tompkins to William Gibbons, June 15, 1819, Gibbons Family Papers; copy of injunction in New York Chancery Court Case *Ogden v. Gibbons*, June 21, 1819, Gibbons Family Papers.

[48]*In the Matter of Vanderbilt*, 4 Johns 57 (1819); Wheaton Lane, **Cornelius Vanderbilt: An Epic of the Steam Age** (New York: Alfred A. Knopf, 1942): 33–37.

[49]*Livingston v. Ogden and Gibbons*, 4 Johns 48 (1819); *Livingston v. Ogden and Gibbons*, 4 Johns 95 (1819).

[50]*Gibbons v. Ogden*, 17 Johns 418 (1820); *Livingston v. Tompkins*, 4 Johns 421 (1820); *Gibbons v. Ogden*, 6 N.J.L. 285 (1822).

[51] *Ogden v. Gibbons*, 4 Johns 175 (1819). Gibbons launched several appeals for a new trial until the New Jersey supreme court finally reduced the fine to $2,500. *State v. Gibbons*, 4 N.J.L. 45 (1818); *State v. Dayton*, 4 N.J.L. 64 (1818); *Ogden v. Gibbons* 5 N.J.L. 612 (1819).

[52] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[53] *Cohens v. Virginia*, 19 U.S. 264 (1821).

[54] *Fairfax Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Dartmouth College v. Woodward* 17 U.S. 518 (1819); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[55] Joseph Story to Brockholst Livingston, June 4, 1822, Joseph Story Papers, Massachusetts Historical Society.

[56] *Gibbons v. Ogden*, 6 Wheaton 448 (1821).

[57] Thomas Gibbons to Aaron Ogden [rough draft], March 22, 1822, Gibbons Family Papers.

[58] *Elkison v. Deliesseline*, 8 Fed. Cas. 493–94, no. 4366 (Circuit Court of S.C., 1823).

[59] *Gibbons v. Ogden*, 9 Wheaton 1, 1–41 (1824).

[60] *Gibbons*, 9 Wheaton at 43–102.

[61] The quote comes from, *Aeneid*, Book 1, Verse 460. *Gibbons*, 9 Wheaton at 195–96.

[62] *Gibbons*, 9 Wheaton at 196–228.

[63] *Gibbons*, 9 Wheaton at 229–30.

[64] *Gibbons*, 9 Wheaton at 233–34.

[65] *Gibbons*, 9 Wheaton at 238–39.

[66] *Gibbons*, 9 Wheaton at 238–77.

[67] *Gibbons*, 9 Wheaton at 277–78.

[68] *Gibbons*, 9 Wheaton at 278–79.

[69] *Gibbons*, 9 Wheaton at 278–302.

[70] *New York Commercial Advertiser* (March 12, 1824): 2.

[71] *Elizabethtown Gazette* (March 15, 1824), reprinted in the *Savannah Daily Georgian* (March 31, 1824): 2.

[72] *Richmond Enquirer* (March 16, 1824), cited in Charles Warren, **The Supreme Court in United States History** (Frederick, MD: Beard Books, 1999): 618.

[73] *New York Spectator* (n.d.), reprinted in the *Norwich Courier* (May 5, 1824): 2.

[74] *Gibbons v. Ogden*, 1 Hopkins Ch. 149 (1824).

[75] *North River Steamboat Co. v. Livingston*, 3 Cowen 713, 5 (1825).

[76] *Albany Argus* (n.d.), reprinted in the *New York Evening Post* (March 15, 1825): 2.

[77] Thomas Gibbons, will, October 26, 1825, Gibbons Family Papers.

[78] Thayer at 232–42.

[79] *Brown v. Maryland*, 25 U.S. 419 (1827).

[80] *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. 245 (1829).

[81] *License Cases*, 46 U.S. 504, 581 (1847).

[82] *Cooley v. Board of Wardens*, 53 U.S. 299 (1852).

[83] *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886); *Swift v. United States* 196 U.S. 375 (1905); *U.S. v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); Paul W. MacAvoy, **The Economic Effects of Regulation: The Trunk-Line Railroad Cartels and the Interstate Commerce Commission Before 1900** (Cambridge, Mass.: M.I.T. Press, 1965).

[84] *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[85] Felix Frankfurter, **The Commerce Clause Under Marshall, Taney, and Waite** (Chapel Hill: University of North Carolina Press, 1937): 18–19.

[86] *United States v. Carolene Products Co.* 304 U.S. 144 (1938).

[87] *Wickard v. Filburn*, 317 U.S. 111, 122 (1942).

[88] *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 251 (1964).

[89] *U.S. v. Lopez*, 514 U.S. 549 (1995).

[90] *U.S. v. Morrison*, 529 U.S. 598 (2000).

[91] *Gonzales v. Raich*, 545 U.S. 1 (2005).

Isaiah and His Young Disciples: Justice Brandeis and His Law Clerks

TODD C. PEPPERS*

Introduction

It cannot be said that Louis Dembitz Brandeis has suffered from a lack of scholarly attention. Brandeis is considered to be one of the most influential Justices in the history of the U.S. Supreme Court, and scores of books and law-review articles have been written about Brandeis the lawyer, the political insider, the Zionist, and the Justice. A case can be made, however, that history has not fully recognized the important and lasting contribution that Brandeis made to the development of the institutional rules and norms surrounding the Supreme Court law clerk, an oversight that this essay seeks to rectify.

Brandeis was not the first Supreme Court Justice to hire law clerks. Upon his elevation to the Supreme Court in 1882, Justice Horace Gray started the practice of hiring recent Harvard Law School graduates to serve as his legal assistants.[1] Justice Gray instituted the tradition of hiring law clerks while serving as the Chief Justice of the Massachusetts supreme judicial court, and one of the young Harvard Law School men Gray hired was Brandeis himself. Nor was Brandeis responsible for much of the early mythology surrounding the relationship between Justice and law clerk. It was the "Magnificent Yankee," Justice Oliver Wendell Holmes, Jr., who summoned a generation of Harvard Law School graduates to serve as private secretaries, social companions, surrogate sons, and caretakers to "God's grandfather."[2] It would be Brandeis' clerkship model, however, that led to the professionalization of the clerkship institution. From the hiring of his first law clerk, Brandeis demanded that each law clerk have a strong work ethic, possess superior legal writing and research skills, and abide by the fiduciary relationship between Justice and law clerk. While future Justices have differed from Brandeis in the type of substantive job duties assigned to their law clerks, the

expectations about the duties of confidentiality and loyalty as well as the skills to be possessed by law clerks remain unchanged. This essay will explore the Brandeis clerkship model, arguing that Brandeis' rules for and expectations of his law clerks not only were unique for their time, but also forever shaped the clerkship models adopted by future generations of Justices.

Before turning to Justice Brandeis, a brief aside about one of the primary sources used in this essay. In the early 1980s, author and attorney Lewis J. Paper had the rare opportunity to interview twelve surviving Brandeis law clerks as he prepared to write his book on the late Justice.[3] His interview notes offer a fascinating peek into the world of the Brandeis clerkship and contain many details and tidbits never before discussed in any book or article. Mr. Paper donated his interview notes to the Special Collections Department at Harvard Law School, and he has graciously allowed me to quote from them in this article.

The Selection of Justice Brandeis' Law Clerks

The selection of law clerks by the Justices on the White, Taft, and Hughes courts varied dramatically from the selection practices of the modern Court. While today's Justices pore through hundreds of applications, often assisted by a screening committee, in the early years of the clerkship institution law students at Harvard, Yale, and Columbia found themselves tapped by faculty members to work at the Supreme Court for such Justices as Holmes, William Howard Taft, and Harlan Fiske Stone. Upon arriving at the Supreme Court, Brandeis began following Holmes' practice of having Harvard Law School professor Felix Frankfurter select his clerks. In a December 1, 1916, letter to Frankfurter, Brandeis wrote that Frankfurter's selection of Calvert Magruder as his first law clerk strengthened the Justice's confidence in Frankfurter,[4] and two years later Brandeis stated that Frankfurter now had unlimited discretion to select his clerks—while adding that "[w]ealth, ancestry, and marriage, of course, create presumptions; but they may be overcome."[5] Brandeis later supplemented his list of non-binding hiring preferences, telling Frankfurter that "other things being equal, it is always preferable to take some one whom there is reason to believe will become a law teacher."[6]

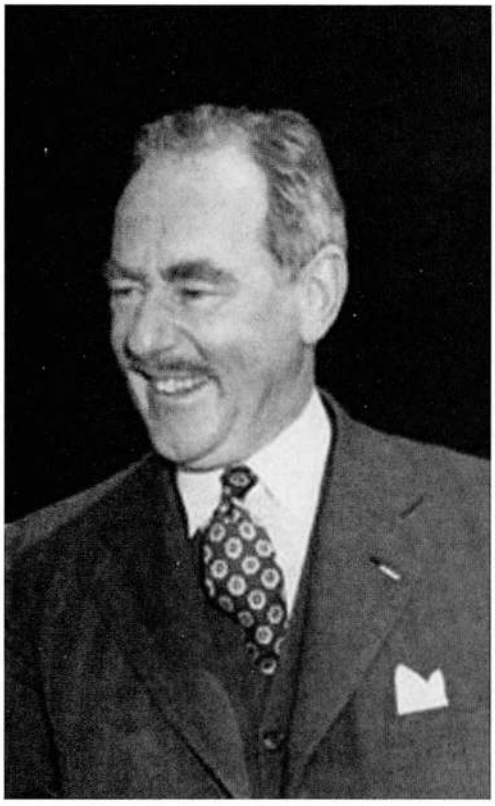
The twenty-one men selected by Frankfurter had a few common characteristics. Of course, they were all Harvard Law School men. Eighteen of the twenty-one clerks were members of the *Harvard Law Review*, many had worked—either during their third year of law school or during a subsequent year of graduate school—as Professor Frankfurter's research assistants, and a few had prior clerkship experience with such appellate court judges as Learned Hand and Julian Mack.[7] Another characteristic that many of the law clerks shared was religion. Brandeis biographer Philippa Strum states that the "overwhelming majority" of Brandeis' clerks in the 1920s and 1930s were Jewish. Strum writes that Brandeis' selection practices stemmed from the fact that (1) he preferred clerks who had the potential to be law professors, and (2) he believed that "'a great service could be done generally to American law and to the Jews by placing desirable ones in the law school faculties,'" given the fact that "'in the Jew [there is] a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews.'"[8]

Typically, Brandeis never interviewed—or even met with—potential law clerks prior to their selection by Frankfurter. At least one law clerk found Brandeis' habit of not interviewing prospective law clerks to be odd. Adrian S. Fisher, who clerked during October Term 1938, asked then-Professor Frankfurter "if I could meet the Justice before, just to make sure he didn't think he was getting a pig in the poke or anything, but Felix looked at me like that was a real strange request, and

so I never met Brandeis before my clerkship began."[9] David Riesman (October Term 1935) was one of the few clerks to meet with Brandeis prior to his clerkship.[10] After traveling to Washington, D.C. and meeting with Justices Brandeis, Benjamin Cardozo, and Holmes in 1934, Riesman returned to Cambridge and immediately contacted Frankfurter. "I wrote to Felix that I would much prefer to clerk for Cardozo instead of someone who reminds me of my stern father [to wit, Brandeis]. Felix Frankfurter rejected this in a very stern letter to me. He said it was precisely for those reasons that it would be good for me."[11] The idea of somebody declining an offer to clerk for Justice Brandeis is a bit astonishing, and, as discussed below, Riesman's entire clerkship experience can be viewed as the exception to the norm.

Perhaps because the law clerks did not interview prior to their clerkship, they found their first encounter with the legendary jurist to be daunting. Former law clerk H. Thomas Austern (October Term 1930) describes Brandeis as a combination of "Jesus Christ and a Hebrew prophet," confessing that "in the first few months I was scared to death of him."[12] Austern's description is echoed by Fisher, who recalls that his first impression was that Justice Brandeis "seemed to be a combination of Isaiah the prophet and Abraham Lincoln. A raw-boned characteristic. He had a rough-hewn look, [and] a grave, almost diffident courtesy."[13] Even former law clerk Dean Acheson (October Terms 1919 and 1920), writing his memoirs after a career on the international stage, remains struck by Brandeis' appearance:

> The Justice was an arresting figure; his head of Lincolnian cast and grandeur, the same boldness and ruggedness of features, the same untamed hair, the eyes of infinite depth under bushy eyebrows, which in moments of emotion seemed to jut out. As he grew older, he carried a prophetic, if not intimidating aura. It was not in jest that later law clerks referred to him as Isaiah.[14]



Dean Acheson, who clerked for Brandeis in the 1919 and 1920 Terms, went on to serve as Secretary of State under Harry S Truman. "Please remember that your function is to correct my errors, not to introduce errors of your own," Brandeis once admonished him.

Given such a description of Justice Brandeis, it is hardly surprising to learn that it would take months before the clerks felt entirely comfortable in the presence of such a biblical figure.

The law clerks received little, if any, advice or instruction from Frankfurter. "He [Frankfurter] did say you were expected to work very hard, meaning mornings, afternoons and evenings, and you would have to cut down on your social life," recalls Fisher. "[It] was also implied that you should not be married. Nothing explicit, but it seemed clear."[15] Through Frankfurter, Brandeis issued warnings and assigned homework to his future law clerks. Brandeis instructed Frankfurter

to inform incoming law clerk Willard Hurst (October Term 1936) "that he will be expected to be familiar with all my opinions by Sept. 15th and that the pass mark is 99 1/4 percent. Also say that he should otherwise familiarize himself with the tools of the trade," lamenting the fact that an earlier law clerk did not fully appreciate the scope of Shepard's Citations.[16] Brandeis subsequently added to the reading list, writing later that "[w]ould it not be well to have Hurst read, before the Autumn, 'Business of the USSC,'[17] and Charles Warren's 'S.C. in U.S. History'[18] so as to get in the background."[19]

The Brandeis Clerkship Model

The Brandeis law clerks reported for duty at Justice and Mrs. Brandeis' private residence—originally at their Stoneleigh Court apartment on Connecticut Avenue, and later at a second apartment building at 2205 California Street Northwest. At both locations, Justice Brandeis used a smaller, second apartment to house offices for himself and his clerk. Regarding the California Street apartment, Brandeis biographer Strum writes: "Willard Hurst found the office apartment overflowing with papers and books. The bathtub was filled with folders of clippings and references to bits of irrelevant information Brandeis came across while doing research, information that interested him as well as data that might provide useful some day... The kitchenette was piled with manuscripts and corrected proofs."[20]

Even after the construction of the Supreme Court building, Justice Brandeis and his law clerk worked at the apartment.[21] In 1920, Congress authorized the Justices to employ both a law clerk and a stenographic assistant, but Brandeis did not hire either a secretary or a second law clerk. "Why Brandeis dispensed with secretarial aid was never explained, but I surmise that he was loath to share the confidences of the office more widely than the absolute minimum," writes former law clerk Paul A. Freund (October Term 1932). "That, and perhaps his general avoidance of belongings."[22] Justice Brandeis' official Court staff was rounded out by a series of aging messengers.

The law clerks typically reported to duty in late September, often overlapping with the outgoing clerk for several days of "breaking in." The clerks' primary job duties were assisting in the preparation of opinions and related legal research. Brandeis alone began the process by drafting the statement of facts. "This was a chore that Brandeis took upon himself," comments Freund. "[I]t seemed to me ... that this was a token, a mark of his intellectual scruple, that before either he or his law clerk should set to work expounding the law, the facts of the case should have been thoroughly assimilated, understood and made part of himself as an earnest that his work would be grounded in an appreciation of the true nature of the controversy before him."[23] The statement of facts in the cases assigned to Brandeis can be found in his personal papers, written in his distinctive hand on lined paper "with a large black fountain pen that might have been a relic of the Iron Age."[24]

Brandeis did not always produce a complete first draft. "He would most frequently write out a few pages, have them printed, revise them, add a few more pages, and the whole printed again, and so forth."[25] At some point the printed pages would be handed off to the clerk for comment and revision. Brandeis did not want either himself or his clerk to treat the other's work as gospel. Writes Acheson:

> My instructions regarding his work were to look with suspicion on every statement of fact until it was proved from the record of the case, and on every statement of law until I had exhausted the authorities. If additional points should be made, I was to develop them thoroughly. Sometimes my work took the form of a revision of his; sometimes of a memorandum of suggestions to him.[26]

Justice Brandeis was photographed with his wife, Alice, in their carriage in 1921. Clerks reported for duty at the Brandeis home and rarely accompanied the Justice to the Court.

Conversely, Acheson adds, Brandeis might use portions of his clerk's original draft opinion or instead begin anew.[27] "On occasion, some sentences in the law clerk's memoranda would find their way into the opinion," writes Freund. "[M]ore often they suffered the fate of the Justice's own first drafts—radical revision, transposition, strengthening and polishing."[28] Freund's description of this laborious drafting process is reflected in the Louis Brandeis Papers at Harvard Law School, where multiple opinion drafts—some covered with the Justice's handwritten edits, others with typed insertions of questions or proposed changes by the law clerks—can be found in a single case file.

It is apparent that Brandeis considered his clerk a partner—although not an equal one[29]—in a joint task. This partnership extended through the opinion-drafting process. Freund writes that both Justice Brandeis and his law clerk received copies of revised opinions from the Supreme Court printing office.[30] In describing the final editing process, Acheson comments that "[a] touching part of our relationship was the Justice's insistence that nothing should go out unless we were *both* satisfied with the product. His patience and generosity were inexhaustible."[31] Hurst recalled that Justice Brandeis himself referred to the relationship between law clerk and Justice as a partnership, albeit with the law clerk in a more junior role. "[Y]ou were expected to have the responsibilities of a partner. He expected me to pull no punches and read everything with a critical eye. He didn't want any petitions for rehearing because of any error on his part. I was not to stand in awe of him but was to tell him frankly what I thought."[32]

Of course, this "partnership" placed tremendous stress upon the clerk. "The illusion was carefully fostered that the Justice was

relying, indeed depending, on the criticism and collaboration of his law clerk," writes Freund. "How could one fail to miss the moral implications of responsibility?"[33] These implications were forever seared into the collective memory of the Brandeis law clerks as the result of a blunder committed by the young Acheson, who served as Brandeis' law clerk during October Terms 1919 and 1920. After discovering that there were two incorrect legal cites in an opinion he was preparing to announce from the Bench, Brandeis returned to his home office and sternly announced to Acheson: "'Please remember that your function is to correct my errors, not to introduce errors of your own.'"[34] James M. Landis (October Term 1925) received a similar lecture from Brandeis after failing to correct some erroneous legal citations: "Sonny, [said Brandeis] we are in this together. You must never assume that I know everything or that I am even correct in what I may say. That is why you are here."[35] William A. Sutherland (October Terms 1917 and 1918), who himself suffered the embarrassment of letting an incorrect legal cite remain in a draft opinion, recalls that Brandeis was not angry when his young clerk committed such an error, "but he made you feel that you certainly didn't want to have something like that happen again."[36]

Law clerks did not prepare Bench memoranda, and, if they did review the occasional cert. petition, it was at the start of the Term when the pace was slow. Writes Acheson:

> In two respects my work with Justice Brandeis was different from the current work of many law clerks with their chiefs. This is sometimes closely concerned with the function of deciding. The Justice wanted no help or suggestions in making up his mind. So I had nothing to do with petitions for certiorari. . . . [T]he Justice was inflexible in holding that the duty of decision must be performed by him unaided. . . . He was equally emphatic in refusing to permit what many of the Justices today require, a bench memorandum or précis of the case from their law clerks to give them the gist of the matter before the argument. To Justice Brandeis . . . this was a profanation of advocacy. He owed it to counsel—who he always hoped . . . would be advocates also—to present them with a judicial mind unscratched by the scribblings of clerks.[37]

Freund suggests another, more practical reason for why the clerks did not discuss the cases with Brandeis prior to oral argument: "[H]e would consider it an unnecessary drain on resources."[38]

A few additional topics were never discussed between law clerk and Justice: the results of the Court's weekly conferences and Brandeis' opinions of other Justices. Unlike future Justices, Brandeis did not come back from the Supreme Court's conferences and unburden himself to his law clerks. His docket book was kept locked, only to be burned at the end of the Term by the Marshal of the Court.[39] Nor did he complain or gossip about the other Justices,[40] perhaps due to what one clerk perceived as the Justice's "adulation for the dignity of the Supreme Court."[41]

The other main responsibility for a Brandeis clerk was legal research. Not surprisingly, the inventor of "the Brandeis brief" gave his clerks daunting research assignments. "[W]e worked like hell for Brandeis checking cases and doing research," recalls Sutherland.[42] While Justice Brandeis expected his clerks to provide "the most exacting, professional, and imaginative search of the legal authorities," Acheson states that successful *legal* research "was more often than not the beginning, not the end, of our research."[43] Thus, Acheson's research time was spent equally in the Supreme Court Library and in the Library of Congress, collecting statistics and historical data "with civil servants whose only

recompense for hours of patient help to me was to see an uncatalogued report of theirs cited in a footnote to a dissenting opinion."[44] A good example of the exhausting research projects assigned to the law clerks can be found in the clerkship of Henry J. Friendly (October Term 1927), who spent weeks at the Library of Congress preparing a report on the wiretapping laws of the forty-eight states.[45] Such visits were common to all clerks, who "came to know intimately the labyrinths of the Library of Congress."[46]

At times, the research projects allowed the law clerks a glimpse of the legendary Brandeis memory. Strum recounts an instance in which Brandeis not only instructed his law clerk to journey to the Library of Congress, but provided helpful instructions on how to locate both the book and the material contained therein: "While working on a patent case, he told one clerk, 'There is a book in the Library of Congress published about 1870; a small volume with a green cover; and in chapter three the point in this case is discussed.'"[47] The clerk subsequently discovered that Brandeis was correct on all three counts.

Strum neatly summarizes the law clerk–Justice relationship from the perspective of the law clerks: "The clerks went to Brandeis each year in trepidation, worked with exhilaration, and left in exhaustion."[48] Since Brandeis assumed that his law clerks would provide nothing less than excellence, they were not praised when they achieved that standard. Recalls Austern:

> One time we had this case, the Jewel[49] [sic] case, involving a question of radio copyrights. And I set up this elaborate contraption with balls and pendulums to show the impact of frequency modulation. And we sat there, with his legs crossed, watching my little demonstration for 40 minutes. And after it was all over he just said thank you, and that was it. He rarely said anything you did was a great job. He assumed, since you were there, that you would do a great job.[50]

Adds Acheson: "Justice Brandeis's standard for our work was perfection as a norm, to be bettered on special occasions"—a standard that the law clerk might not know if he ever achieved, since the Justice "was not given to praise in any form."[51] If the law clerks did receive praise for their work, it tended to come from either Frankfurter or Mrs. Brandeis. For a group of young men, fresh out of law school and working for a great man, operating without positive feedback from the Justice must have felt akin to doing a high-wire act without a net.

While former law clerk Friendly undeniably met the standard of excellence demanded by Justice Brandeis,[52] he humorously lamented the fact that his skepticism about technology cost Brandeis the opportunity to be the first jurist to pen a legal opinion that referenced television. The opinion was Justice Brandeis' famous dissent in *Olmstead v. United States*,[53] a case involving whether the government's warrantless wiretapping of the telephone calls of a suspected bootlegger violated the Fourth Amendment. In support of his powerful argument that "[t]he progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping," Brandeis originally pointed to the nascent technology of television in an opinion draft. Friendly recalls that in early drafts of the *Olmstead* dissent, Brandeis argued that television would permit the government to look into people's homes—a technological point with which Friendly took issue:

> And I said: Mr. Justice, it doesn't work that way! You can't just beam a television set out of somebody's home and see what they're doing. He said: That's just exactly what you can do. So we batted the ball across the net a few times, and I said: Well, I really think it's silly for two lawyers to be discussing this—why don't I go

> to the Library of Congress and get you some articles about this. Which will explain what television really is. Well, he said, that's fine. And of course you're going to be wrong. Well, I didn't say anything. So, I got the articles, and unhappily, I was right. And so, he had to strike that sentence.[54]

"Unhappily, the reference was deleted in deference to the scientific skepticism of his law clerk," writes Freund, clearly tongue-in-cheek, "who strongly doubted that the new device could be adapted to the uses of espionage."[55] Cheerfully admits Friendly: "And in the course of events, he [Brandeis] was right! And I was wrong."

From the law clerks' perspective, Brandeis' natural remoteness was exacerbated by his method of communication. Recalls former law clerk Louis L. Jaffe (October Term 1933):

> I worked in a little apartment at Stoneleigh Court. Brandeis worked in his own apartment, and I really saw very little of him. He would slip a paper under the door leaving me instructions in the morning before I got there, and I would slip my work under his door when I finished. He was really a very remote, distant person. I had very little direct personal contact with him. It took me a while to get over the pique of that, not having any contact with him.[56]

Brandeis typically met with his law clerks for a thirty-minute meeting around 8:30 a.m. and again in the early evening around 6:00 p.m. to 7:00 p.m. The law clerks typically continued working after the evening meeting. An early riser, Brandeis was often at work when the clerks arrived in the morning—a fact that made former clerk Freund "feel like a laggard keeping banker's hours."[57] Freund was not the only law clerk impressed by Brandeis' work ethic. Recalls Austern: "I remember one time preparing a memo and staying up all night until about 5:30 [a.m.], going down to his apartment and slipping the memo under the door, and see it retrieved from the other side of the door."[58] Brandeis would sometimes work in his office in the second apartment before returning to his bedroom/study in his own apartment in the afternoon. Despite these meetings, at least one former clerk admitted that "it was a lonesome job."[59]

With the job, however, came freedom. Justice Brandeis did not impose set office hours on his clerks, and his only concern was that the assigned work be completed on time. Recalls Freund:

> It had become the custom by my time for clerks to work at all hours, but some had rather individual habits. One predecessor, who has since become an industrialist [Robert G. Page], made a practice of going out at night on the social circuit, then coming straight to the office in the early hours of the morning for a stint before returning home. On one occasion, having arrived at the office at one or two a.m., he was overtaken there at five o'clock, which was the Justice's opening of the work day...The Justice entered the office, just above his residence in the apartment building, and greeting his clerk, "Good morning, Page," in a perfectly casual way, as if it were the most natural thing in the world for a law clerk to be about at five in the morning in white tie and tails.[60]

There is a sense that the limited interactions between the Justice and his law clerk diminished over time, a pattern perhaps explained by Brandeis' slowly declining health. "You have to remember that we didn't talk much because this man was hoarding his energy," explains Fisher, Brandeis' last law clerk. "It was almost like being in Floyd Patterson's training camp. He [Brandeis] wasn't going to

expend any energy on something he didn't have to do."[61]

The day-to-day ritual of clerking for Brandeis was shaped not only by the Justice but also by his wife. "I should say that Mrs. Brandeis looked after him like he was a baby," recalls Sutherland. "She wouldn't let him work more than two hours in a row, for example. So every two hours he took the stairs down, took a quick walk around the block, came back for a five minute nap, and then started working again."[62] Mrs. Brandeis' protectiveness of her husband occasionally led to the odd job assignment for the law clerks. Freund recounts the time when Justice Brandeis was scheduled to meet President-elect Franklin Delano Roosevelt at the Mayflower Hotel in Washington, D.C. The day prior to the meeting, Freund was dispatched to the hotel by Mrs. Brandeis to "make sure that there were no open windows because Justice Brandeis was very susceptible to colds." Upon arriving at the hotel, the hotel staff told Freund that Mrs. Brandeis' fears were unfounded, since FDR "did not like drafts either."[63]

The sense of isolation felt by some of the Brandeis law clerks was further exacerbated by Justice Brandeis' imposition of a strict duty of confidentiality, a precursor to the rules and norms that bind modern law clerks. "I remember the first thing he said. 'In this job you will hear and see a lot that's confidential,'" states Freund. "'There has never been a leak from this office and I don't expect there to be any leaks.'"[64] The duty of confidentiality extended not only to the general public, but to the Supreme Court law clerks in other Chambers as well.[65] Brandeis' requirement of confidentiality pre-dated the "Code of Conduct for Law Clerks of the Supreme Court of the United States," which the Supreme Court formally adopted in the late 1980s. The Code imposes upon Supreme Court law clerks a duty of complete confidentiality and loyalty. Finally, Brandeis' sense of institutional loyalty meant that he imposed a duty of confidentiality upon himself. "Throughout the history of the Court there have been justices who in private conversation or correspondence have referred to colleagues in salty and not always complimentary terms," explains Magruder. "I never heard Justice Brandeis indulge himself in this relatively harmless sport. Nor did he ever betray any exasperation when his associates did not see things his way."[66]

The duties of the law clerks extended beyond the law. The clerks were drafted to help host the weekly teas that Washington society expected Mrs. Brandeis to hold.[67] At the teas, the law clerks served multiple roles, including guest, waiter and bouncer. Landis explains that his duties included making sure "both that the guests were served and that the Justice should not be cornered too long by anyone of them."[68] Acheson paints a wonderfully vivid picture of the setting:

> The hostess, erect on a black horsehair sofa, presided at the tea table. Above her, an engraved tiger couchant, gazing off over pretty dreary country, evoked depressing memories of our dentist's waiting room. Two female acolytes, often my wife and another conscripted pupil of Mrs. Brandeis's weekly seminar on child education, assisted her. The current law clerk presented newcomers. This done, disciples gathered in a semicircle around the Justice. For the most part they were young and with spouses—lawyers in government and out, writers, conservationists from Agriculture and Interior, frustrated regulators of utilities or monopolies, and, often, pilgrims to the shrine.[69]

The former clerks believed that the teas were not merely social occasions, but served multiple functions. Freund states that Brandeis "often invited people to tea who had just done something that he admired," adding that the invitation itself was a "sort of accolade" and that the invited guest would receive the Justice's full attention and a volley of "penetrating

questions."[70] Acheson writes that they allowed Justice Brandeis to discuss the two topics that he found most compelling: "the Greek Genius ... and the Curse of Bigness. These themes crossed like the lines on a telescopic sight on any unfortunate who was reported to be going, not back to his home town, but to New York or Chicago or Philadelphia."[71] Riesman suggests, however, that the teas also served as an information-gathering session for the Justice. "At the Sunday teas he treated people like oranges, squeezing them of information and then tossing them away."[72]

Brandeis' courtly side emerged at the teas. "Brandeis would never sit if a lady were in the room standing," states Austern. "So at these teas we had, Mrs. Brandeis had me running around making sure all the ladies were sitting down."[73] Law clerks remember that Brandeis could be charming to his guests, including the relatives of his law clerks. Former law clerk Nathaniel L. Nathanson (October Term 1934) recounts a story of taking his mother to tea at the Brandeis residence: "He [Brandeis] was a pretty tough cookie, I thought, and I had told my mother about him ... [but] he was as charming as could be at that tea, and afterwards my mother kept asking me how I could say all those things about him."[74] Mrs. Brandeis herself would make sure that visitors were not monopolizing the Justice's time, often limiting them to ten minutes with the Justice before shooing them towards the tea tray. And Mrs. Brandeis would monitor the clerks to ensure they were following strict Washington protocol. "[Mrs. Brandeis] had learned how seriously people in Washington took their titles, and the clerk was admonished to be certain to get them right."[75]

Law clerks were also invited to join the Brandeises for dinner. Former clerk W. Graham Claytor, Jr. (October Term 1937) remembers that Mrs. Brandeis' protective nature extended to dinner as well, where she reminded guests that dinner started promptly at 7:00 p.m. and the Justice was expected to retire by 9:30 p.m. While the conversation and company may have been first-class, the food was not. Austern remarks that Mrs. Brandeis "would cut a slice of roast beef you could see through,"[76] and Riesman is even less charitable: "Dinner there was gastronomically ghastly."[77] The law clerks also served as bouncers at these evening functions. Landis states that the law clerk was responsible for guaranteeing that the Brandeis guests left at 10:00 p.m., and that any failure in this essential duty would result in an "accusing" stare from Mrs. Brandeis.

Besides teas and dinners, the daily grind was interrupted with trips between the Brandeis and Holmes residences. Because Brandeis and Holmes did not like the telephone, the law clerks' responsibilities included carrying materials between the two homes. This purely secretarial responsibility gave clerks the opportunity to interact with the great Holmes.[78] The visits also gave the Brandeis clerks the chance to socialize with the Holmes clerks, encounters that gave one clerk a brief glimpse of Holmes' insecurity about his friendship with Brandeis. Recounts former clerk Sutherland:

> [O]ne time I remember Holmes' clerk asked me to lunch. And he said to me, "What does Brandeis think of Holmes?" And I said, just out of curiosity, why do you want to know? And he said, "Because Holmes keeps asking me and I want to know what to tell him.[79]

Sutherland clerked during October Terms 1917 and 1918, and perhaps the bond between Brandeis and Holmes had not fully developed. By the time Holmes retired from the Court, the mutual affection felt by the two Justices was undeniable.

In his final years on the Bench, the aging Brandeis may have leaned more heavily upon his law clerks. His last law clerk, Fisher, recalls working on both cert. petitions and some opinion drafts, and the strapping former-rugby-player-turned-law-clerk was pressed into service as an elevator:

> [Mrs. Brandeis] called in the afternoon and said the elevator was broken, Justice Brandeis was already on his way back from the Court, and what was I going to do about it. Clerks were expected to do everything. Well, I went down there and found the janitor ... [a]nd we found a chair. And when Brandeis walked in, we had him sit in the chair, and we carried him up five flights of stairs. And I'll never forget that. Brandeis in his overcoat and derby hat, serene as could be, taking it all in stride as though there [was] not the slightest problem, looking straight ahead.[80]

Unfortunately for Fisher, his bout of manual labor was not yet complete. "Mrs. Brandeis came down in all a flutter, and she too had a weak heart, so after we took Brandeis up, we had to come back and carry Mrs. Brandeis up in the chair."[81]

Unlike modern law clerks, but perfectly keeping with the Brandeis tradition, the Justice and his former law clerks did not have formal reunions. Nor did Brandeis condone lavish celebrations or expensive gifts in his honor.

> When, on the approach of his eightieth birthday, the former secretaries of Mr. Justice Brandeis planned a visit in his honor, word came that, more than the pilgrimage, the Justice would welcome a message from each of the group recounting the public service that he had of late been performing. The would-be pilgrims had known in their hearts that the devotion the Justice cherished most from them was devotion to his conception of the lawyer's calling.[82]

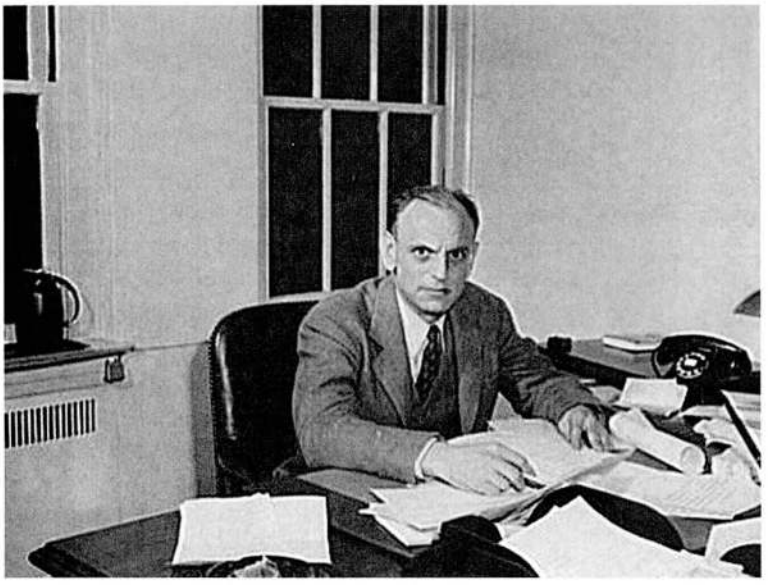
When recounting this story years later, Judge Magruder paused and added, "[M]y letter was rather short."[83]

The Bonds between Isaiah and His Young Disciples

For the Brandeis law clerks, their relationship with Justice Brandeis took on a familiar pattern—distant, polite and formal at first, with the chill of the early relationship replaced with warmth and occasional flashes of Brandeis' humor. Comments Nathanson: "[Justice Brandeis] did not immediately clasp his law clerk to his bosom as a member of the family as well as a working associate. On the contrary, he seemed to keep personal relations at a minimum—especially at first—and to be deliberately testing the mettle of his assistants."[84] Once the law clerks passed Justice Brandeis' unspoken litmus test, however, the Brandeis clerks discovered that "beneath that aloofness, there was a great serenity—and also a sense of fun. But it was so distilled."[85] One example of Brandeis' unique sense of humor: "I never forget asking him about an article with which I disagreed strongly, and I said how could the author say those things," states Austern. "And he said, 'Mr. Austern ... you'll find this world is full of sons of bitches, and they're always hard at work at it.'"[86] Despite these flashes of humor, the law clerks remained in awe of Brandeis' emotional self-control, intellect, self-discipline, and formidable memory.

While law clerk and Justice might grow closer over the course of their year together, the relationship—perhaps with the exception of Brandeis' with Dean Acheson—did not evolve into friendship. "It was difficult to get to know [Brandeis]," recalls Sutherland. "You could admire him, but he wasn't the kind of person to mold in with as old friends."[87] Despite the distance between Justice and law clerk, Brandeis' assistants were fiercely loyal to "Isaiah." "There was some quality about him that made people want to work for him and please him," states Sutherland.[88]

While aloof, Brandeis took an interest in his law clerks' lives and well-being. A touching example of this concern can be seen in the fact that when Brandeis retired from the



James Landis became chairman of the SEC and dean of Harvard Law School after his Supreme Court clerkship.

Supreme Court in 1939, his primary concern was finding his current clerk, Fisher, immediate employment. "Frankfurter told me that he [Brandeis] called Felix in and told him, and after Frankfurter, who was then a Justice, went through how terrible it all was, Brandeis said, 'Well, that's not why I called you here. What are we going to do with Adrian?'"[89] This concern is also reflected in Brandeis' correspondence with Frankfurter. For example, upon learning that former clerk Landis would remain at the Security and Exchange Commission until he started at Harvard Law School, Brandeis wrote that Landis was "unwise" to work so hard and "needs a vacation & time for meditation."[90]

Moreover, Brandeis took a keen interest in the career paths selected by his law clerks, and his correspondence with Felix Frankfurter is sprinkled with references to the professional achievements of his clerks and suggestions regarding future advancement.[91] Brandeis preferred law clerks who might become teachers or public-interest lawyers, and he employed both direct and indirect tactics in achieving these goals, often discussing with Frankfurter his own career plans for his law clerks before he shared said plans with the clerks themselves. During Harry Shulman's clerkship, Justice Brandeis quickly concluded that the young man "is too good in mind, temper, and aspirations to waste on a New York or other law offices . . . Can't you land him somewhere in a law school next fall?"[92] What Brandeis later referred to as "our plans for his teaching" were not revealed to Shulman himself until two months later, and subsequently it was Brandeis who "practically dictated" Shulman's letter of acceptance to Yale Law School.[93] As for law clerk Henry M. Hart, Jr., the Justice wrote to Frankfurter that "[t]here has been no 'opportunity' of sounding Hart [out about teaching at Harvard Law School]. Of course I can, without occasion, take up the subject with him. But would that be wise? Hadn't he better be asked by [Professor Samuel] Williston to talk with me?"[94]

Brandeis' efforts to fill the halls of prominent law schools with former law clerks extended to clerks in other Chambers. In a February 14, 1925 letter to Frankfurter, Brandeis wrote that he had met with Charles Dickerman Williams, a Yale Law School graduate and law clerk to Chief Justice William Howard Taft. "If he is as good as he looks, he ought to be in law-teaching," observed Brandeis. "It might

be worthwhile to make some enquiries about him from the Yale Faculty. Perhaps that would induce them to give him a try there & save his soul."[95]

Brandeis voiced his displeasure when his former clerks did not follow his advice. In an October 13, 1929 letter to Frankfurter, Brandeis wrote that "[t]he satisfaction I had in having Page and Friendly with me is a good deal mitigated by the thought of their present activities [private practice]. Of course, it is possible that they, or at least Friendly, may reform and leave his occupation."[96] Brandeis was particularly vexed that Friendly did not become a law professor, referring to Friendly's time in private practice as a "trial period" and periodically pondering aloud about the "possibility of wrenching Henry Friendly loose" so he could make his preordained return to Harvard Law School.[97]

Riesman keenly recalls Brandeis' disappointment regarding his decision to enter private practice. "[H]e was contemptuous of me because I wanted to go back to Boston to a law firm."[98] Brandeis was "vehement" that Riesman must "be a missionary" who used his talents to benefit the less fortunate. "The fact that I had friends in Boston and had season tickets to the Boston Symphony was totally frivolous and unworthy of consideration. Friendship was not a category in his life."[99] Those law clerks who followed Brandeis' suggestions, however, found that the prophet was not infallible. "He never urged me to go into teaching," states Fisher, "but he did urge me to go back to Tennessee, which I did and it proved to be a real mistake."[100]

With his confidantes, Brandeis could be sharply candid in his assessment of his law clerks. His first law clerk was Calvert Magruder, who later served as a federal appeals court judge. In a March 25, 1920 letter to Thomas Nelson Perkins, Brandeis wrote: "He [Magruder] has a good legal mind and good working habits—and is a right-minded Southern gentleman. He is not of extraordinary ability or brilliant or of unusual scholarship, but he has stability."[101] Upon learning that former clerk William Gorham Rice, Jr. (October Term 1921) was a candidate for a deanship, Brandeis observed to Frankfurter that "[d]espite his mental limitations, he [Rice] may be the best man available for Wisconsin,"[102] and predicted that Louis Jaffe—having "found himself"—would be "much better at teaching than he was as secretary."[103]

Brandeis' unvarnished assessment of his clerks extended even to Acheson. Although Brandeis requested that Acheson remain his assistant for a second year, he was not wholly impressed with his young clerk's abilities. In a November 25, 1920 letter to Frankfurter, Brandeis wrote:

> Acheson is doing much better work this year, no doubt mainly because of his greater experience; partly, perhaps, because I talked the situation over with him frankly. But for his own sake he ought to get out of this job next fall. I don't know just what his new job ought to be. It should be exacting. If I consulted my own convenience I might be tempted to ask him to stay.[104]

There is no indication in Acheson's memoirs as to "the situation" that was the subject of a discussion between the two men.

Acheson, Jaffe, Magruder, and Rice were not the only law clerks whose abilities and limitations were bluntly summarized by the Justice. During October Term 1928, Frankfurter's vaunted track record of selecting perfect assistants was singlehandedly ended by the antics of new clerk Irving Baer Goldsmith. One week into Goldsmith's clerkship, Brandeis wrote Frankfurter that Goldsmith had arrived hours late to work on two different days, making excuses about being "poisoned by seafood," the hotel failing to provide a requested wake-up call, and fatigue from his first week of the clerkship. Brandeis was unconvinced, writing: "His excuses are barely plausible. I suspect his habits are bad—the victim of drink or worse

vices. I have a sense of his being untrustworthy; and something of the sense of uncleanness about him."[105]

While Frankfurter made arrangements for an immediate replacement, Brandeis hesitated, worried that Goldsmith's abrupt firing "would be a severe blow to G. and might impair his future success for an appreciable time."[106] After having a frank discussion with Goldsmith, during which the young man promised "total abstinence from drink" and to maintain a lifestyle that would "give him his maximum working capacity,"[107] Brandeis permitted Goldsmith to remain in his position. Brandeis never regained confidence in Goldsmith, however, later writing that "he lacked the qualities which would have made him desirable in a law school, or in any important public service."[108]

Few law clerks became close enough to Brandeis to be considered confidantes and friends. The one exception to this rule was Dean Acheson. Even during his clerkship, Acheson was able to temporarily draw Brandeis' focus away from work and engage him in discussions on pressing political, social, and economic issues of the day, and in later years it would be Acheson who would ask Brandeis to swear him in as Assistant Secretary of State and would spend evenings with Brandeis, gossiping and sharing "the latest dirt."[109] Acheson and his wife often joined Justice and Mrs. Brandeis for holiday dinners. Brandeis grandson Frank Gilbert recalls that Freund also became close to the Justice after his clerkship and visited Brandeis and his extended family at his summer cottage in Chatham, Massachusetts. And the correspondence between Frankfurter and Brandeis contains multiple references to Freund and former James Landis, including a discussion of Landis's engagement in 1926 and Brandeis' willingness to loan Landis $2,000 (presumably to cover expenses associated with the pending nuptials).[110]

Upon the Justice's death, Acheson was the Brandeis law clerk who delivered the eulogy at the Justice's small memorial service at his California Street residence. Referring to the Brandeis law clerks as "the fortunate ones," Acheson revealed that Brandeis' affection for his law clerks ran deeper than they imagined. "I have talked, over the past twenty years, with the Justice about these men. I have heard him speak of some achievement of one of us with all the pride and of some sorrow or disappointment of another with all the tenderness of a father speaking of his sons."[111] Walter B. Raushenbush, the grandson of Louis and Alice Brandeis, attended the memorial service, and over sixty years later he still recalls being struck by Acheson's poise, as well as his "moving and eloquent" remarks.[112]

While Justice Brandeis declined his law clerks' offers of celebration and tribute, after his death his clerks honored the memory and service of their formal employer in a variety of different ways. Several of them published "tribute" pieces in law reviews and legal journals in the decades following the Justice's passing, arguably becoming the originators of a literary tradition now followed by scores of former law clerks from all levels of federal and state courts. The clerks also commissioned a bust of the late jurist, which was presented to the Harvard Law School in January 1943. At the presentation, Magruder spoke of Justice Brandeis' "'almost paternal concern' for and continuing interest in 'his boys.'"[113] In short,

Paul Freund taught at Harvard for thirty-seven years and was a leading expert on constitutional law. He famously turned down President Kennedy's offer to be Solicitor General because he was writing the *Oliver Wendell Holmes Devise History of the Supreme Court.* He is pictured here during his clerkship in the 1932 Term.

these post-clerkship activities are compelling evidence in support of Strum's assertion that the clerks "left Brandeis's service with admiration bordering on adulation."[114]

A Collective Portrait of the Brandeis Law Clerks

From 1916 to 1939, Brandeis hired twenty-one Harvard Law School graduates to serve as his law clerks at the Supreme Court. As with modern clerkships, the clerks began working at the Court in the summer after graduation and—with two exceptions—remained with the Justice for a single Term of Court. William A. Sutherland and Dean Acheson each clerked for Justice Brandeis for two years, perhaps due to the effect of World War I on the number of law students attending Harvard Law School.

Fulfilling Brandeis' wish to fill the halls of major law schools with his clerks, eleven of his former clerks became law-school professors and deans. Of these, perhaps the most famous is Paul A. Freund, who became a longtime Harvard Law School professor and one of the leading experts on constitutional law. Other Brandeis law clerks to teach at Harvard Law School included Henry M. Hart, Jr., Louis L. Jaffe, James M. Landis, Calvert Magruder, and William E. McCurdy. Of these, Landis's career witnessed the most spectacular fall from grace. After teaching at Harvard Law School in the late 1920s, Landis served on both the Federal Trade Commission and the Security and Exchange Commission, becoming chairman of the SEC in 1935, before returning to Harvard Law School as its new dean in 1937. Landis later served as chairman of the Civil Aeronautics Board during the Truman administration and as an advisor to President John F. Kennedy, only to see his professional career unravel in the 1960s after his conviction and brief incarceration for failing to file income taxes. Landis was found drowned in his swimming pool in July 1964.

David Riesman joined his former colleagues at Harvard University, but not as a law professor. While Riesman briefly taught at the University of Buffalo Law School, the publication of his book **The Lonely Crowd**[115] led to his appointment as a professor of sociology at Harvard in 1958. Harry Shulman went to Harvard Law School's chief rival, joining the Yale Law School faculty in 1930 and quickly establishing a reputation as a top scholar in labor law. Shulman became the dean of Yale Law School in 1954, only to have his academic career cut prematurely short upon his death at the age of fifty-one in March 1955.[116] Adrian S. Fisher served as a law school dean at the Georgetown University Law Center, and later taught at the George Mason School of Law, but he also had a long career as an arms-control negotiator.[117]

Two additional clerks, J. Willard Hurst and William G. Rice, spent their teaching careers at the University of Wisconsin School of Law. Hurst gained renown as a prominent legal historian, while Rice focused his academic studies on international law.[118] Nathaniel L. Nathanson taught at Northwestern University School of Law and coauthored a textbook on administrative law with Harvard Law professor Jaffe.[119]

A number of Brandeis law clerks became prominent lawyers. Of these practicing attorneys, four found a semipermanent home at the Washington, D.C. law firm of Covington & Burling. Dean Acheson practiced at Covington & Burling between stints of public service, and he was joined there by H. Thomas Austern and W. Graham Claytor, Jr. Claytor practiced with Covington and Burling from 1938 to 1967 and from 1981 to 1982, taking breaks to serve as the president of Southern Railroad and AMTRAK as well as Secretary of the Navy in the Carter Administration.[120] In the 1950s, Fisher also worked at the firm.

Covington & Burling, however, did not have a monopoly on those former Brandeis clerks practicing law. William A. Sutherland founded the Atlanta-based law firm of Sutherland, Asbill & Brennan, and Warren Stilson Ege opened the Washington office of the law firm Jones, Day, Reavis and Pogue.

TABLE ONE: **The Law Clerks of Justice Louis Brandeis**

Name of Clerk	Clerkship	Undergraduate	Law School	Law Review	Subsequent Legal Career*
Calvert Magruder	1916–1917	St. John's College	Harvard	Note Editor	Chief Judge, U.S. Court of Appeals for the First Circuit
William Anderson Sutherland	1917–1919	Univ. of Virginia	Harvard	n/a	Attorney, Sutherland, Asbill & Brennan
Dean Gooderham Acheson	1919–1921	Yale	Harvard	Treasurer	Secretary of State
William Gorham Rice, Jr.	1921–1922	Harvard	Harvard	n/a	Professor, University of Wisconsin School of Law
William Edward McCurdy	1922–1923	Harvard	Harvard	Book Rev. Ed.	Professor, Harvard Law School
Samuel H. Maslon	1923–1924	U. of Minnesota	Harvard	Note Editor	Attorney, Maslon, Edelman, Borman & Brand
Warren Stilson Ege	1924–1925	Dartmouth	Harvard	President	Attorney, Jones, Day, Reavis and Pogue
James McCauley Landis	1925–1926	Princeton	Harvard	Case Editor	Dean, Harvard Law School; Chairman, SEC
Robert Guthrie Page	1926–1927	Yale	Harvard	President	President, Phelps Dodge Corporation
Henry Jacob Friendly	1927–1928	Harvard	Harvard	President	Judge, U.S. Court of Appeals for the Second Circuit
Irving Baer Goldsmith	1928–1929	Michigan	Harvard	Member	Attorney, Mayer, Brown & Platt
Harry Shulman	1929–1930	Brown	Harvard	Member	Dean, Yale Law School
H. Thomas Austern	1930–1931	NYU	Harvard	President	Attorney, Covington & Burling
Henry Melvin Hart, Jr.	1931–1932	Harvard	Harvard	President	Professor, Harvard Law School
Paul Abraham Freund	1932–1933	Washington U.	Harvard	President	Professor, Harvard Law School
Louis Leventhal Jaffe	1933–1934	Johns Hopkins	Harvard	Member	Professor, Harvard Law School
Nathaniel Louis Nathanson	1934–1935	Yale	Harvard	n/a	Professor, Northwestern Law School
David Riesman	1935–1936	Harvard	Harvard	Legislation Ed.	Sociology Professor, Harvard University; author, **The Lonely Crowd**
James Willard Hurst	1936–1937	Williams College	Harvard	Note Editor	Professor, University of Wisconsin School of Law
William Graham Claytor, Jr.	1937–1938	Univ. of Virginia	Harvard	President	President, AMTRAK; president, Southern Railway; Attorney, Covington & Burling
Adrian Sanford Fisher	1938–1939	Princeton	Harvard	Note Editor	Dean, Georgetown University Law Center; arms-control negotiator

**Includes only significant and sustained professional accomplishments.*

Two former Brandeis clerks and future Harvard Law School professors—Louis Jaffe (left) and Paul Freund (right)—were photographed together.

Brandeis' second-to-last clerk, William Graham Claytor, Jr., became a lawyer for Covington & Burling and had stints as president of Amtrak and Secretary of the Navy under Jimmy Carter.

Samuel H. Maslon helped start the Minneapolis law firm of Maslon, Edelman, Borman & Brand, but he balanced the private practice of law with a brief and part-time teaching career (he taught at the University of Minnesota School of Law in the 1930s), public service (helping found the Metropolitan-Mount Sinai Hospital in Minneapolis as well as a public television station), and the arts.[121] Irving B. Goldsmith, whose antics during the early days of his clerkship almost led to his firing, practiced law in Chicago, Illinois before dying at the relatively young age of 39.[122]

Two former clerks had long and distinguished careers on the federal bench: Magruder and Henry J. Friendly. Magruder taught at Harvard Law School for approximately twelve years before being appointed to the Court of Appeals for the First Circuit in 1939. Friendly was a partner at the New York law firm of Cleary, Gottlieb, Friendly and

Hamilton before being appointed to the Court of Appeals for the Second Circuit by President Eisenhower.[123]

Arguably, only one law clerk, Robert Page, ran afoul of Justice Brandeis' warning against "the Curse of Bigness." While he practiced law for a number of years, Page left private practice in 1947 to become president of the Phelps Dodge Corporation, an international mining company, eventually rising to the position of chairman of the board prior to his death in 1970.[124] Justice Brandeis might have been mollified, however, to learn that Page was also a supporter of the Legal Aid Society.

Conclusion

While Louis Brandeis reshaped the institutional rules and norms surrounding the utilization of Supreme Court law clerks, he did not write on a blank institutional slate. Brandeis built upon the early practices of Justices Horace Gray and Oliver Wendell Holmes, Jr., and these three jurists are bound together when it comes to discussing the origin and evolution of the clerkship institution. When Brandeis arrived at the Supreme Court in 1916, Holmes was the only Supreme Court Justice routinely hiring Harvard Law School students as his clerks—a tradition that Holmes adopted when he replaced Gray on the Supreme Court. The practice of hiring law clerks, however, was not foreign to Brandeis. As noted earlier, from 1879 to 1881 he clerked for Gray during Gray's tenure as Chief Justice of the Massachusetts supreme judicial court, and he subsequently hired three of Gray's former Supreme Court law clerks—William Harrison Dunbar, John Gorham Palfrey, and Ezra Ripley Thayer—to work at the Boston law firm of Brandeis, Dunbar, and Nutter.

In sum, Brandeis followed the practice of both Gray and Holmes in having a Harvard Law School professor select a top-law school graduate to clerk for one year at the Supreme Court. Where Brandeis differed from Gray and Holmes, however, was that he used his law clerks differently. While clerking for Gray, Brandeis performed substantive legal work. In a July 12, 1879 letter, Brandeis described his job duties for Gray as follows:

> He takes out the record and briefs in any case, we read them over, talk about the points raised, examine the authorities and arguments, then he makes up his mind if he can, marks out the line of argument for his opinion, writes it, and then dictates to me. But I am treated in every respect as a person of co-ordinate position. He asks me what I think of his line of argument and I answer candidly. If I think other reasons better, I give them; if I think his language obscure, I tell him so; if I have any doubts, I express them. And he is very fair in acknowledging a correct suggestion or disabusing one of an erroneous idea.[125]

From this description, one can see parallels between the Gray and Brandeis clerkship models. Both Justices considered their law clerks to be partners and encouraged candid discussion and debate over language, structure, and legal arguments contained in the opinions. Where Gray and Brandeis differ, however, is that Gray involved his law clerks in debating how the case should be decided, whereas Brandeis "was inflexible in holding that the duty of decision must be performed by him unaided."[126]

When it came to substantive responsibilities, Brandeis' clerkship model diverged more dramatically from Holmes'. "Holmes wanted a clerk for a son," observes Hurst. "Brandeis wanted a working clerk."[127] While Justice Holmes asked his law clerks to review cert. petitions and occasionally find a cite to Holmes' "favorite author" (himself), his clerks were a combination of private secretary and companion. Holmes biographer Francis Biddle writes that Harvard Law School Professor John Chipman Gray, the half-brother of Horace Gray, was well suited to the task of selecting clerks: "Gray knew the kind of boys Holmes wanted—they must be able to deal with the *certiorari*,

balance his checkbook, and listen to his tall talk. And they would have more chance of understanding it, thought Gray, if they also were honor men."[128]

While Brandeis might debate the threat posed by large corporations, the flaws of the National Recovery Administration, or the role of unions in America with his clerks, Holmes' "tall talk" was of a more esoteric type:

> [Holmes] wanted someone to talk about literature and philosophy. Here's a typical example. Holmes said to his clerk one day, "Young man, what would you do if you saw a miracle?" And the clerk thought about it, and said ... he didn't know what he would do if he were confronted by a miracle. And Holmes said he knew. "Why I would say, miracle, I'm so surprised, because I always thought cause and effect would outlast even me."[129]

When not asking his law clerks metaphysical questions, Holmes would regale them with tales of the Civil War, have them admire the spring flowers blooming around the District of Columbia, and ask them to take him to visit his future grave at Arlington National Cemetery.

Whether or not by design, the former law clerks to both Brandeis and Holmes shared one critical responsibility after their clerkships: burnishing the legends of the two Justices. If one pores through the biographical materials on Brandeis and Holmes, it quickly becomes apparent that these clerks are the chief defenders of their respective Justice's place in the judicial pantheon. The one glaring exception is the aforementioned David Riesman, the lawyer-turned-sociologist who initially sought to decline the Brandeis clerkship. "I have taken a harsher look at him [Brandeis] since I left, in part because of all the adulation that surrounds him with Mason's book[130] and other writings, which I felt was misleading."[131] Riesman is unique among the Brandeis clerks. If other clerks have felt irritation at the larger-than-life treatment of their former employer by biographers, they have remained silent.[132]

Justice Louis Brandeis left the Supreme Court in 1939, but in many ways his clerkship model has become the standard for the clerkship institution. While modern Justices have admittedly deviated from the Brandeis model in terms of the types of job duties assigned to their law clerks,[133] what remains unaltered is Brandeis' expectation that a Supreme Court law clerk graduate from a top law school, possess a strong work ethic, have superior legal writing and research skills as well as the internal fortitude to serve as a sounding board and critic to the Justice's work product, and appreciate the importance of loyalty and confidentiality. In creating these standards, Brandeis, like Gray and Holmes, left his own distinct mark on the clerkship institution.

ENDNOTES

*I would like to thank Clare Cushman of the Supreme Court Historical Society, Professor Robert O'Neil of the University of Virginia School of Law, Dr. Melvin I. Urofsky of Virginia Commonwealth University, Dr. Philippa Strum of the Woodrow Wilson International Center for Scholars, Dr. Artemus Ward of Northern Illinois University, and Brandeis grandchildren Frank B. Gilbert, Alice Brandeis Popkin and Walter B. Raushenbush for reviewing earlier drafts of this article. Moreover, I once again owe a debt of gratitude to Ms. Lesley Schoenfeld of the Special Collections Department at the Harvard Law School Library for her assistance. Portions of the article are reprinted with permission from Todd C. Peppers, **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (Stanford University Press, 2006).

[1]*See* Todd C. Peppers, "Birth of an Institution: Horace Gray and the Lost Law Clerks," *Journal of Supreme Court History* 32 (November 2007): 229–48.

[2]For a wonderful article on the relationship between Holmes and his law clerks, see I. Scott Messinger, "The Judge as Mentor: Oliver Wendell Holmes Jr. and His Law Clerks," *Yale Journal of Law & the Humanities* 11 (Winter 1999): 119–52.

[3]Lewis J. Paper, **Brandeis: An Intimate Biography** (Englewood Cliffs: Prentice Hall, 1983). A graduate of Harvard Law School (J.D.) and the Georgetown University Law Center (LL.M.), Mr. Paper is also the author of **John F. Kennedy: The Promise and the Performance** (1975) and **Empire: William S. Paley and the Making of CBS**

(1987). Mr. Paper is presently a partner at the law firm of Dickstein Shapiro, LLP.

[4]Melvin I. Urofsky and David W. Levy, eds., **The Letters of Louis D. Brandeis**, vol. 5 (Albany: State University of New York Press, 1975): 268.

[5]*Id.*

[6]*Id.* at 320.

[7]Prior appellate clerkship experience would not become the norm for Supreme Court law clerks until the 1960s.

[8]Philippa Strum, **Louis D. Brandeis: Justice for the People** (Cambridge: Harvard University Press, 1984): 359 (quoting correspondence with Felix Frankfurter).

[9]Lewis J. Paper, interview with Adrian S. Fisher, August 11, 1980, Washington, D.C.

[10]Law clerk Henry J. Friendly and his parents separately met with Justice Brandeis prior to Friendly's clerkship, apparently due to concerns over Friendly's future career plans. On October 28, 1926, Justice Brandeis spent one hour discussing with Friendly's parents "[t]heir misapprehensions as to facts & relative values of Practicing Lawyer v. Professor of Law." Brandeis writes that "[t]he only definite advice I gave them was to leave their son alone; to let him make up his own mind & not merely to say so, but let him see & know that they will be happy in whatever decisions he makes." Melvin I. Urofsky and David W. Levy, eds., **"Half Brother, Half Son:" The Letters of Louis D. Brandeis to Felix Frankfurter** (Norman: University of Oklahoma Press, 1991): 257. Ironically, Brandeis himself did not follow his own advice and spent the next decade urging Friendly to become a law school professor.

[11]Lewis J. Paper, interview with David Riesman, May 5, 1981, Cambridge, Massachusetts. Of all the Brandeis law clerks, Riesman appears to be the only former clerk to speak critically of Justice Brandeis—or at the very least the one former clerk to view Justice Brandeis as mortal. During his interview with Paper, Riesman confessed that "I felt very ambivalent about my work with Brandeis. I was very critical of him. But I also felt that I had let him down, and I felt terribly guilty about that. I always had the impression that Freund and the other clerks had done so much for him, and I didn't feel like I made a real contribution." Riesman concedes that "I'm sure I didn't start things off on the right foot when I told him at the very beginning that I thought Zionism was nothing more than Jewish fascism. And he said he wouldn't discuss it with me because I had no understanding of history." According to Brandeis' grandson, Frank Gilbert, former law clerk Paul Freund recounted a slightly more nuanced exchange in which the Justice first asked whether Riesman had read a specific list of books on the topic and, after Riesman's reply that he had not, then stated that there was no further purpose in discussing the topic. Author's telephonic interview with Frank Gilbert, January 15, 2008.

[12]Lewis J. Paper, interview with H. Thomas Austern, January 12, 1981, Washington, D.C.

[13]Paper, interview with Fisher.

[14]Dean Acheson, **Morning and Noon** (Boston: Houghton Mifflin, 1965): 47.

[15]Paper, interview with Fisher. Justice Holmes also had a strong preference for unmarried law clerks, but for a different reason: he wanted unattached clerks who could go to parties at night and return the next day to share the latest gossip with him.

[16]Urofsky and Levy, **Half Brother, Half Son,** 574.

[17]Felix Frankfurter and James M. Landis, **The Business of the United States Supreme Court: A Study in the Federal Judicial System** (New York: MacMillan Company, 1927).

[18]Charles Warren, **The Supreme Court in United States History** (Boston: Little, Brown & Company, 1928).

[19]Urofsky and Levy, **Half Brother, Half Son,** 579.

[20]Strum, **Justice for the People,** 355.

[21]All of the Justices continued working at home after completion of the Supreme Court building in 1935. Beginning with Hugo Black's appointment in 1937, all newly appointed Justices and their staffs worked primarily in their Chambers at the new Court building. By the time Chief Justice Fred Vinson was appointed in 1946, all nine Justices and their staffs were working full-time at the Court.

[22]Paul A. Freund, "Historical Reminiscence—Justice Brandeis: A Law Clerk's Remembrance," *American Jewish Historical Society* 68 (1978): 7–18, 9.

[23]Paul A. Freund, "The Supreme Court: A Tale of Two Terms," *Ohio State Law Journal* 26 (1965): 225–38, 226.

[24]Freund, "A Law Clerk's Remembrance," 9.

[25]Alexander M. Bickel, **The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** (Cambridge: Harvard University Press, 1957): 16.

[26]Acheson, **Morning and Noon,** 80–81.

[27]*Id.* at 80.

[28]Freund, "A Law Clerk's Remembrance," 10.

[29]Not surprisingly, the law clerk's duties often varied with Justice Brandeis' assessment of his young assistant's abilities. "His relationship with a particular clerk seemingly determined the degree of the clerk's independence," writes Strum. "To some, Brandeis merely gave drafts to check and flesh out with citations; others Brandeis encouraged to write first or later drafts, and the two would engage in mutual criticism of each other's ventures." Strum, **Justice for the People,** 356–57.

[30]Paul A. Freund, "Mr. Justice Brandeis: A Centennial Memoir," *Harvard Law Review* 70 (March 1957): 776.

[31]Acheson, **Morning and Noon,** 81.

[32]Lewis J. Paper, interview with J. Willard Hurst, May 31, 1980, Madison, Wisconsin. James Landis felt the same, referring to himself as being in "a junior partnership with the greatest Justice of the Supreme Court." James M. Landis, "Mr. Justice Brandeis: A Law Clerk's View," *American Jewish Historical Society* (1957): 468.

[33]Freund, "A Centennial Memoir," 776.

[34]Acheson, **Morning and Noon**, 80.

[35]Landis, "Mr. Justice Brandeis," 468.

[36]Lewis J. Paper, interview with William A. Sutherland, November 7, 1980, Washington, D.C.

[37]Acheson, **Morning and Noon**, 96–97. *See also* Freund, "A Law Clerk's Remembrance,"10: "Never in my experience did Brandeis invite the law clerk's view concerning how a case should be decided—that was distinctly the judge's responsibility—but the law clerk's ideas about the structure and content of the opinion were highly welcome."

[38]Lewis J. Paper, interview with Paul Freund, February 11, 1981, Cambridge, Massachusetts.

[39]Dean Acheson writes that "one of the joys of being a law clerk was to open the [docket] book on Saturday afternoon and learn weeks ahead of the country what our masters had done," but it appears from Paper's interviews with subsequent law clerks that Justice Brandeis abandoned the practice of giving his law clerks access to his docket book at some undetermined point in time after Acheson's clerkship. Acheson, **Morning and Noon**, 85. Supreme Court historian Artemus Ward hypothesizes that Brandeis may have changed his docket book practices after a scandal involving allegations that Ashton Embry, law clerk to Justice Joseph McKenna, was leaking information on pending decisions to a band of confederates. See John B. Owens, "The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919." *Northwestern University Law Review* 95, no. 1 (Fall 2002): 271–308.

[40]Lewis J. Paper, interview with Nathaniel L. Nathanson, December 17, 1980, Washington, D.C.; Calvert Magruder, "Mr. Justice Brandeis," *Harvard Law Review*, vol. 55 (December 1941): 193–94.

[41]Paper, interview with Austern.

[42]Paper, interview with Sutherland.

[43]Acheson, **Morning and Noon**, 82.

[44]*Id.* Landis describes a research project that required that he review every page of sixty-odd years of Senate journals. Landis, "Mr. Justice Brandeis," 471.

[45]Leonard Baker, **Brandeis and Frankfurter: A Dual Biography** (New York: Harper & Row, 1984): 214. Baker adds: "A few days before the argument, to Friendly's chagrin, telephone companies filed an *amicus curiae* brief with identical information." *Id.*

[46]Paul M. Freund, in Bickel, **Unpublished Opinions**, xix.

[47]Strum, **Justice for the People**, 355.

[48]*Id.*

[49]*Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

[50]Paper, interview with Austern.

[51]Acheson, **Morning and Noon**, p. 78.

[52]Friendly clearly met Brandeis' standards. In a May 20, 1928 letter to daughter Susan Brandeis Gilbert, Brandeis wrote that "[t]here is even enough work on hand to satisfy my voracious secretary [Friendly]." Melvin I. Urofsky and David W. Levy, eds., **The Family Letters of Louis D. Brandeis** (Norman: University of Oklahoma Press, 2002): 465.

[53]*Olmstead v. United States*, 277 U.S. 438 (1928).

[54]David Epstein, oral history interview with Henry J. Friendly, July 1, 1973.

[55]Paul. A. Freund, "The Evolution of a Brandeis Dissent," *Manuscripts* 10 (1958): 18–25, 34.

[56]Lewis J. Paper, Interview with Louis L. Jaffe, February 10, 1981, Cambridge, Massachusetts. Claytor echoed Jaffe's description of the minimal interactions with Brandeis, stating that "[b]asically we communicated by writing." Lewis J. Paper, interview with W. Graham Claytor, Jr., October 15, 1980, Pentagon. Alice Brandeis Popkin, granddaughter of Louis Brandeis, admits that she is surprised to hear her grandfather described in such terms: "He was not a distant person. Whenever I talked to my grandfather, he would look you straight in the eye. He was a very warm and loving person." Author's interview with Alice Brandeis Popkin, April 16, 2008.

[57]Paper, interview with Freund.

[58]Paper, interview with Austern.

[59]Paper, interview with Hurst.

[60]Freund, "The Supreme Court: A Tale of Two Terms," 226.

[61]Paper, interview with Fisher.

[62]Paper, interview with Sutherland.

[63]Paper, interview with Freund.

[64]*Id.* Professor Urofsky suggests, however, that Justice Brandeis was not offended if his clerks shared gossip from other Chambers with him. Author's correspondence with Urofsky. Once all nine Justices and their staffs began working exclusively at the new Supreme Court building, a "clerk network" quickly developed and clerks were generally encouraged by the Justices to aid in coalition formation. *See* Artemus Ward and David L. Weiden, **Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court** (New York University Press, 2006): 159–70.

[65]Nathaniel L. Nathanson, "Mr. Justice Brandeis: A Law Clerk's Recollections of the October Term, 1934," *American Jewish Archives* 15 (April 1963): 6–16.

[66]Calvert Magruder, "Mr. Justice Brandeis," *Harvard Law Review* 55 (1941): 193–94.

[67]Acheson, **Morning and Noon**, 49.

[68]Landis, "Mr. Justice Brandeis," at 470.

[69]Acheson, **Morning and Noon**, 50.

[70]Paper, interview with Freund.

[71]Acheson, **Morning and Noon**, 50.

[72]Paper, interview with Riesman.

[73]Paper, interview with Austern.

[74]Paper, interview with Nathanson.

[75]Strum, **Justice for the People**, 362.

[76]Paper, interview with Austern.

[77]Paper, interview with Riesman. Philippa Strum recalls Alger Hiss telling her the story of attending a dinner party at the Brandeis residence during his Holmes clerkship: "He remembered Poindexter, LDB's man of all work, taking a plate of asparagus around to the guests. Hiss got the plate relatively early and took what he thought was a reasonable helping. To his horror, he realized afterwards that the plate was not going to be replenished and his healthy helping meant that there would not be enough for everyone else." Author's correspondence with Strum.

[78]Almost forty years later, Henry Friendly's only regret regarding his clerkship was the lack of contact with Justice Holmes: "[O]ne of the only criticisms I have of Brandeis. . .I think he only took me around there [to meet Holmes] once. I wish he'd done it more." Epstein, interview with Friendly.

[79]Paper, interview with Sutherland.

[80]Paper, interview with Fisher.

[81]*Id.*

[82]Paul A. Freund, "Mr. Justice Brandeis," *Harvard Law Review* 55 (1941): 195–96.

[83]Paper, interview with Gilbert.

[84]Nathanson, "A Law Clerk's Recollections," 9.

[85]Paper, interview with Nathanson.

[86]Paper, interview with Austern. Another example of Brandeis' sense of humor was found in his explanation as to why he had Acheson work for two—as opposed to one—year as his law clerk. "Whenever Brandeis was queried about it in Acheson's hearing, the latter recalled, 'He would speak of a concern for my prospective clients.'" Strum, **Justice for the People**, 362.

[87]Paper, interview with Sutherland.

[88]*Id.*

[89]After helping Brandeis organize his papers, Fisher subsequently clerked with Frankfurter.

[90]Urofsky and Levy, **Half Brother, Half Son**, 597.

[91]*See generally id.*.

[92]*Id.* at 395.

[93]*Id.* at 402, 410.

[94]*Id.* at 470.

[95]*Id.* at 193. While Williams subsequently entered government service as an Assistant United States Attorney, he spent the bulk of his career in private practice and never taught in a law school. For a glimpse into the life of a Taft law clerk, see C. Dickerman Williams, "The 1924 Term: Recollections of Chief Justice Taft's Law Clerk," *Supreme Court Historical Society Yearbook* (1989): 40–51.

[96]Melvin I. Urofsky and David W. Levy, eds., **The Letters of Louis D. Brandeis, Volume V (1921–1941): Elder Statesman** (Albany: State University of New York Press, 1978): 404.

[97]Urofsky and Levy, **Half Brother, Half Son**, 457, 531.

[98]Paper, interview with Riesman.

[99]*Id.*

[100]Paper, interview with Fisher.

[101]Urofsky and Levy, **The Letters of Louis D. Brandeis**, 454.

[102]Urofsky and Levy, **Half Brother, Half Son**, 371.

[103]*Id.* at 581.

[104]*Id.* at 510.

[105]*Id.* at 359.

[106]*Id.*

[107]*Id.* at 360.

[108]*Id.* at 404.

[109]Strum, **Justice for the People**, 358; Baker, **Brandeis and Frankfurter**, 185. Strum points out that Supreme Court scholars owe a debt of gratitude to Acheson, for it was he, during his clerkship, who convinced Justice Brandeis to keep copies of drafts and other related materials in his official Court files. Strum, **Justice for the People**, 357.

[110]Urofsky and Levy, **Half Brother, Half Son**, 248–49.

[111]Dean Acheson, "Mr. Justice Brandeis," *Harvard Law Review* 55 (December 1941): 191–92.

[112]Author's telephonic interview with Walter B. Raushenbush, January 28, 2008.

[113]Strum, **Justice for the People**, 359 (quoting from minutes of the presentation).

[114]*Id.* at 358.

[115]David Riesman with Reuel Denney and Nathan Glazer, **The Lonely Crowd; A Study of the Changing American Character** (New Haven: Yale University Press, 1950).

[116]"Yale Law Dean Rites Tomorrow," *Boston Herald*, March 21, 1955.

[117]"Adrian S. Fisher, 69, Arms Treaty Negotiator," *The New York Times*, March 19, 1983.

[118]As a Wisconsin Law School student in the 1950s, Brandeis' grandson Walter Raushenbush took classes from both of his grandfather's former clerks. He recalls both professors fondly, describing Hurst as a "remarkable and demanding teacher who was full of interesting ideas."

[119]Louis L. Jaffe and Nathaniel Nathanson, **Administrative Law: Cases and Materials** (Boston: Little, Brown, 1968).

[120]Richard D. Lyons, "W. Graham Claytor, Architect of Amtrak Growth, Dies at 82," *The New York Times*, May 15, 1994.

[121]"Samuel H. Mason, 87, lawyer, KTCA founder," *Star Tribune*, May 14, 1988.

[122]"Irving B. Goldsmith," *Chicago Daily News*, July 24, 1941.

[123]"From Clerk to Judge," *The New York Times*, March 11, 1959.

[124]"Robert Page, 69, of Phelps Dodge," *New York Times*, December 27, 1970.

[125]Urofsky and Levy, **The Letters of Louis D. Brandeis**, 38.

[126]Acheson, **Morning and Noon**, 96–97.

[127]Paper, interview with Hurst.

[128]Francis Biddle, **Mr. Justice Holmes** (New York: Charles Scribner's Sons, 1942): 12.

[129]Paper, interview with Sutherland.

[130]Alpheus T. Mason, **Brandeis: A Free Man's Life** (New York: The Viking Press, 1946).

[131]Paper, interview with Riesman.

[132]Modern law clerks have been less hesitant in criticizing the Justices. *See generally* David Margolick, Evgenia Pertz, and Michael Shnayerson, "The Path to Florida," *Vanity Fair* (October 2004): 310–20; Edward Lazarus, **Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court** (New York: Random House, 1998); Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon and Schuster, 1979).

[133]*See generally* Todd C. Peppers, **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (Stanford University Press, 2006); Ward and Weiden, **Sorcerers' Apprentices**; Chester A. Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks," *Oregon Law Review* 40 (1961): 299–317.

Public Diplomacy in the U.S. Supreme Court: The Warren Years—Part II

THEODORE M. VESTAL

Chief Justice Warren as Overseas Ambassador of Goodwill

Before Chief Justice Warren played host to Prime Minister Nehru at the Supreme Court in 1956, opening the Marble Temple as a place to practice personal diplomacy, he had done little international travel. Indeed, "the first six decades of his life had been spent almost entirely in the United States."[1] After his elevation to the Bench, however, he and Mrs. Warren traveled extensively overseas during the recess between terms, as quasi-official American ambassadors of goodwill. It became almost an annual event for the Chief to go abroad, usually on an official visit as head of the federal judiciary. Travel became a significant part of Warren's continuing education, and he found it "always an exhilarating experience." He learned empirically, gaining understanding through experience and participation. Civil-libertarian author Alan Barth found that Warren "grew prodigiously."[2]

Warren's interest in international relations was stimulated by the founding meetings of the United Nations (U.N.) in San Francisco in 1945, when as Governor of California he formally welcomed the delegates.[3] The following year, he attended the inauguration of Mexican president Miguel Aleman and subsequently paid several official visits to Mexico. In August 1951, the Governor traveled to Japan to meet soldiers of California's own National Guard division who had been wounded fighting in Korea.[4]

While still Governor, Warren was sent to London by President Eisenhower as one of the U.S. representatives to the coronation of Queen Elizabeth II on June 2, 1953.[5] The delegation was headed by former Secretary of State George C. Marshall and included General

This ceremonial gavel was presented as a gift to Earl Warren by Chief Justice Wilson of Liberia when Warren attended the World Peace Through Law Conference in 1965.

Omar Bradley and Mrs. Fleur Cowles, at that time wife of Gardner Cowles, editor and publisher of *Look* magazine. This assignment allowed Warren to take his wife and three daughters on their first visit to Europe. While in Scandinavia during that extended tour, Warren wired Attorney General Brownell his coded acceptance of a position in the Eisenhower Administration—an acceptance that eventually led to his nomination for the Chief Justice post on August 3, 1953. In Stockholm, Warren was awarded the Swedish Grand Cross of the Royal Order of the North Star, and in Oslo, he had an audience with the elderly King Haakon and Crown Prince (later King) Olav. When he subsequently was asked if the European vacation had been arranged to familiarize him with foreign affairs and lead to his appointment as a roving ambassador, Warren answered bluntly: "I am not interested in that service. I never have been."[6]

Early in his tenure on the Court, the Chief Justice contributed to the mythology of the State Department. Warren had recommended that Jack Peurifoy become Ambassador to Guatemala, and agreed to come to Foggy Bottom to swear in the diplomat. In the office of Secretary of State John Foster Dulles, the Chief had difficulty getting into a robe that he had brought from the Court for the brief ceremony, and was being assisted by several Foreign Service Officers. Unfortunately, no one had informed the Secretary of what was transpiring in his office. According to Consul General Ben Franklin Dixon, Dulles returned from a meeting on Capitol Hill and when the elevator opened at his office, "he was so surprised, he opened his mouth wide and his false teeth fell out." The diplomats scurried to pick up Dulles's false teeth and to get the robe on Chief Justice Warren. "Peurifoy looked very pleased; Dulles, gritting his

teeth, looked absolutely furious." Thus Warren, in one of his first appearances at State, was present during a rare occasion when John Foster Dulles lost his cool (and his teeth), or was at least nonplussed.[7]

Throughout Warren's Chief Justiceship, he and Mrs. Warren were frequently involved in events at the White House honoring visiting heads of state. During their first year in Washington, the Warrens attended a state dinner honoring Emperor Haile Selassie of Ethiopia in May, and in June, Warren was one of "forty Republicans and Democrats" and the only Justice invited to Eisenhower's White House luncheon for Winston Churchill. The President and Prime Minister held private talks about the best means of bolstering the cause of freedom in Southeast Asia. Declared the Prime Minister: "To jaw-jaw is always better than to war-war." When the luncheon attendees came out on the North portico, Sir Winston walked out with the Chief Justice, while Republican Congressmen accompanied Eisenhower.[8]

After the 1954 Term ended in June 1955, the Warrens returned to the Scandinavian countries as part of a six-week, eight-nation tour, ostensibly on "the first vacation in 30 years," but serendipitously as personal diplomats *par excellence*. At one level, they were typical American tourists taking in the sights and writing home about them—for example, fulfilling a long-time ambition "to see the midnight sun on the longest day of the world."[9] But on another level, their travels, though unofficial, were frequently reported in local newspaper headlines. In Helsinki, the Chief Justice's arrival upstaged the grand opening of a Communist-organized "World Assembly of Peace."[10] In Bonn, Warren was the luncheon guest of West German Chancellor Conrad Adenauer.[11] Accompanied by U.S. Ambassador to Germany James B. Conant, the Warrens returned to America from Copenhagen on a "transpolar flight" (a route still newsworthy in those days) to Los Angeles on July 17.[12]

When he went to San Juan to speak at the dedication of a new Puerto Rico Supreme Court building in February 1956, Warren inadvertently got involved in a Hispanic political controversy.[13] The Warrens were the guests of Governor Nunoz Marin, and the Chief Justice was to receive an honorary Doctor of Laws degree from the University of Puerto Rico. A similar honor was to be bestowed upon José Castan Tobenas, Chief Justice of Spain. Honoring Tobenas, however, caused cellist Pablo Casals to turn down a Doctor of Humanities from the university at the same ceremony, as he felt the jurist represented the Franco dictatorship that suppressed legal rights and liberties of the Spanish people. Local labor picketed the university ceremony with banners proclaiming that Warren should be honored but that the "buddy" of Generalissimo Franco should not.[14]

In his dedicatory address, Warren paid homage to Puerto Rico's merging two of the great legal systems of civilized times: the legal inheritance of Spain and that of the English-speaking nations. Said the Chief Justice: "Retention of those parts of the Spanish heritage best adapted to the conditions of this island and the adoption of the basic feature of the Anglo-American system of jurisprudence created a composite unlike any other governmental structure." Warren described the modernistic, highly functional new court building as a "temple of justice representing the noblest efforts in accordance with the Puerto Rican people's compact with the United States to develop and expand republican principles which recognize the dignity of every human being and guaranteeing rights, opportunities, and responsibilities for all it represents." The Chief emphasized the relationship between peace and justice. "Our national ideal is peace ... We believe that it can only be achieved through justice ...The success of any legal system is measured by its fidelity to the universal ideal of justice." In a frequently quoted statement, Warren proclaimed that "the most important problem of these times was whether the world and all its parts were to be governed by the rule of force or by the force of law."[15]

The San Juan ceremonies were attended by ambassadors and other high officials from Latin American countries and an impressive delegation representing the U.S. legal community, including Attorney General Herbert Brownell, Solicitor General Simon E. Sobeloff, several federal judges, and the deans of the Harvard and Yale law schools, Erwin N. Griswold and Eugene V. Rostow. Dr. Ralph Bunche was there on behalf of the U.N.[16]

Impressive as the Puerto Rican events were, it was not until the summer of 1956, with his successful State Department-sanctioned trip to India, that the Chief Justice took on the mantle of judicial ambassador of the American promise of racial equality, a role that he would play as an international celebrity for the rest of his life.

In July and August 1957, the Warrens returned to the British Isles, this time on the *Queen Mary*, to vacation and to attend the American Bar Association's conference in London.[17] At the request of the ABA, the Chief led a historic goodwill mission of 15,000 bar association members to London, "where with English Bench and Bar, [they] jointly expressed devotion to the principles of common law which had developed there and had become the foundation for the legal institutions of both countries." Warren viewed the pilgrimage as a demonstration of the two nations' unified resolve to preserve freedom under law. The conference program was marred, however, by an ABA Committee report on "Communist Tactics, Strategy and Objectives" that Warren found "trickily contrived to discredit the Supreme Court." Additionally, the meeting's managers made a sartorial gaffe in not informing the Chief about formal dress being expected on the dais. This resulted in an embarrassed Warren appearing in a brown suit, instead of morning coat and striped trousers. Several other untoward events related to the London meeting were so galling to the Chief Justice that he resigned from the ABA a short time later.

After the conference, the Chief Justice led a party of 125 American lawyers to Ireland, among them his running mate in the 1948 presidential election, Thomas Dewey, former Governor of New York, and U.S. Attorney General Herbert Brownell. At the Dublin airport, they were greeted by a phalanx of members of Ireland's legal community and politicians led by Chief Justice John A. Costello. The Warrens were the guests of President Sean T. O'Kelly at the official residence in Phoenix Park. At the National University, Prime Minister Éamon de Valera, chancellor of the university, conferred an honorary Doctor of Laws degree upon the Chief Justice. Later, a reception for members of the ABA was held at the historic Four Courts in Dublin.[18] At the conclusion of their stay in Dublin, the Warrens spent a month traveling through Ireland, Scotland, and England in unusually pleasant weather and returned to New York on the *S.S. United States*, the fastest ocean liner at the time.

The Chief's travels appeared to inspire in him a new, keen interest in comparative law, especially in an international context.[19] Upon his return to the United States, Warren took part in a three-day conference at the Jewish Theological Seminary in New York City, where he participated with rabbinical scholars and laymen in discussions of Judaic laws, ethics, and morals and their relevance to the contemporary world. The Chief called for a new effort to discover the common denominator of faith and understanding among the religions and people of the world. He advocated a worldwide series of exchanges among scholars and religionists. The Chief Justice confessed that his discussion of Talmudic law and its interpretation was "the first serious undertaking of this kind" that he had ever experienced. By studying the Talmud, Warren said he hoped that he might "have a better concept of justice and righteousness and be better able to serve the people of our nation." Another attendee, former President Harry S Truman, thought it "wonderful that the nation's Chief Justice should renew his learning and inspiration" at the seminar.[20]

In October 1957, the Chief Justice, as chairman of the Board of Trustees of Washington's National Gallery of Art, welcomed Queen Elizabeth of Great Britain at the museum. Warren presented the Queen to trustees and donors who accompanied her on her tour. The Queen especially admired Stuart Gilbert's portrait of George Washington and a watercolor lent from her own collection, "Assumption of Our Lady," a work by William Blake.[21] The British monarch was in the United States to attend ceremonies for the 350th anniversary of the first permanent English settlement in America at Jamestown, Virginia.

While the Chief frequently was involved in official functions involving foreign heads of state, Nina Warren was active in her own right in international activities. In November 1958, Mrs. Warren and daughter Virginia were among fifty-nine guests invited by hotel magnate Conrad Hilton to help inaugurate the new Berlin Hilton. When the Warrens, *mater et filia*, were delayed by engine trouble on a chartered DC-7C flight to Berlin, the incident was reported in the *New York Times*.[22] Indeed, during the 1950s and 1960s, the travels of the Chief Justice were considered newsworthy and frequently were mentioned in national newspapers. By the time Warren Burger became Chief Justice in 1969, international travel received far less press coverage.

In August and September 1959, the Chief and Mrs. Warren traveled to the Soviet Union, Germany, and Scandinavia.[23] They went to the USSR as private citizens and participated briefly in the American exhibition in Moscow, the scene of the famous "Kitchen Debate" between Vice President Richard Nixon and Soviet Premier Nikita Khrushchev only a few weeks earlier (on July 24, 1959).[24] Introduced to the crowd at the exhibition fashion show, the Chief Justice was applauded and besieged by autograph seekers. Ever the consummate politician, the Chief "worked the crowd," telling them he was happy to be in Moscow and to see so many smiling faces. When his remarks were translated, they brought another round of applause. Warren then leaned down from the platform to shake hands with people in the front row and to sign more than a score of the Russians' fair programs.[25]

The homes of American ambassadors were frequently the domicile of the Chief Justice and his wife while abroad. For example, while in Moscow, the Warrens stayed at Spaso House, the residence of U.S. Ambassador Llewellyn E. Thompson, Jr.

The Chief stopped briefly in Leningrad and Helsinki, Finland before continuing to West Germany for a three-week visit to study the court system as a guest of the Federal Republic of Germany.[26] Warren visited several courts and met leading Germans, including the mayor of Berlin, Willy Brandt. In a major lecture, "Justice for the Individual," delivered in West Berlin's *Amerika Haus*, the Chief expressed hope for the eventual introduction of some measure of personal justice in dictatorships. Warren called dictatorships "blighted areas," which harbored "systematized injustice bolstered by the great physical power of political regimes." He said it is "not too much to anticipate that even the forces supporting such systematized injustice will, in the long run, increasingly seek to introduce for their own protection some elements of personal justice."[27] The Warrens then toured East Berlin, where they visited the city's largest department store.[28]

In Bonn, the capital of West Germany, the Chief Justice was honored by a formal reception and was the luncheon guest of President Theodor Heuss.[29] In Karlsruhe, Warren addressed the Supreme Court of Civil and Criminal Judicature, where he received an unusual standing ovation from the Justices. Said Warren:

> The more I explore other systems of free governments, the more I am convinced that there is no perfect system; the forms of successful government are not copied, but grow according to the spirit of the people

> who live under them. And that spirit springs inevitably from the history, traditions, and experience of the people themselves. There are today, as we all know, constitutions drafted in the most eloquent and inspiration language that are not worth the paper they are written on, because there is no spirit to make the words meaningful.[30]

At the end of August, the Warrens concluded their German excursion with a visit to Munich and with several days of rest at Berchtesgaden in the Bavarian Alps.[31] In both Russia and Germany, Warren's fame as the champion of equality preceded him. Wherever he went, hundreds asked for his autograph.[32] The Chief Justice and the Supreme Court had a strong impact on the European public's general impression of the United States. Throughout the 1950s and 1960s, there was extensive coverage by European mass media of important events in America, especially racial segregation.

Throughout his tenure on the Court, Warren attended international judicial conferences. He was elected the first president of the World Association of Judges, a voluntary organization of jurists and lawyers from 117 nations dedicated to establishing the legal bases for world peace. In 1959, Warren also helped found the International World Peace Through Law Conference, which was funded partially with U.S. foreign aid funds and a Ford Foundation grant.[33] The idea of a world conference intended to develop a program to strengthen international law and judicial machinery originated with the ABA. The Chief Justice's inaugural address presented the Conference with the idea "that we of our generation have the capacity to create enough new law and new legal institutions to make law a major factor in world affairs." The opening day of the conference was observed throughout the world as the first "World Law Day." Warren became one of the strongest supporters of and spokesmen for "Peace Through Law," and he attended all biennial meetings of the conference thereafter.[34]

In 1961, the Warrens were the guests of Agnes Meyer, an old acquaintance and the widow of Eugene Meyer, the owner of the *Washington Post*, on her yacht *Lisboa*.[35] Along with columnist Drew Pearson and his wife Luvie, they cruised the fjords of Norway and made a stop at Haugesund, the birthplace of the Chief Justice's father.[36] As part of a world tour in 1961, the Warrens also visited Australia, where the Chief Justice met with Prime Minister Robert Menzies, who had been a guest at the U.S. Supreme Court the year before.[37]

After the 1961 world tour, the Chief Justice was recognized as a popular representative of his country. J. Lee Rankin, then Solicitor General, later said, "When you travel, you realize this is the best-known American in the world. The new nations of Asia and Africa call him a saint—the greatest humanitarian in the Western Hemisphere since Abraham Lincoln."[38]

The following summer, again as guests of Agnes Meyer, the Warrens—along with Pearson, Adlai Stevenson, and Alicia Patterson, editor of Long Island's *Newsday*—cruised the Mediterranean with stops in Israel and Yugoslavia.[39] They spent one week in Israel, where the Chief met President Izhak Ben Zvi and presented him with a prepublication set of volumes 4 through 7 of a new critical edition of the Talmudic Law. Warren also met with Premier David Ben-Gurian, Chief Justice Ishak Olshan, and members of the Supreme Court and was a guest lecturer at Hebrew University Law School.

The Warrens and their party visited President Josip Tito of Yugoslavia on his island retreat of Brioni.[40] There, the Chief Justice was personally chauffeured around the estate in a golf cart driven by Tito.[41] The Chief was photographed with Tito and U.S. Ambassador C. Burke Elbrick, who six years later was to be kidnapped and held hostage by urban guerrillas in Brazil. Tito had expected to have a friendly chat with his guests, but with

Chief Justice Warren is pictured with President Tito of Yugoslavia during his 1967 visit to that country. Ambassador C. Burke Eldrick stands between them.

the Ambassador present, he had to speak officially. The Yugoslavian President explained that his country's foreign policy was "not following the Russian line, but rather the line of the non-aligned nations of which Nasser was the leader. Sometimes we'll follow Moscow; sometimes, not." In commenting on the situation in the Middle East, Tito candidly prescribed that "the Arab states must recognize Israel's existence, but Israel must surrender territory it seized."[42]

At Pec in Yugoslavia, where Pearson had served on a Quaker mission in his youth, the Chief Justice met a young woman who was studying to be a lawyer. "I am glad you are studying law. If you come to America, come to see me," Warren told the girl, who didn't know who he was. He gave her his card as he walked away, and she ran after the Chief to give her picture and to ask for his. He promised to send her one. Pearson wondered how Warren could explain carrying around the photo of a Yugoslav beauty to Nina.

The guests on Agnes Meyer's yacht were a frenetic group with which their hostess could not keep up. When a U.S. Foreign Service officer called on Meyer in Yugoslavia while attempting to locate Stevenson, Mrs. Meyer explained: "Let me tell you what I have on my hands here. I have a circus of untrained fleas and they are bouncing all over creation. I cannot make contact with them. Maybe you can. Where would the governor be? I don't know whether he's with Drew Pearson, looking at some church Drew Pearson built twenty years ago, or whether he is off with Earl Warren, or what." Stevenson was eventually found.[43]

To the distress of his hosts and the yacht's crew serving on lifeguard duty, Warren enjoyed swimming twice daily in the

shark-infested Adriatic. Traveling throughout Yugoslavia, the Chief Justice and his wife were overnight guests in Bar, Titograd, Kotor, Hercegnvi, Dubrovnik, Korcula, Hvar (where they were the guests of Ambassador George Kennan), Split, Sibenik, Zadar, Opatija, Pula, and Brejuni. During the cruise, Mrs. Warren noted that in passing by Albania, an "Iron Curtain country," the *Lisboa* was obliged to stay beyond the three-mile limit."[44] In the courtyard of the Ducal Palace in Venice, the Warren party was treated to a performance of "Othello."

Super Chief's Super Tour in 1963

In May 1963, the Chief and Mrs. Warren traveled to Majorca, Spain, for the 250th anniversary of the birth of Father Junipero Serra. During the seventeenth century, Father Serra established a series of Catholic missions along the El Camino Real from San Diego to San Francisco, a seminal episode in the history of the West Coast of the United States. In Spain, the Warrens, joined by the mayors of Los Angeles and San Francisco and other California officials and clergy, attended official ceremonies, where the Chief spoke. They were entertained by Hollywood pianist Jose Iturbi (a friend of the Warrens from their California days) and the Spanish National Orchestra, and by Spanish dancers in the Drach Caves. The Chief Justice also paid an official visit to the Spanish Supreme Court in Madrid.[45]

The following month, President Kennedy phoned Warren at his home and appointed him, along with Senator Mike Mansfied (D-MT), to head the U.S. delegation to the coronation of Pope Paul VI.[46] The Chief Justice accepted the appointment, with the understanding that he would have to leave immediately after the coronation ceremony to address the opening session of the biennial International World Peace Through Law Conference in Athens. The President assured the Chief that he would arrange for air transportation for the Warrens from Rome to Athens. The appointment as a delegate to the Papal Coronation was the springboard for a two-month, nine-nation tour by the Warrens. Most of the information known about their 1963 trip is contained in a letter from Nina Warren to "Dear Sisters in P.E.O."[47]

On June 28, the Warrens and the other delegates left Washington's Andrews Air Force Base for Rome on the President's plane, a modified Boeing 707 known as Air Force One. The coronation was held outdoors, in front of St. Peter's Basilica at 6:00 on the evening of June 29th.[48] The Warrens were received by the Pope and wore State Department-prescribed formal attire for the occasion, with the Chief Justice donning a black vest instead of the usual white, and Mrs. Warren wearing a long-sleeved black silk dress and a black mantilla.

The Warrens left immediately for Athens after the ceremony, on a small two-crew and two-passenger U.S. Air Force plane. Somehow, the large Super Chief was able to change into a business suit in the cramped quarters of the luggage-filled aircraft. At the newly opened Athens Hilton Hotel, the Chief Justice was welcomed by Greek Premier Panayotis Pipinelis. He addressed the opening session of the World Peace Through Law Conference, which was attended by King Paul, Queen Frederika, and other members of the royal family. Warren spoke to an audience of 1,000 lawyers from more than 100 countries, including supreme court justices from twenty nations, and called for an effective international court with power to enforce its judgments. The Chief advocated a working system of international law as an "absolute necessity." He charged lawyers in all countries with a special responsibility for bringing about "international order based upon law."[49]

On July 10, the Warrens flew to Ankara, Turkey, where they stayed at the residence of U.S. Ambassador Raymond Hare. On almost all of these foreign visits, Warren kept up a hectic schedule of official calls, speeches, lunches, receptions, and dinners. On one day in Ankara, the Chief Justice called individually

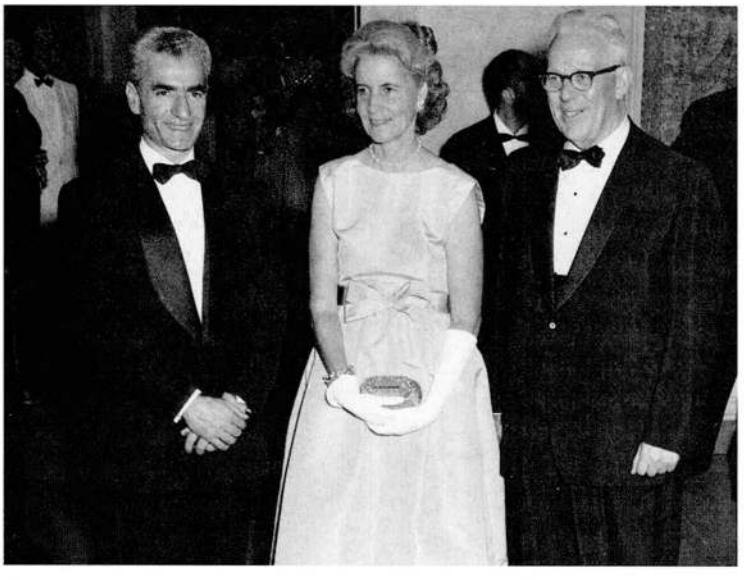
on the Turkish President, Prime Minister, Foreign Minister, Minister of Justice, President of the Constitutional Court, President of the Court of Cassation, and President of the Council of State. In the late afternoon, he spoke to the law faculty at the University of Ankara, and that evening he was the guest of honor at a reception at the Embassy Residence. Mrs. Warren also stayed busy, with visits to welfare projects, hospitals, and various ceremonies. The Chief Justice was treated as a visiting head of state, lacking only the title. He placed a wreath on the Tomb of Ataturk. The Foreign Minister gave a formal dinner in the Chief's honor, and Mrs. Warren was given a gift, a red velvet runner heavily embroidered in gold that she had framed as a wall hanging.[50] In Istanbul, the Warrens were the guests of the local Governor, whom they had befriended years earlier in Sacramento when he was a young visitor to California.[51]

The Warrens continued on to Nicosia, Cyprus, where they were luncheon guests of Archbishop Makarios, the first President of the Republic of Cyprus, at the Presidential Palace. The Chief Justice gave an address before Cypriot government, diplomatic, and community leaders.[52]

In Tehran, Iran, Warren gave eight speeches in two days. The Chief Justice had an audience with the Shah of Iran, while Mrs. Warren enjoyed an audience with Empress Farah at Saadabad Palace and seeing the Crown Jewels.[53] The Warrens stayed at the "new, beautiful" American Embassy that would become the scene of an ugly hostage crisis in 1979.

On either side of the Iranian stop, the Warrens had brief but intense layovers at Beirut, Lebanon, at the time a spectacularly beautiful city. U.S. Ambassador Armin H. Meyer and Mrs. Meyer met the Warrens at the airport of what was then, in the words of Mrs. Warren, "an interesting city and wonderful place to stop." During a six-hour stay, the Warrens managed to work in a lunch with a "large group" at the embassy, official calls, and a shopping expedition.[54] The 72-year-old Chief Justice did not suffer from a lack of energy.

The next official visit on the Chief's tour was in Cairo, Egypt. The Warrens stayed at the Nile Hilton where Nina and Virginia, their oldest daughter, had been the guests of Conrad Hilton at the hotel's grand opening four years earlier, in 1959. The Chief Justice carried out his usual round of duties in the uncomfortable



Warren posed with Mohammad Reza Pahlavi, the Shah of Iran, and Mrs. Paul Mellon at a reception for "7,000 Years of Iranian Art" at the National Gallery of Art in 1964. Chief Justice and Mrs. Warren had visited Iran the previous summer.

July heat of Cairo, but the Warrens also found time to take in tourist sites, as well as the rehearsal of a parade commemorating the revolution that brought President Gamal Abdel Nasser, the Chief Justice's official host, to power.[55]

On July 23, the Warrens arrived in Nairobi, Kenya, where the cooler weather was a welcome change from the summer heat of Egypt.[56] At the time, Kenya was still a colony within British East Africa, and hence the highest ranking American diplomat was the Consul General, rather than an ambassador. The Warrens were met by their host, the U.S. Chargé d'Affaires Laurence C. Vass, who a week before had written the Chief Justice: "Events in America are much in the news here, while the perspective is neither flattering nor accurate. The fact that our African friends will be able to see and hear a distinguished American like yourself will unscramble our picture."[57] See and hear the Chief Justice they did. Warren made his usual official calls—including attending a meeting of the new Parliament, where he found the debate "sharp and good-natured, accompanied by frequent applause"—spoke at the United Kenya Club, and was honored with a reception attended by several hundred people at Charter Hall in the City Hall. Said Warren: "I have come to see something of Africa, which we know all too little about in the United States." The Chief Justice delivered an address on "The Rule of Law in Today's World" at Gloucester Hall of the Royal College (now the University of Nairobi). The Chief Justice noted the U.S. drive for racial integration and observed that "America's efforts to wipe out racial discrimination should strengthen the nation's support in the rest of the world." Mrs. Warren noted that the members of the Kenyan courts were so eager to talk to the Chief Justice and discuss problems that the Chief really had "a working schedule." She added: "It is amazing how much is known about the Supreme Court decisions in other lands." During their stay in East Africa, the Warrens especially enjoyed visits to rural villages and game preserves. Warren told Drew Pearson that he saw a dozen lions in one of the parks. A lioness walked away from her cubs, looking bored. Then a cub looked up, saw the Chief Justice, and also walked off looking bored. "The Chief, a Republican, was disappointed to see no elephants in the game preserves of Kenya."[58]

Nineteen-sixty-three was an exciting time for Kenya. In pre-independence elections in May, Jomo Kenyatta led the Kenyan African National Union Party to victory and was named Prime Minister in June. Under Kenyatta's leadership, Kenya gained formal independence in December.

The final stop on the Chief Justice's African tour was Addis Ababa, Ethiopia.[59] The Warrens had met Emperor Haile Selassie at a White House state dinner during the Eisenhower administration, and the Emperor went all out to show unusual hospitality to the Chief Justice and his wife by declaring them his personal guests at Jubilee Palace, placing a palace car at their disposal, and assigning a minister of the Imperial Court as their escort officer. Haile Selassie hosted a lavish luncheon honoring the Warrens at the palace, and "virtually the entire cabinet" attended. The Emperor spoke French during the luncheon (with an interpreter on hand), but as the party broke up, he addressed Mrs. Warren in English and asked, "Why don't you speak French so I can talk to you?" Haile Selassie gave the Warrens gifts befitting a head of state: for the Chief Justice, an autographed photograph of the Emperor in a sterling silver frame engraved with the royal Lion of Judah crest; for Mrs. Warren, a striking gold bracelet; and for the two of them, a handmade filigreed silver centerpiece in the shape of a fluted bowl (a gift very similar to one that Haile Selassie presented to President and Mrs. Kennedy during his state visit to the United States three months later). The Chief Justice reciprocated the Emperor's hospitality by entertaining him on a Potomac cruise on the yacht *Sequoia* during the Emperor's state visit to the United States in October 1963, just

before the beginning of the Supreme Court's 1963 Term.

When Ambassador Edward Korry held a formal dinner in honor of the Chief Justice at his residence, the Emperor permitted the Crown Prince and other members of the Imperial Family to attend, even though the family was still in mourning following the deaths of the Empress Menen and Prince Sahle Selassie (the Emperor's wife and son).[60] A series of large receptions were held for the Warrens. Korry hosted one at the U.S. embassy for a select group of Ethiopians described by the Ambassador as "some of the best minds in the country."[61] Another one was held at Haile Selassie I University for members of the Ethiopian legal profession.[62] And a third one was held for the sizeable American community at the Addis Ababa Golf Club. Haile Selassie told Warren that it was "so difficult to get judges of integrity and qualification" that the Emperor was "the final appeal" and that the law school would remedy that situation.

The Warrens toured the countryside around the capital city, visiting Oklahoma A&M's USAID-sponsored agricultural experimental station at Debra Zeit and a Crossroads Africa construction project. They met with Peace Corps volunteers, who had arrived in the country the year before as the largest Peace Corps contingent sent abroad up until that time and described by the U.S. Ambassador as "being off to a resounding, unqualified, successful start."[63] In Addis Ababa, Mrs. Warren was especially impressed with Africa Hall, the new permanent headquarters of the United Nations Economic Commission for Africa, and its imposing stained glass windows by Ethiopian artist Afework Tekle.

The Emperor, in his role as chancellor of Haile Selassie I University, personally arranged for and sponsored a public address delivered by the Chief Justice at the National Theatre. Tickets for the event were difficult for the public to get. Among the 2,500 hearing the Chief speak on "Equal Justice Under Law" were the Emperor, the entire cabinet, top governmental officials, and the diplomatic corps.[64] According to Korry, Warren's address was "considered the major intellectual event of the year if not of the decade." Joe Tenn, then a Peace Corps Volunteer teacher at Prince Mekonnen Secondary School in Addis Ababa, remembers shaking the Chief Justice's hand in a long post-speech receiving line and eliciting a smile and a favorable comment from Warren when he told him he was a Californian—the usual Earl Warren warm human touch on such public occasions.[65]

On radio programs and in press interviews, the Chief Justice gave judicious answers to questions concerning the role of Africa in world affairs, racial segregation in the United States, and the impact of Supreme Court decisions on American society. His experience as a politician and public official was reflected in his facile eloquence. According to Graham Tayer, an English journalist who was present at a press conference, Warren winced when reporters called him "Your Excellency." For the down-to-earth Warren, "Mr. Chief Justice" would have sufficed. Other than Vice President Nixon, the Chief Justice was the highest-ranking American official to have ever visited Ethiopia.[66]

The head-of-state treatment afforded Warren by the Imperial Government of Ethiopia may well have been the most elegant he encountered in his foreign travels as Chief Justice. The U.S. embassy staff, however, viewed the Emperor's extraordinary hospitality for Warren as a subtle reminder to the U.S. government of how an important visitor should be treated, at a time when plans were being made in Washington for Haile Selassie's forthcoming state visit in September.[67] Whatever the hosts' motivations, the Warrens' official three-day visit to Addis Ababa was "highly successful" and, other than Warren's triumphal 1956 tour of India, the most widely acclaimed by his host country. Mrs. Warren thought Ethiopia to be "the most interesting and fascinating of all the countries [they] visited." She found the weather there "stimulating and temperate"

and thought that it compared "favorably with California."[68] At the end of the tour of Africa, Pearson found the Chief Justice "bubbling over with praise for Haile Sealssie." According to Warren, the Emperor "was anxious to know about the Supreme Court and the entire system of American judiciary."[69]

The Warrens left Addis Ababa on July 30 for Athens, where Agnes Meyer met them on the *Lisboa*. Along with the Pearsons, they spent a month on an event-laden cruise. In addition to a sightseeing tour of the Greek islands and Turkey, ending in Istanbul, the Warrens sailed on the Black Sea to Varna, Bulgaria, where they gave a dinner for Mrs. Eugenie Anderson, U.S. Minister to Bulgaria, and her husband on board the *Lisboa*.

From Varna, they traveled to Constanca, Romania in what Mrs. Warren described as "a very rough and stormy trip . . . very spooky—lots of lightning and such a heavy sea!!" There the Warrens were guests of the government and received special red-carpet hospitality. Mrs. Warren was impressed with the Romanian officials' furnishing "big, black shining cars and drivers for our use." The party was driven to church services, resorts, and a university before being flown over 400 miles inland to Cluj in central Romania. From there, they drove through the Carpathian Mountains to Tirgu Mures in the heart of Transylvania. At a mountain winery, the Warrens were entertained with Hungarian violinists and traditional dances. They were also subjected to the mandatory Eastern Bloc tourist stops of the time: a collective farm and a large tractor factory. In Bucharest, the Chief Justice made his rounds of official calls, and the Warrens were guests of honor at a lakeside formal dinner given by the Chief Justice of the Romanian Supreme Court. In touring Bucharest, the Warrens "saw miles of new public housing—100,000 new units so far—mostly for workers." The Warren party was flown back to Constanca, where they spent an hour with the President of the State Council, Gheorghe Gheorghiu-Dej, at his summer villa. There, with the nation's Prime Minister also present, "many questions were asked and answered."[70]

Back on the *Lisboa*, the Warrens cruised overnight along the Crimean Coast. The next day, on August14, they stopped in the USSR at Yalta, the gem of the Crimea, where President Franklin D. Roosevelt, Churchill, and Joseph Stalin had planned the end of World War II. The next day, the *Lisboa* sailed to Sochi, a health resort on the east coast of the Black Sea, where Mrs. Warren noted Benny Goodman and Van Cliburn had performed. On August 16, the Chief Justice, Meyer, and Pearson drove fourteen miles south to Gagra, Georgia, on the Soviet Riviera, to have an interview with Nikita Khrushchev. *Tass* reported the meeting as a "friendly talk." Thus, Warren, who had met most of the "Free World" leaders, also extended his personal diplomacy to the head Communist.[71]

Continuing their counterclockwise route around the Black Sea, the Warrens sailed south and then west to Trebizond and Sansom, Turkey, where they again encountered rough seas. As soon as they reached the Bosporus,[72] however, sailing was "smooth." After two days of sightseeing in Istanbul, the Warren party arrived at Canakkale, Turkey, on the Dardanelles and near the World War I battlefield of Gallipoli. There, the *Lisboa*'s passengers went swimming in "forbidden waters." Turkish officials, backed up by "a boat full of soldiers with guns," told the *Lisboa*'s skipper that the group could not swim there. The passengers scampered back on board. Ten minutes later, a Turkish official, carrying a bouquet of flowers that he presented to Mrs. Meyer, told the group that they "could swim off the boat for ten minutes—then go to port and swim." Mrs. Warren described this as "a tense moment."

During the next week, the Warrens kept up an energetic schedule of visits to tourist sites on the Aegean Coast of Turkey and in the Greek Isles. The *Lisboa* called on Dikili, Izmer, and Kusadasi, Turkey, and the Greek islands of Samos, Rhodes, Kos, Mykonos, and Andros before docking at Athens on

August 29. The next day the Warrens returned to the United States on a TWA flight to New York. Throughout the sightseeing marathon, the 72-year old Chief Justice was indefatigable, but Nina Warren complained mildly about the heat, dust, and walking great distances at Troy and Ephesus. After trekking around the nine cities of Troy, Luvie Pearson remarked, "Ruins are just not my cup of tea." To which Nina Warren could say a hearty "Amen," as she informed her sisters in P.E.O.

Less than three months after the Warrens returned to the United States, President Kennedy was assassinated. On November 30, 1963, President Lyndon B. Johnson appointed the Chief Justice to head a seven-man panel to investigate the assassination (officially called the Commission to Report upon the Assassination of President John F. Kennedy). According to Jesse Choper, the Chief's "worldwide stature, particularly in third world countries, made him the *only* government official whose judgment would *really* be trusted."[73] Warren reluctantly took the assignment, as much to allay foreign suspicions of a plot as to reassure the American public about the bona fides of the group of investigators that came to be called the Warren Commission. The President thought the investigation of "such great importance that the world is entitled to have it presided over by the highest judicial officer of the United States." Johnson pressed Warren to serve, saying, "You've worn a uniform; you were in the Army in World War I," and adding, "This job is more important than anything you ever did in the uniform."[74] Throughout 1964, the Chief was busy with his Warren Commission duties and did not travel abroad. On September 25, 1964, the Chief Justice presented President Johnson with the Warren Commission Report in the White House Cabinet Room.[75]

The Chief Overseas during the Johnson Administration

During the next four years, Johnson took advantage of both Warren's reputation and his sense of duty, drafting him as a temporary goodwill ambassador. Johnson went so far as to provide Warren with the use of Air Force One for some of his foreign trips. Warren saw no conflict with his role as Chief Justice, so long as his participation in overseas trips was symbolic.[76] Explained the Chief to biographer John Weaver in 1966, "We must offer a worthy example by stressing the theme of equality abroad as well as at home."[77]

Johnson designated Warren, along with Eisenhower, Secretary of State Dean Rusk, and Ambassador David K.E. Bruce, as representatives of the United States at the funeral of Winston Churchill in February 1965.[78] Warren and Eisenhower flew together to London. On the flight, the former President told Warren that he was disappointed that the Chief Justice had not turned out to be the "moderate" he had expected. Warren asked what decisions had led to his disapproval. Ike replied, "The Communist cases—all of them."[79]

Warren attended the last rites for Churchill at St. Paul's Cathedral, and along with other world dignitaries, visited the fallen leader's bier.[80] The playing of "The Battle Hymn of the Republic" in St. Paul's was a poignant moment to honor Churchill's honorary American citizenship. That evening, Warren attended an informal dinner at Ambassador Bruce's residence, where the new British Prime Minister, Harold Wilson, conferred for the first time with President Charles de Gaulle of France.[81]

Only a few days later, the Chief Justice was in the Philippines attending the thirtieth-anniversary celebration of the Philippine constitution. During his six-day stay in Manila, Warren gave a major address, received an honorary degree from the University of the Philippines, and visited the World War II battle site of Corregidor.[82]

Back in Washington, the Chief Justice took part in a celebration of one of America's most successful overseas programs of the time, the Peace Corps. Early in 1965, President Johnson asked Vice President Hubert Humphrey to convene a conference of

Returned Peace Corps Volunteers (RPCVs) in March, so that they could meet with American leaders and discuss the RPCVs' "role in national life."[83] Warren was a popular and imposing figure at the gathering of over 1,000 RPCVs and 250 leaders of American society at the State Department. To Harris Wofford, this was a "high-water mark of the Peace Corps."[84] The event was described by Richard Rovere in the *New Yorker* as "the most informal as well as the liveliest gathering ever to have taken place in the ungainly pile of concrete in the heart of Foggy Bottom."[85] The RPCVs impressed everyone as "sharp, independent, and confident critics of American society," wrote Rovere, and "most of the observers went away persuaded that the Peace Corps' impact on American life may be an immense one." The day ended in a packed State Department auditorium, where Warren, Humphrey, Peace Corps Director Sargent Shriver, Rusk, Secretary of Defense Robert McNamara, and Harry Belafonte linked arms onstage and sang a stirring rendition of "We Shall Overcome."

During the summer of 1965, the Warrens joined their frequent traveling companion, U.S. Ambassador to the UN Adlai Stevenson, in San Francisco for the commemoration of the twentieth anniversary of the organization's founding. Only a few days after Stevenson left the Warrens, he died in London on July 14, 1965.[86]

Another conference of note, the biennial World Conference on World Peace Through the Rule of Law, was held in Washington, D.C. in September 1965. The Chief Justice addressed the inaugural session, attended by more than 3,200 leading jurists, lawyers, and law teachers from 121 countries.[87] Warren served as honorary chairman of the World Peace Through Law Center that operated in Geneva. The Chief Justice also was elected the first president of the World Association of Judges, a voluntary organization of jurists and lawyers from 117 nations dedicated to establishing the legal bases for world peace, and he served in that capacity from 1966 to 1969.

On May 29, 1966, the Chief Justice gave the commencement speech at the European Division of the University of Maryland in Heidelberg, Germany. The trip was a quick weekend's work: The Chief left Washington on Thursday evening, delivered his address on Sunday, and flew back to the United States in time to preside over Tuesday morning's Supreme Court session. Warren originally was scheduled to arrive in Germany on a commercial flight, but President Johnson allowed the Chief to fly via Air Force One to the U.S Air Force Base at Rhine-Main, near Frankfurt. This also enabled Warren to bring an entourage that included Mrs. Warren, their sons James and Robert and their wives, their daughter Nina and her husband, Dr. Stuart Brien, their granddaughter Dorothy, Supreme Court Associate Justice Hugo L. Black and retired Associate Justice Stanley F. Reed and their wives, two Air Force generals, and two University of Maryland officials. Before leaving the presidential jet, Warren, "wearing a gray hat and suit and carrying a bulging briefcase, paid his compliments to the plane crew." The Warren party departed immediately for Heidelberg, where the University of Maryland's European Division provided instruction primarily for U.S. servicemen and women.[88]

At the conclusion of the 1965 Term of the Court, the Chief Justice and his family cruised the Mediterranean on a 115-foot yacht that California hotel magnate Ben Swig had rented.[89] The Warrens returned to Israel for the dedication of a Kennedy Memorial and Peace Forest. On the highest point in the barren Judean hills seven miles southwest of Jerusalem, Israeli architect David Reznik had designed a 60-foot-high memorial to Kennedy in the shape of a cut tree trunk, symbolizing a life cut short. The monument, known today as Yad Kennedy, was built with money donated by the Jewish National Fund in the United States.[90] Warren delivered a 4th of July dedicatory speech, paying tribute to what he described as a "living memorial" being planted for Kennedy. In his remarks before an audience

of 2,000 official guests and American tourists and students, Warren quoted the slain President, saying "A nation reveals itself not only by the men it produces but also by the men it honors, the men it remembers."[91] On his return trip to the United States, the Chief Justice stopped in Rome, where he was received by Pope Paul VI in a private audience.[92]

On November 30, 1966, Warren headed a U.S. delegation to the Barbados independence celebration. The Caribbean island's nationhood, attained after 341 years of British rule, was feted with the raising of the Barbados "broken trident" national flag and the first playing of the national anthem. Warren presented Prime Minister Errol Walton Barrow with a $50,000 economic-aid grant, a stereo sound system, and an inscribed photograph of President Johnson.[93]

The Chief, and especially Mrs. Warren, took pleasure in maintaining ties with foreign officials who came to Washington, D.C. after having been hosts to the Warrens abroad. Such was the case following their extensive summer travel in 1963. Wrote Mrs. Warren, "Since returning to Washington, the Romanian Embassy has given a dinner for us, and whenever the officials who entertained us over there come here, we have met them again at official affairs."[94] The apogees of the Warrens' reciprocation of hospitality of overseas hosts were the Supreme Court dinner for Nehru in 1956 and the luncheon for Emperor Haile Selassie on February 14, 1967.

Also in February 1967, President Johnson dispatched the Chief Justice on Air Force One as a goodwill ambassador on a thirteen-day trip to Bolivia, Peru, Ecuador, and Colombia, where Warren talked to legal officers and bar associations as part of a study of South American nations' judicial systems. In the face of unexpected difficulties inherent in international travel, the Chief Justice remained equanimous. As Pearson observed, Warren could not be rattled. "He doesn't lose his temper. When Air Force One could not take off from the La Paz Airport, thereby throwing his program of meeting Latin American presidents off schedule by two days," Warren "made no remarks about mechanical inefficiency" but patiently waited until his party could get on its way.[95]

Although the Chief wanted to emphasize a message of world peace through the rule of law, the report of the Warren Commission and conspiracy theories were more intriguing to his Latin American audiences at the time. In Lima, Peru, at the urging of U.S. Ambassador J. Wesley Jones, Warren held a press conference on conspiracies. Warren had not talked about that subject in the United States because he thought the Commission Report had sufficiently laid the matter to rest. For an hour and a half, the Chief answered reporters' questions. At the end of the session, someone asked a question about conspiracies that provoked Warren to ask: "Have you read the report?" When no one indicated they had, the Chief responded, "Well, I know you could, because we sent reports to your libraries here; we saw to it that you have it. So it's available to you there." "Yes," they said. "But you didn't read it?" "No," they replied. "Then how did you get your information?" Warren recalled:

> Well, they were all over the lot; they didn't know how they got their information and so forth, but I'm sure that when it was all over that I didn't change a person's view. I think the whole outfit of them had the idea it was a conspiracy . . . And the strange part of it is that there's one theory of conspiracy on the right; another theory of conspiracy on the left; and they both merge by saying it was a conspiracy. Both agree that it was a conspiracy, only they are a thousand miles apart as to what kind of conspiracy.[96]

Although the Chief Justice "didn't change anybody's idea" about conspiracies and the assassination of Kennedy among the attentive, if ill-informed, Peruvian reporters, the Warrens' tour of South America was another success

In 1967, President Johnson dispatched the Chief Justice on Air Force One to be a goodwill ambassador to Bolivia, Peru, Ecuador, and Colombia. Warren talked to legal officers and bar associations as part of a study of South American nations' judicial systems. He received a ceremonial mace while visiting Bolivia.

in personal diplomacy and in the fostering of goodwill. As Jack Pollack noted, Peruvian farm workers "who could not understand a word of English walked miles to hear him speak," illustrating Leo Katcher's observation that "many, who did not understand his words, understood their meaning." The Chief kept up his typical busy schedule of official meetings, press conferences, and speeches, and Mrs. Warren had her own itinerary of tours of social-service organizations, hospitals, and women's groups. At Sucre, the Bolivian Supreme Court held a "Session of Honor" for Warren, and the nation's President, René Barrientos Ortuño, hosted a dinner in his honor for a hundred guests at the Governor's palace. The next day, one of the oldest universities in the Americas, the University of San Francisco Xavier, founded in 1625, bestowed an honorary degree upon the Chief Justice. The Interim President of Ecuador, Otto Arosemena, held an official luncheon in honor of the Warrens in Quito (hats were not required for ladies). Later in the day, the Chief paid a courtesy visit to the Supreme Court of Ecuador. In Bogotá, Colombian President Carols Lleras Restrepo held a luncheon honoring the Chief at the San Carlos Palace, and Warren called on the Foreign Minister, the Minister of Justice, parliamentarians, and law students. At USIA Bi-national Centers, the Chief participated in seminars on the themes "Concepts of the Continuing Revolution of the United States" and "Law as an Agent of Freedom." Typical of Latino response to the Warrens' visit was the presentation of a handsome Mace of Justice to the Chief in Bolivia by La Senora Daisy de Wende de Artesanias Bolivianos.[97]

In late May 1967, criticism of the Warrens' foreign travel was voiced in Congress because the Latin American trip had occurred at State Department expense. In response, a State Department spokesman described the Chief Justice as a "rare catch" for the Government's program of keeping channels of communication open between the United States and other nations. The spokesman said Warren would be asked to make more trips. In the 1960s, there were several programs under the auspices of the United States Information Agency and other government organizations that sponsored speaking tours in foreign countries by distinguished Americans or "experts" from a variety of backgrounds. When Warren went on what he referred to as "exchange programs," he talked before legal officers and bar associations abroad. Mrs. Warren visited schools, hospitals, and meetings of women's organizations. Warren made five such trips while he was Chief Justice.[98] Congressman H.R. Gross (R-IA) stood in opposition to such travel, accusing the Chief Justice of "loading himself on the taxpayer's back."[99]

Neither the Chief Justice nor Mrs. Warren submitted a written report on their mission, but the Chief was "debriefed" at a session attended by about forty officials from various federal agencies. The State Department paid transportation and daily expenses for the Warrens. Records of hearings by the House Appropriations Committee showed Warren received $586 for expenses, Mrs. Warren $362. The Chief's field of activity was described as participation in "informal seminar-type discussions," while Mrs. Warren's field was listed as "voluntary social welfare."[100]

Warren described his preparation for State Department-sponsored "foreign trips to sensitive places." There were no White House briefings; rather, there was a question-and-answer session for the Warrens "a day or so" before they departed "with a half-dozen people in the State Department." Said the Chief:

> I would ask some questions about the country we were going to and they would tell me a little bit about it, but nothing of a nature that would put any responsibility on me to do anything and never make any reports of any kind of anybody on what we have seen. They are merely goodwill missions I have been on, merely for the purpose of establishing goodwill between the nations.[101]

Warren's gross treatment by the congressional committee soon blew over, and a month later, at the conclusion of the Supreme Court's Term, the Chief and his wife were traveling abroad again, this time to Eastern Europe. In Belgrade, Yugoslav officials seized upon Warren's five-day visit to emphasize their desire to maintain good relations with the United States, despite differences over the Middle East. Earlier in the month, the Six-Day War had resulted in Israel assuming an unprecedented military domination in the region—a major shift in the power constellations of the Cold War. Although Warren's trip had been planned far in advance, it coincided with a new chill in relations between Yugoslavia and the United States. The State Department expected that the Chief Justice would receive a cursory reception. Instead, the visit was given prominent press coverage, and Warren had a two-hour conversation with President Tito. The Yugoslav leader stated, in a forthright but cordial fashion, his views on a number of topics, including the Middle East and relations with the United States.[102] In addition, the Chief Justice was the guest of honor at a lunch given by Blazo Jovanovic, President of the Yugoslav Constitutional Court, and the justices of the court.[103]

On June 29, after his talks with Tito, Warren flew to Prague to visit Czechoslovakia. The Chief Justice was an honored guest at a luncheon with President Josef Litera of the Czech Supreme Court.[104]

After a quick tour of Vienna, the Warrens arrived in Warsaw on the 4th of July for a four-day visit to Poland. The Chief Justice paid a call on Minister of Justice Stanislav Walczak and then met the justices of the Polish Supreme Court, who held a special session to meet the visiting dignitary.[105]

On July 15, the Warrens went to West Berlin, where they were received in the City Hall by Mayor Heinrich Albertz (Willy Brandt's successor, who was in office for only one year). They visited the divided city as guests of the U.S. commandant, Major General Robert G. Fergusson.[106]

In July 1967, Warren opened the World Peace Through Law Conference in Assembly Hall in the Palais des Nations in Geneva (now the home of the Geneva office of the UN) with a speech urging the lawyers of the world to sponsor the negotiation of "hundreds and perhaps thousands" of treaties to regulate all phases of international relationships. Instead of matching each other in military might, Warren declared, nations should compete with each other "law for law, treaty for treaty."[107] The Chief Justice also "was the interested and enthusiastic chairman" of a conference exhibition on the use of computers to make legal information more accessible—a new idea at the time.[108] In September 1968, the Warrens returned to Geneva and the Palais des Nations to take part in World Law Day ceremonies.[109]

In September 1967, the Warrens paid a ten-day visit to Japan as guests of the Supreme Court of Japan, marking its twentieth anniversary. Crown Prince Akihito and Princess Michiko received the Chief Justice and Mrs. Warren in Tokyo, where Warren also addressed the Foreign Correspondents Club of Japan.[110] The Chief predicted that "more restrictions would be placed on public officials in the United States to protect the rights of persons accused of crimes and curtail sensational coverage of trials." In remarks informed by the recently decided *Sheppard v. Maxwell* case[111] —called a "media circus" at the trial-court level—the Chief Justice said "the problem was to balance the right of freedom of the press with the right of the accused to a fair trial."

The Warrens continued on to South Korea for a four-day visit under the State Department's educational and cultural program.[112] In Seoul, they visited President Chung Hu Park and other governmental leaders. At a dinner given in his honor by Korean Chief Justice Cho Chin-man, Warren told his audience: "I believe there is a common bond between men of law in all nations because the law we use is not strictly our own." The Chief noted that the U.S. Constitution and its core principles of individual rights, power residing in the people, and the diffusion of powers were not of American origin: They came from a process in which all law is continually borrowed and moving around. "None of these principles was discovered by our Founding Fathers. They had learned from the experience of peoples of all ages. But put together as they were and adapted to our conditions and mores, they have served us well."[113] Warren also received another honorary doctorate, an LL.D., from Seoul-National University.

By the time of his final year as Chief Justice, Warren had achieved an international reputation far greater than any of his predecessors. In 1969, he went to the Waldorf-Astoria Hotel in New York, where he was awarded an honorary LL.D. from the Israeli Bar-Ilan University, located at Ramat Gan, near Tel Aviv.[114] The Chief Justice and Vice President Humphrey were only the second and third people to receive honorary degrees from the university that grew to be Israel's largest academic community.

Warren's Post-Court Diplomacy

Warren's resignation from the Court was accepted by President Nixon on June 23, 1969. Only fifteen days later, Nixon gave a White House dinner in honor of Emperor Haile Selassie, who was on his fourth state visit to the United States. The former Chief Justice, who had known and interacted with the Emperor for fifteen years, was not invited. However,

the Supreme Court was well represented at the July 8 state dinner by Associate Justices Potter Stewart and Thurgood Marshall and their wives. On October 24, 1970, Chief Justice Warren Burger and Mrs. Burger attended the Nixon's White House dinner honoring foreign heads of state, including Haile Selassie, who had come to the United States for the twenty-fifth anniversary of the founding of the U.N. During the Emperor's sixth and final state visit to the United States, no one from the Court attended Nixon's White House dinner in his honor on May 15, 1973. This lack of judicial-branch participation in a Washington event honoring a foreign ruler with a special relation to the Supreme Court was indicative of the Court's declining involvement in international affairs during the 1970s.

At the time of his retirement as Chief Justice, Warren was a figure of enormous stature and prestige throughout the world. Tom Storke, the Santa Barbara publisher who traveled with the Chief on several international trips, reported that Warren had become a symbol of America to foreigners: "They all knew him. They knew about the segregation decisions."[115] Justice Thurgood Marshall found the same thing in Africa: "I have yet to go anywhere in Africa that I don't find a good word for our Supreme Court. In fact, I have yet to go to any country in the world where I don't find somebody ... who will say: 'Give my best to your Chief Justice.'"[116] *Washington Post* columnist John P. Mackenzie wrote that Warren "has emerged as a world figure and symbol of an American commitment to equal justice to all races and income levels." Warren was "very popular in Europe, too," according to Storke.[117] Cearbhall Ó Dálaigh, President of Ireland from 1974 to 1976, remembered Warren as "calm, clear, Olympian. His authority was unforced but all-pervading."[118]

In retirement, travel became the Warrens' great pleasure. The former Chief Justice accepted invitations to give speeches throughout the United States and abroad in return for fares and accommodations. In addition to domestic themes, such as eliminating poverty and religious and racial discrimination, his speeches frequently addressed the need to end the war in Vietnam.

Warren, who had "made the cause of human liberty the great cause of his life,"[119] remained active in the World Conference on World Peace Through the Rule of Law and attended that group's biennial meetings. On their way to the conference in Bangkok, Thailand, which ran from September 2–12, 1969, the Warrens returned again to Tokyo and to the Philippines.[120] In Bangkok, the United States Information Service had a private showing for the visiting couple of the film "Chief Justice Warren Visits India" that had been shot in 1956 and that the Chief Justice was keen to see. The Warrens attended the Belgrade, Yugoslavia, conference in 1971 between stays in Copenhagen, Vienna, and Rome and a Mediterranean cruise with Swig on his yacht, the *Northwind*. The former Chief delivered a conference address on July 21, 1971, and was honored there "for his landmark decisions upholding human rights which have justly earned him worldwide esteem as a champion of the liberty of man."[121] Warren spoke at the Abidjan, Ivory Coast conference on August 27, 1973, where he chided the delegates from 123 nations for not having succeeded in getting their governments to implement the twenty-five-year-old United Nations Universal Declaration of Human Rights. The Abidjan World Peace Through Law convention bestowed upon Warren the First Human Rights Award. His citation read: "When history reviews the record of our day in terms of men, leadership and their accomplishment in advancing human rights, no name will loom larger than that of Earl Warren."[122] The Warrens also attended the conference of the International Labor Organization in Geneva in March 1972 and spent two weeks enjoying that global business center.[123]

In his retirement, the former Chief continued to be honored with honorary degrees. On October 30, 1969, Warren traveled to Israel to receive a Doctor of Laws degree from Hebrew

University, Jerusalem. The former Chief Justice avowed that the traditional view of peace as a static condition would have to give way to a concept of a dynamic peace. "If the courts, traditional bastions of conservatism, can demonstrate that they remain flexible, surely we can expect no less adaptability from the other institutions of our society."[124] On that trip, Warren agreed to serve on the board of the Harry S Truman Center for the Advancement of Peace on the university's Mt. Scopus campus in Jerusalem.

In 1970, the former Chief Justice had the sad duty of delivering an eulogy at the memorial service of the Warrens' international traveling companion, Agnes Meyer. That year, Warren was also named chairman of the United Nations Association of the United States of America, succeeding former Supreme Court Associate Justice and U.S. Ambassador to the U.N. Arthur J. Goldberg. Warren remained chairman through 1974. One of the highlights of his chairmanship was his adroit presiding over a spirited convocation on the "China question" before 3,000 delegates in New York City on October 29, 1971. This conference laid the groundwork for the entrance of the People's Republic of China into the U.N. before President Nixon's historic trip to China the following year.[125]

The Significance of the Supreme Court in Public Diplomacy

Under the separation-of-powers doctrine in the U.S. Constitution, the making of foreign policy and the conduct of foreign relations are entrusted primarily to the President and Congress. The judiciary acts as a check on the powers of the other two branches, but it makes no important foreign policy and usually defers to the President and Congress regarding foreign relations.[126]

In its official external relations, the U.S. government attempts to influence other states by the direct or commanding method of exercising power. In getting other states to do what they otherwise would not do, or to not do what they would prefer to do (power relationships), traditional diplomacy can be based on the use of inducements ("carrots") or threats ("sticks") to influence a favorable outcome.[127] The President and Congress, with their emphasis on treaties and geopolitical debates, exercise such "hard" power.

But there is another way to exercise power, to obtain desired outcomes through attraction rather than through coercion or payment. A country may achieve desired outcomes in its foreign relations because other countries admire what it stands for and want to follow its example, or have agreed to a system that produces such effects. "In this sense, it is just as important to set the agenda and attract others in world politics as it is to force others to change in particular situations."[128] Getting others to want what you want might be called "attractive" or "indirect" power behavior, or what Joseph Nye calls "soft" power.[129] Soft power matters because countries that like you will want to be your allies.

Soft power can rest on such resources as "the attraction of one's ideas or on the ability to set the political agenda in a way that shapes the preferences others express."[130] Intangible power resources, such as culture, ideology, and institutions, can influence these preferences.

One of America's greatest strengths during the Cold War was leading the community of democracies and the nonaligned nations by example.[131] This was done through "public diplomacy"—interactions other than those between national governments. Effective public diplomacy involved dialogue, a two-way exchange of information, and people-to-people contacts were a significant aspect of that effort. U.S. public diplomacy emphasized the nation's core values and subtly built an image of a benevolent global leader.

Under the leadership of Chief Justice Warren, the Supreme Court took up the challenge of exercising soft power through public diplomacy, especially that involving visiting foreign heads of state in the United States. The

Supreme Court building and the Justices were adroitly used, offering visiting international leaders intellectual stimulation and attractive ideas for emulation. Thus, the Court was an ideal place to practice soft power.[132]

As an individual, Chief Justice Warren was a practitioner *par excellence* of public diplomacy. By disposition and training, he enjoyed being with people and seemed to have had a special knack for making people comfortable in his presence.[133] Judge Simon Sobeloff thought that "few men in or out of government could equal the Chief Justice in human warmth."[134] Biographer Jim Newton found the Chief Justice "canny and insightful." Warren also gave the appearance of being big. "Though only just over six feet tall, Warren, with his bear chest and booming voice, commanded a room before speaking a word, even though he was in some ways shy."[135] Although Warren's voice was not especially deep, when he spoke from the Bench, his "booming voice" made it seem "somewhat as if Mount Rushmore had spoken."[136] His commanding presence, combined with graciousness and a ready warmth, made Warren an ideal ambassador of goodwill at home and abroad.

In his work on the Court, Warren was a strong believer in personal diplomacy—the idea of having direct and frank discussions with those he was seeking to persuade. That was seen in his face-to-face meetings with individual Associate Justices in 1954 in his effort to marshal a unanimous Court in *Brown v. Board of Education*.[137] He used the same tactic in gaining a unanimous report of the Warren Commission.[138] The Chief exuded an easy self-confidence and was assured of his own negotiating ability. He carried over these skills to his international diplomacy—as well he should. Warren was a public figure of highest national prominence before he came to the Supreme Court.[139] He had thrice been a serious contender for the presidency of the United States, and had served thirty-four consecutive years in political office in California, culminating in his being elected as governor of a flourishing state with a population and gross national product that would rank it ahead of most nations of the world. He could talk to any head of state as an equal. This explains his frequent engagement of world leaders in one-on-one conversation; this tactic sought to diminish any fear of the United States' intentions and to seek common ground for reducing tensions and promoting peace. Warren wanted to establish a personal relationship and to break down any barriers of mistrust that divided countries. He possessed a profound understanding of America and of what made it unique and truly remarkable among nations. Fairness was one of his strongest guiding principles. While Chief Justice, Warren practiced his style of public diplomacy on several of his contemporaries who were considered great men, men of stature, including Winston Churchill, Nikita Khrushchev, Jawaharlal Nehru, Conrad Adenauer, and Charles de Gaulle. All were party to the Chief Justice's "forthrightness, vision, and liberalism—the qualities most consequential to the world."[140] Warren had the ability to understand and influence foreign populations, not only in their councils of state but in their cities and villages, as seen in his reception when he had the opportunity to be with the common people.

Drew Pearson pointed out that even though Warren's critics charged him with being pro-Communist, the Chief Justice never hesitated to see the leaders of the Soviet world and the Eastern Bloc. Warren traveled to their home countries to visit Khrushchev; Tito (twice); Wladyslaw Gomulka, First Secretary of the Polish United Workers' Party; Todor Zhivkov, President of Bulgaria; President of the State Council of Romania Gheorghe Gheorghiu-Dej; and even the Red-leaning Egyptian President Gamal Abdel Nasser. Explained Warren: "I'm not going to let other people tell me who I should see and talk to. The future of world peace depends on our getting along with these people."[141]

Warren thrived upon international travel and the social activities that accompanied it. Being treated as a head of state, with all the indulgences and condescension that this

entailed, seemed good for him. Warren always found these trips to be an exhilarating experience, an opportunity "to recharge his batteries."[142] Justice Byron White noted that Warren "enjoyed so much going around on trips. To me and for most people going on a trip, making speeches, meeting people all the time is absolutely exhausting. But it seemed to refresh him and it was almost like an old fire horse getting out . . . If he went on a trip somewhere like to Europe, even though he was on an official schedule, he would come back not exhausted, but fresher."[143]

In his foreign travels, "the big, bluff, friendly Chief Justice," as Fred Rodell described him, conveyed an easy strength. He was "a direct, plain-speaking politician" who combined humanity with honesty.[144] Yet in that setting, Warren appreciated his hosts' scrupulously respecting his position and never asking him "to discuss political matters or any legal matters which would come before the Court."[145]

While overseas, the Chief could assuage an occasional longing for the political arena. Explained Warren: "No one could have a background of such activities as I had without having a nostalgic feeling for it, particularly when there are exciting things going on in the country and in the world."[146] In press conferences abroad, Warren would take on "questions—some sharp, some stupid, all politely parried or handled head-on."[147] As was the case in his leading the Supreme Court to what Justice Abe Fortas termed "the most profound and pervasive revolution ever achieved by substantially peaceful means,"[148] in the international realm, "the root of his [Warren's] achievement [was] in a genius for politics, using the word in its best and truest meaning. This [was] joined in the Chief Justice with a deep dedication to the fundamental American freedoms embodied in the Bill of Rights."[149] Warren as Chief Justice thus "became the most influential public figure of his time."[150]

Warren possessed what Eric Sevareid described as "that certain quality that helps to hold a diverse people together and move a nation on. What the Romans called 'gravitas'—patience, stability, weight of judgment, breadth of shoulders. It means the strength of the few that makes life possible for many. It means manhood."[151]

Such characteristics made Warren an appropriately venerated figure as a politician, Governor, and Chief Justice. He should also be recognized for his outstanding role in public diplomacy, something in which he excelled. Warren might well be considered the greatest American practitioner of public diplomacy since Benjamin Franklin plied the art in the courts of Europe in the eighteenth century. Super Chief should also be commended for starting the practice of utilizing the Supreme Court building as a welcoming site for foreign leaders, allowing them to get acquainted with the culture of American law in its most revered institutional setting. These kudos should add to the recognition of the rare strength, courage, and wisdom that Earl Warren possessed.

ENDNOTES

[1]Leo Katcher, **Earl Warren: A Political Biography** (New York: McGraw Hill, 1967), pp. 356, 405. The Warrens traveled to Canada for a two-week wedding trip in 1925. They stayed in "the grand old Empress Hotel in Victoria," British Columbia. "The island, with its flowers and shrubbery, was beautiful, but the weather was atrocious." There was a constant downpour for several days. The newlyweds entertained themselves by attending "a British trial." Earl Warren, **The Memoirs of Chief Justice Earl Warren** (Lanham, MD: Madison Books, 1977), pp. 65–66.

[2]Carey McWilliams, "The Education of Earl Warren," *The Nation*, 12 October 1974, p. 326, quoted in Bernard Schwartz, **Super Chief, Earl Warren and His Supreme Court** (New York: New York University Press, 1983), p. 489.

[3]Katcher, pp. 263–64; Christine L. Compston, **Earl Warren: Justice for All** (New York: Oxford University Press, 2001), p. 145.

[4]Ed Cray, **Chief Justice: A Biography of Earl Warren** (New York: Simon & Schuster, 1997), p. 219.

[5]Warren, **Memoirs**, pp. 262–63; John D. Weaver, **Warren: The Man, The Court, The Era** (Boston: Little Brown, 1967), p. 187; Cray, p. 248. Warren sat in a choir seat at Westminster Abbey and noticed Prime Minister Nehru sitting opposite him.

[6]Warren, **Memoirs**, pp. 265–69; Cray, p. 249; Schwartz, pp. 1–7; Katcher, p. 301.

[7]Consul General Ben Franklin Dixon, oral history interview, Foreign Affairs Oral History Collection of the Association for Diplomatic Studies and Training, American Memory, Library of Congress (CD-ROM, 2000) (hereafter Foreign Affairs Oral History Collection).

[8]W.H. Lawrence, "Churchill Urges Patience in Coping with Red Dangers," *New York Times*, June 27, 1954, p. 1.

[9]"Warren on Vacation," *New York Times*, June 15, 1955, p. 2.

[10]"Finnish Press Spurns Red Peace Assembly," *New York Times*, June 24, 1955, p. 9; "Warren Arrives in Norway," *New York Times*, June 28, 1955, p. 7; Box 796, Address, Swedish-American celebration, Stockholm, Sweden, July 5, 1955, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C. (hereafter EWPLC).

[11]"Adenauer Entertains Warren," *New York Times*, July 15, 1955, p. 2.

[12]"C.J. Warren in Berlin," *New York Times*, July 17, 1955, p. 3; "Warren Back from Europe," *New York Times*, August 8, 1955, p. 8.

[13]"San Juan Opens Courts Building," *New York Times*, February 5, 1956, p. 79.

[14]"Puerto Rico U. Gives Degree to Warren," *New York Times*, February 6, 1956, p. 13.

[15]Box 797, Address, dedication of U.S. Supreme Court law building, San Juan, Puerto Rico, February 4, 1956, EWPLC. *See also* Box 808, Address, first general session, Round Table Conference on Administration of Justice, Supreme Court Building, San Juan, Puerto Rico, February 5, 1962.

[16]"San Juan Opens Courts Building," *New York Times*, February 5, 1956, p. 79.

[17]Warren, **Memoirs**, pp. 321–31; Box 801, Address, Law Society dinner, Guildhall, London, England, July 31, 1957, EWPLC. As a condition for his attending the ABA meeting, Warren succeeded in getting Vice President Richard Nixon "disinvited." Cray, p. 340.

[18]"Warren Honored in Visit to Dublin," *New York Times*, August 2, 1957, p. 7; Cray, pp. 339–41. De Valera would be the guest of the U.S. Supreme Court in Washington in 1964.

[19]Did international travel and exposure to other ways of approaching legal questions effect Warren's writing of opinions on the Court? According to Viki C. Jackson, "[s]ensitivity to international democratic norms was a marked feature in the Warren Court's jurisprudence." Viki C. Jackson, "The Early Hours of the Post-World War II Model of Constitutional Federalism: The Warren Court and the World," in Harry N. Scheiber, ed., **Earl Warren and the Warren Court: The Legacy in American and Foreign Law** (Lanham, MD: Rowman & Littlefield, 2007), p. 186; *see* Schwartz, pp. 313–19.

[20]Richard Amper, "Warren Pleads for Moral Unity," *New York Times*, September 16, 1957, p. 22; Schwartz, pp. 287–88.

[21]"Nixon & Dulles Entertain Queen; Rain Mars Fetes," *New York Times*, October 19, 1957, p. 1. The Smithsonian's charter specifies that the only two members of the Board of Regents to serve as a duty of their respective offices are the Chief Justice and the Vice President of the United States.

[22]"Airliner Turns Back," *New York Times*, November 29, 1958, p. 42.

[23]"Warren to See Moscow," *New York Times*, August 1, 1959, p. 2.

[24]"Warren Drops in at Soviet Display," *New York Times*, August 8, 1959, p. 2; Katcher, p. 405.

[25]"Moscow Crowd Welcomes Justice Warren at U.S. Fair," *New York Times*, August 12, 1959, p. 1; Box 804, Remarks, Moscow, Russia, ca. August 12, 1959, EWPLC.

[26]"Warren Goes to Leningrad," *New York Times*, August 14, 1959, p. 5; "Warrens Arrive in Helsinki," *New York Times*, August 16, 1959, p. 67.

[27]"Warren Foresees Eased Dictatorship," *New York Times*, August 19, 1959, p. 4; Box 804, Address and remarks, "Essentials of Justice for the Individual," Berlin, Germany, August 17–20 1959, EWPLC.

[28]"Warren Tours East Berlin," *New York Times*, August 20, 1959, p. 6.

[29]"Warren Visiting Bonn," *New York Times*, August 21, 1959, p. 4.

[30]Box 804, Address, Supreme Court of Civil and Criminal Judicature, Karlsruhe, Germany, August 25, 1959, EWPLC; Katcher, p. 405; Address, American House, Hamburg, Germany, September 4, 1959, EWPLC.

[31]"Warren Arrives in Munich," *New York Times*, August 28, 1959, p. 4. The Warrens returned to the United States via Copenhagen. "Justice Warren in Copenhagen," *New York Times*, September 6, 1959, p. 53.

[32]Katcher, p. 406.

[33]Fred P. Graham, "Experts Debate World Law Rule," *New York Times*, September 14, 1965, p. 24; Jack H. Pollack, **Earl Warren: The Judge Who Changed America** (Englewood Cliffs, NJ: Prentice-Hall, 1979), pp. 303–4.

[34]The organization now is a part of the World Jurist Association. Compston, p. 145.

[35]Warren had spoken on several occasions at events honoring Eugene Meyer: Box 797, Remarks, luncheon marking the eightieth birthday of Eugene Meyer, Willard Hotel, Washington, D.C., October 31, 1955, EWPLC; Box 802, Remarks, luncheon marking Eugene Meyer's twenty-fifth anniversary with the *Washington Post* sponsored by the Advertising Club of Washington, Presidential Arms Hotel, Washington, D.C., June 10, 1958, EWPLC; Box 804, Eulogy, Eugene Meyer memorial service, All Souls Unitarian Church, Washington, D.C., July 21, 1959, EWPLC.

[36]Cray, p. 367.

[37]"Earl Warren in Rome," *New York Times*, July 27, 1961, p. 9; *see* Box 808, Address (undelivered), Sydney, Australia, June 28, 1962, EWPLC.

[38]Schwartz, p. 358–59.

[39]"Justice Warren Begins Week's Visit in Israel," *New York Times*, July 8, 1962, p. 30; "Warren Visits Ben-Zvi," *New York Times*, July 10, 1961, p. 5; "Betty Beale's Washington, Berlin Events Are Big Topics at W. German Envoy's Fete," *New York World Telegram & Sun*, September 8, 1962; "Yugoslavia Trip 1962," Personal Papers of Drew Pearson, Box C93 [2 of 3], LBJ Library, Austin, TX; Cray, p. 367.

[40]Cray, p. 367. Agnes Meyer was described by her daughter, Katherine Graham, as a worshiper of great men; she devoted her life to worshiping great men such as Tito, as demonstrated in some of her travels with the Warrens. Katharine Graham, **Personal History** (New York: Alfred A. Knopf, 1997).

[41]A photograph of Warren and Tito was published in *the New York Times*, August 14, 1962, p. 5.

[42]U.S. Supreme Court, Photographs; "Proposed Book—'The Chief'—Material," Personal Papers of Drew Pearson, Box G315, 2 of 2, LBJ Library.

[43]Ambassador William J. Dyess, oral history interview, Foreign Affairs Oral History Collection.

[44]Letter, Nina Warren to Sisters in P.E.O., April 16, 1964, U.S. Supreme Court, Earl Warren Collection (hereafter Nina Warren); Itinerary of Mrs. Eugene Meyer on *S.S. Lisboa*, "Yugoslavia Trip 1962," Personal Papers of Drew Pearson, Box C93 [2 of 3], LBJ Library; Schwartz, p. 399.

[45]Nina Warren; Box 810, Address, ceremonies marking the 250th anniversary of the birth of Junipero Serra, Mallorca, Spain, June 3, 1963, EWPLC.

[46]"Warren and Mansfield Will Represent the U.S." *New York Times*, June 23, 1963, p. 2; Nina Warren.

[47]The meaning of "P.E.O." in the organization's name is an official secret. No explanation is given on the group's website or in its published materials. Some members of the Sisterhood have suggested publicly that "P.E.O." stands for "Philanthropic Educational Organization."

[48]"Pope Is Crowned in Outdoor Rites," *New York Times*, July 1, 1963, p. 2. "Pope Paul Meets with Delegations in Farewell Talks," *New York Times*, July 2, 1963, p. 3.

[49]Anthony Lewis, "Warren Favors Worldwide Laws," *New York Times*, July 2, 1963, p. 2, EWPLC; Box 811, Address, opening session, World Conference on World Peace Through the Rule of Law, Athens, Greece, July 1, 1963, EWPLC; Address, conclusion of the World Conference on World Peace Through the Rule of Law, Athens, Greece, July 8, 1963, EWPLC.

[50]"Warren Begins Turkish Visit," *New York Times*, July 11, 1963, p. 6.

[51]Box 811, Address, Propeller Club of Istanbul, Istanbul, Turkey, July 12, 1963, EWPLC.

[52]Box 811, Address before Cypriot Government, diplomatic, and community leaders, Ledra Palace Hotel, Nicosia, Cyprus, July 16, 1963, EWPLC.

[53]"Warren Sees Shah in Iran," *New York Times*, July 19, 1963, p. 7; U.S. Supreme Court, Photographs; Box 811, Address, "The Rule of Law," Iran-America Society, Tehran, Iran, July 18, 1963, EWPLC.

[54]Nina Warren.

[55]*Ibid.*

[56]"Warren in Kenya, Notes U.S. Drive for Integration," *New York Times*, July 24, 1963, p. 15.

[57]Letter, Laurence C. Vass to Warren, July 17, 1963, Box 59, Foreign File, EWPLC.

[58]Diary entry, August 1, 1963, "Warren, Earl #2," Personal Papers of Drew Pearson (hereafter Earl Warren), Box G 246, 3 of 3, LBJ Library. Charter Hall, the City Council's debating chamber and conference center, was destroyed in a March 2004 arson attack.

[59]"Earl Warren in Addis Ababa," *New York Times*, July 28, 1963, p. 30; "Warren in Ethiopia," *Washington Post*, July 28, 1963, p. A6.

[60]Telegram, Korry to Sec State, July 31, 1963, National Security Files, Box 69, Ethiopia, General, 6/63–7/63, John F. Kennedy Presidential Library, Boston, MA (hereafter JFKL).

[61]Letter, Korry to President Kennedy, June 28, 1963, National Security Files, Box 69, Ethiopia, General, 6/63–7/63, JFKL.

[62]Letter, James C.N. Paul to Warren, July 23, 1963, Box 116, Luncheon for Emperor of Ethiopia, EWPLC; Diary entry, August 1, 1963, "Warren, Earl #2," Personal Papers of Drew Pearson, Box G 246, 3 of 3, LBJ Library. With financial assistance from the United States, a new law school was being established on the Addis Ababa campus, with University of Pennsylvania professor James C.N. Paul serving as dean.

[63]Telegram, Richards to Sec State, October 19, 1963, National Security Files, Box 69, Ethiopia, General, 3/62–10/62, JFKL.

[64]Telegram, Korry to Warren, July 4, 1963, Box 116, Luncheon for Emperor of Ethiopia; Box 811, Address, [Haile Selassie I University,] Addis Ababa, Ethiopia, [July 29, 1963,] EWPLC.

[65]Email, Joe Tenn to author, January 27, 2004.

[66]Nina Warren.

[67]Telegram, Korry to Sec State, July 31, 1963, National Security Files, Box 69, Ethiopia, General, 6/63–7/63, JFKL; Diary entry, August 1, 1963, "Warren, Earl #2," Personal Papers of Drew Pearson, Box G 246, 3 of 3, LBJ Library.

[68]Nina Warren.

[69]Earl Warren.

[70]Nina Warren.

[71]"Khrushchev Sees Warren," *New York Times*, August 17, 1963, p. 17. Cray, p. 367, claimed that "Warren

declined to meet Khrushchev lest his visit be seen as a piece of American-Russian diplomatic relations," but Nina Warren reported that on "August 16th—Drew Pearson, Mrs. Meyer and Earl drove to Gagra to have an interview with Mr. Khruschev" (Nina Warren).

[72]"Warren Arrives in Turkey," *New York Times*, August 22, 1963, p. 11.

[73]Jesse H. Choper, "Afterword: Earl Warren—A Law Clerk's Memory of the Man and the Court," in Scheiber, pp. 358–59; "Johnson Names 7-Man Panel to Investigate Assassination," *New York Times*, November 30, 1963, p. 1; Schwartz, pp. 495–96.

[74]Transcript, Earl Warren Oral History Interview I, 9/21/71, by Joe B. Frantz, Internet Copy, LBJ Library; Warren, **Memoirs**, pp. 351–72.

[75]Charles Mohr, "Johnson Gets Assassination Report," *New York Times*, September 25, 1964, p. 1.

[76]Cray, p. 480.

[77]Quoted in *ibid.*

[78]"Johnson Won't Go to London Rites," *New York Times*, January 28, 1965, p. 1; "Elizabeth Visits Churchill's Bier," *New York Times*, January 29, 1965, p. 6.

[79]Warren, **Memoirs**, pp. 5–7; Schwartz, p. 173.

[80]"Churchill Funeral Today; World Leaders Visit Bier," *New York Times*, January 30, 1965, p. 1; "A Cold Prevents Rusk from Attending Rites," *New York Times*, January 31, 1965, p. 33.

[81]"Wilson Confers with DeGaulle," *New York Times*, January 30, 1965, p. 2.

[82]"Chief Justice Warren in Manila," *New York Times*, February 5, 1965, p. 15; Box 815, Address, dinner marking thirtieth anniversary of Philippine Constitution Day sponsored by the Philippine Constitution Association, Manila, Philippines, February 8, 1965, EWPLC.

[83]Scott Stossel, **Sarge: The Life and Times of Sargent Shriver** (Washington, D.C.: Smithsonian Books, 2004), pp. 449–50.

[84]Harris Wofford, **Of Kennedys and Kings: Making Sense of the Sixties** (Pittsburgh: University of Pittsburgh Press, 1980), p. 302.

[85]Richard Rovere, "Letter from Washington, March 14," *New Yorker*, March 20, 1965, pp. 184–86.

[86]Cray, p. 444.

[87]Fred P. Graham, "Experts Debate World Law Rule," *New York Times*, September 14, 1965, p. 24; Charles S. Rhyne, "The Washington World Conference on World Peace Through Law," *The American Journal of International Law* 60 (April 1966): 361–67; Box 818, Address, inaugural session, Washington World Conference on World Peace Through the Rule of Law, Washington, D.C., September 13, 1965, EWPLC.

[88]John Krueger, "Justice Warren Arrives; Will Address U. of Md. Graduation," *Stars & Stripes*, European edition, May 28, 1966, p. 1; Box 820, Address, commencement, European Division of the University of Maryland, Heidelberg, Germany, May 29, 1966, EWPLC.

[89]Cray, p. 399.

[90]James Feron, "Warren in Israel for Kennedy Rite," *New York Times*, July 1, 1966, p. 3.

[91]James Feron, "Israel Unveils Kennedy Tribute," *New York Times*, July 5, 1966, p. 8; Box 820, Address, dedication, John F. Kennedy Peace Forest, Jerusalem, Israel, July 4, 1966, EWPLC.

[92]"Warrens Visit Pope Paul," *New York Times*, July 9, 1966, p. 15.

[93]Paul L. Montgomery, "Barbados Joining Independent Nations," *New York Times*, November 30, 1966, p. 1.

[94]Nina Warren.

[95]"Proposed Book—'The Chief'—Material," Personal Papers of Drew Pearson, Box G315, 2 of 2, LBJ Library; Itinerary for Chief Justice Warren, "Latin America Trip 3/24–3/8 1967," [Folder 1 of 2], Personal Papers of Drew Pearson, Box G93, 1 of 3, LBJ Library; "Latin America Trip 7/24–3/8 1967," [Folder 2 of 2], Personal Papers of Drew Pearson, Box G93, 1 of 3, LBJ Library; Pollack, p. 256.

[96]Transcript, Earl Warren Oral History Interview I, 9/21/71, by Joe B. Frantz, Internet Copy, LBJ Library. At that time, the United States Information Agency, known overseas as the United States Information Service, supported bi-national centers and cultural centers that offered books, periodicals, and other materials to help foreign audiences learn about the United States—its people, history, culture, and current political and governmental policies. The Report of the Warren Commission would have been available in these centers.

[97]Pollack, p. 304; Katcher, p. 405. The Warrens traveled for part of the South American trip with the Drew Pearsons, Mr. and Mrs. Earl Warren, Jr., and the White House military aide and White House physician.

[98]U.S. Supreme Court, Photographs; Box 821, Remarks, University of San Francisco Xavier, Sucre, Bolivia, February 26, 1967, EWPLC; Visit of Chief Justice Warren to Bogota—March 5–8, 1967; Schedule for Mrs. Earl Warren and Mrs. Drew Pearson, "Latin America Trip 3/24–3/8 1967," [Folder 1 of 2], Personal Papers of Drew Pearson, Box G93, 1 of 3, LBJ Library.

[99]*US News & World Report*, June 12, 1967, pp. 14, 8. Gross was a parsimonious Congressman dedicated to keeping appropriations in line as he saw fit. He protested against taxpayers' paying the gas bill for the eternal flame at President Kennedy's grave at Arlington National Cemetery. As a freshman representative in 1949, he voted against the Marshall Plan.

[100]*U.S. News & World Report*, June 12, 1967, p. 14.

[101]Transcript, Earl Warren Oral History Interview I, 9/21/71, by Joe B. Frantz, Internet Copy, LBJ Library. Typical of the information prepared by the State Department

for the Warrens for an overseas trip was "Welcome to Colombia," a twenty-nine-page document of unclassified materials about the country's characteristics, politics, economy, and leaders, the U.S. presence in the country, sightseeing suggestions, and medical precautions. "Latin America Trip 3/24–3/8 1967," [Folder 1 of 2], Personal Papers of Drew Pearson, Box G93, 1 of 3, LBJ Library.

[102]"Belgrade Friendly During Warren Visit," *New York Times*, June 30, 1967, p. 13.

[103]"Warren Honored in Belgrade," *New York Times*, June 27, 1967, p. 4.

[104]"Warren in Prague," *Washington Post*, June 30, 1967, A6.

[105]"Warren Arrives in Warsaw," *New York Times*, July 5, 1967, p. 15.

[106]"Warrens Visit W. Berlin," *Washington Post*, July 16, 1967, A15.

[107]Thomas J. Hamilton, "Warren Calls on Jurists at Geneva Parley to Promote a 'Law-Full' World" and "Earl Warren to Meet Japan's Prince Akihito," *Chicago Tribune*, August 29, 1967, p. 15; Box 822, Address, "Peace with Justice," World Conference on World Peace Through the Rule of Law, Palais des Nations, Geneva, Switzerland, July 10, 1967, EWPLC.

[108]Charles S. Rhyne, "The Original Creation and Future Impact of Law Day: Law Empowering People to Be Free from 1958 to the New Millennium," Law Library of Congress Law Day Celebration, May 1, 2000, Washington, D.C.

[109]Box 824, Address, ceremonies marking international observance of World Law Day, Palais des Nations, Geneva, Switzerland, September 16, 1968, EWPLC.

[110]"Earl Warren to Meet Japan's Prince Akihito," *Chicago Tribune*, August 29, 1967, p. 15; "Akihito to Receive Warren," *New York Times*, August 29, 1967, p. 4; "Warrens Arrive in Tokyo," *New York Times*, September 3, 1967, p. 3; "Warren Foresees Trial News Curbs," *New York Times*, September 4, 1967, p. 25; *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

[111]*Sheppard v. Maxwell*, 384 U.S. 333 (1966).

[112]"Arrives in Korea," *Washington Post*, September 12, 1967, A10; "Justice Warren in Korea," *New York Times*, September 12, 1967, p. 3.

[113]"Warren Sees S. Koreans," *New York Times*, September 13, 1967, p. 2; "Warren Gets Seoul Degree," *New York Times*, September 15, 1967, p. 39; Box 822, Remarks, dinner honoring Warren hosted by Korean Chief Justice Cho Chin-man, Young Bin Kwan (State Guest House), Seoul, Korea, September 12, 1967, EWPLC; Thomas Ginsburg, "The Warren Court in East Asia: An Essay in Comparative Law," in Scheiber, p. 266.

[114]"An LL.D. from Israel Given Warren Here," *New York Times*, February 3, 1969, p. 4; Box 823, Remarks, convocation dinner sponsored by the Bar-Islan University (Ramat Gan, Israel), Waldorf-Astoria Hotel, New York, N.Y., February 2, 1969, EWPLC; Cray, p. 479.

[115]Quoted in Katcher, p. 448.

[116]Quoted in Pollack, p. 304.

[117]Mackenzie, quoted in Cray, p. 479; Weaver, p. 253.

[118]Pollack, p. 304.

[119]Pollack, p. 315.

[120]World Conference on World Peace Through the Rule of Law, **Bangkok World Conference on World Peace Through Law, Bangkok, 1969** (Geneva: World Peace Through Law Center, 1971); Frank P. Coward, oral history interview, Foreign Affairs Oral History Collection.

[121]Cray, p. 515; Box 831, Address, World Conference on World Peace Through the Rule of Law, Belgrade, Yugoslavia, July 21, 1971, EWPLC.

[122]Pollack, p. 315; Cray, p. 515; Box 835, Address, World Conference on World Peace Through the Rule of Law, Abidjan, Ivory Coast, August 27, 1973, EWPLC. In his opinion for the Court in *Zemel v. Rusk*, 381 U.S. 1, 15 (1965), the Chief Justice cited the Universal Declaration.

[123]Cray, p. 516.

[124]"Warren Backs Concept of a Dynamic Peace," *New York Times*, October 31, 1969, p. 9.

[125]Box 829, Eulogy, memorial service for Agnes E. Meyer, Washington Cathedral, Washington, D.C., September 4, 1970, EWPLC; Pollack, p. 304.

[126]J. Woodford Howard, Jr., "Foreign Affairs and Foreign Policy," in Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the Untied States** (New York: Oxford University Press, 1992), pp. 307–08.

[127]*See generally* Robert A. Dahl, **Who Governs?: Democracy and Power in the American City** (New Haven, CT: Yale University Press, 1961).

[128]Joseph S. Nye, Jr., **Understanding International Conflicts** (New York: Pearson/Longman, 2005), pp. 59–62.

[129]Joseph S. Nye, Jr., **Soft Power: The Means to Success in World Politics** (New York: Public Affairs, 2004), p. x.

[130]Joseph S. Nye Jr., **Understanding International Conflicts** (New York: Pearson/Longman, 2005), p. 61.

[131]G. John Ikenberry, **After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars** (Princeton, NJ: Princeton University Press, 2000), pp. 163–214.

[132]Theodore M. Vestal, "Public Diplomacy in the U.S. Supreme Court: The Warren Years—Part I," *Journal of Supreme Court History* 33(3) (2008), pp. 371–93.

[133]Choper, pp. 358–59.

[134]Quoted in Fred Rodell, "It Is the Warren Court," *New York Times*, March 13, 1966, VI, p. 30. Simon Sobeloff was the U.S. Solicitor General from 1954 to 1956 and a judge on the Fourth Circuit Court of Appeals from 1956 to 1973. He presented the government's arguments on implementation of the Supreme Court's *Brown* decision of May 1954 to outlaw segregation in public schools.

[135]Jim Newton, **Justice for All: Earl Warren and the Nation He Made** (New York: Penguin, 2006), p. 6.

[136]Bernard Taper, "Gomillion Versus Lightfoot," *New Yorker*, June 17, 1961, pp. 39, 42, 68.

[137]*Brown v. Board of Education*, 374 U.S. 483 (1954).

[138]Schwartz, pp. 500–501.

[139]Choper, pp. 358–59.

[140]Schwartz, p. 203.

[141]"Proposed Book—'The Chief'—Material," Personal Papers of Drew Pearson, Box G315, 2 of 2, LBJ Library.

[142]Katcher, p. 406.

[143]Schwartz, pp. 201–02.

[144]Rodell, p. 30.

[145]Katcher, p. 356.

[146]Quoted in Schwartz, p. 490.

[147]Rodell, p. 30.

[148]Quoted in Bernard Schwartz, **The Great Rights of Mankind, A History of the American Bill of Rights** (Lanham, MD: Madison House, 1992), p. 227.

[149]The words are Marquis Childs', quoted in Katcher, p. 372.

[150]Choper, pp. 358–59.

[151]Remarks at national tribute to Warren held on the steps of the Lincoln Memorial in June 1969, quoted in Compston, p. 144.

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Some may be surprised to realize that nearly a half century has lapsed since publication of **The American Supreme Court** by Robert G. McCloskey.[1] One reviewer praised the book as "unique," one that could be read "profitably by layman, student, lawyer, and constitutional lawyer."[2] Readers familiar with that compact volume will recall the antinomy that the author put forward as the defining theme of American constitutional history: the tension between fundamental law and popular sovereignty. The latter suggests will and the former restraint. The antinomy is reflected in the founding documents of the Republic. The Declaration of Independence trumpets "inalienable rights" in the same paragraph that it emphasizes "government by the consent of the governed." The Constitution, "ordain[ed] and establish[ed]" by "We the people," insisted in Article VI that it "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This conflict between equally valid principles lies at the heart of judicial review in the federal courts, where appointed and politically unaccountable judges sit in judgment on the actions of the politically accountable representatives of the people. In McCloskey's view, one principle "conjures up the vision of an active, positive state; the other emphasizes the negative, restrictive side of the political problem."[3] Opposites though these principles are, Professor McCloskey emphasized that Americans have managed to cling simultaneously to both. "But like most successes in politics and elsewhere, this one had a price. The failure to resolve the conflict between popular sovereignty and fundamental law perhaps saved the latter principle, but by the same token it left the former intact. And this meant that fundamental law could be enforced only within delicately defined boundaries, that constitutional law, though not simply the creature of the popular will, nevertheless had always to reckon with it, that the mandates of the Supreme Court must be shaped with an eye not only to legal right and wrong, but with an eye to what popular opinion would tolerate."[4]

Attorney General (and future Justice) Robert H. Jackson had captured this dualism nineteen years earlier in another monograph that has likewise achieved status as a classic: **The Struggle for Judicial Supremacy**.[5] In his account of the changing role of the federal

judiciary, the talented former Solicitor General, whom Justice Louis D. Brandeis is said to have extolled as one who should be "Solicitor General for life,"[6] insisted that the "ultimate function of the Supreme Court is nothing less than the arbitration between fundamental and ever-present or rival forces or trends in our organized society."[7] For Jackson, such tension gave rise to a compelling political necessity: a "truce between judicial authority and popular will."[8] Recent books about the Court are a reminder of this hallmark of politics and constitutional government in the United States.

Even less common than compact judicial analyses such as Jackson's and McCloskey's are single-volume histories of the Supreme Court. So the appearance of **The Supreme Court: An Essential History**[9] by Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull is noteworthy. Legal historians at the University of Georgia, Seton Hall University, and Rutgers University School of Law–Camden, respectively, the authors have crafted a readable volume that is both serviceable for the specialist and accessible to the novice and generalist. Part chronicle of the Court and part chronicle of the evolution of American constitutional law, their labors reflect a reality others have long recognized: to write about the Supreme Court necessarily means that one will, sooner rather than later, be writing about constitutional law, and to write about constitutional law in the United States requires that one quickly confront the U.S. Supreme Court.

Any prospective reader can quickly glimpse the subject of the book from the title, but they may nonetheless be puzzled at the outset by the subtitle. Why have the authors labeled the contents "an essential history"? The answer lies in the reasons why Americans need to understand the institution that heads the third branch of the national government. First, the Justices' own justifications for their decisions draw upon history, especially previous rulings of the Court. Second, the historical record reveals that the Court has been a principal political actor across the decades, sometimes rivaling in importance that of some Congresses and Presidents. Third, "a history of the Court is essential because its operation, so vital to our system of checks and balances, is often obscure." Accordingly, a history "can lift the veil on that obscurity."[10] The authors' use of "essential" thus seems to evoke Alexander Hamilton's use of the word in **The Federalist** no. 78, when he described (and defended) the independence of the proposed Supreme Court "as an *essential* safeguard against the effects of occasional ill humors in the society."[11] Thus, the Court has had a key role in coping with the twin dilemmas of popular government. As James Madison explained the problem in **The Federalist** no. 51, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Against the backdrop of the American experiment—to arrive at a happy balance between liberty and restraint or power and limits—the authors pose two questions: Is "the Court just another political institution swayed by the partisanship of the Justices and the political currents of the day," and have the Justices "changed the meaning of our fundamental laws—in effect, remade the Constitution?"[12] For readers of this *Journal* or anyone who may not have dozed at length during Political Science 101, such questions may not appear particularly original, but they might nonetheless pose a challenge for someone new to the study of the Court. One recalls, for example, Judge (later Justice) Benjamin Cardozo's acknowledgement that "[t]he tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by,"[13] as well as Justice Felix Frankfurter's later reminder that "judges are men, not disembodied spirits. Of course a judge is not free from preferences."[14]

The Supreme Court: An Essential History **by Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull is noteworthy because it is a readable single-volume history of the Court. The book may underplay the Court-packing episode of 1937, but it has a splendid bibliographic essay.**

Moreover, Chief Justice Roger B. Taney's insistence that the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers"[15] contrasted sharply with his predecessor's reminder that the Constitution was "intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs."[16] Indeed, much of the meat of **An Essential History** appropriately demonstrates the impact of the Supreme Court on the political system and the impact of the political system on the Supreme Court. Moreover, even in the absence of the effects of formal amendments to the Constitution, any chronicle of the Court and its work, such as this one, plainly illustrates that the Constitution of 1787 is hardly the Constitution of today. "If George Washington founded the country," as one biographer aptly insisted, "John Marshall defined it."[17] The Court's role as expositor of the Constitution, nearly fully taken for granted today, was highly problematic when Marshall became Chief Justice in 1801, in an era when the political role of the judiciary was still only dimly perceived by most.

The authors divide the Court's story into three sections that together contain fifteen chapters. The three sections reflect a familiar division and "correspond to three deep sea changes in ordinary Americans' relationship with their government (and vice versa)."[18] Thus, the first part, labeled "The Heroic Courts," follows the Court from its establishment to 1873, well into Reconstruction. Constitutionally, the overriding issue during most of this time was the vexing problem of federalism: the relationship between the central and state governments; after all, the continued existence of a union of states was anything but certain until after 1865. The second section, "The Classical Courts," encompasses the

Gilded Age, from the late nineteenth century until the end of the New Deal in the late 1930s. While questions of federalism hardly vanished, this was a period when the novel questions centered on the legitimate relationship between government and the economy, particularly in the context of corporate wealth, as well as initial forays into the related matter of governmental power over the individual. The third section, "The Modern Courts," tracks the institution from World War II until 2006. With New Deal policies firmly in place and constitutionally accepted, it was during this period that the Justices made major policy declarations on racial discrimination, voting rights, and representation, heard significant numbers of cases on First Amendment freedoms, undertook supervision of the criminal-justice system on an unprecedented scale, and handed down landmark rulings on gender and privacy matters. In a pattern repeated again and again, each new foray had a galvanic effect on the legal system that "produced another line of cases to be argued, studied, and modified."[19]

Within each section, chapters adhere to a "chief justice synthesis,"[20] whereby each Chief's tenure comprises a separate chapter. This method expectedly yields chapters of varying lengths, depending in part not only on how long each Chief served, but on the significance and complexity of the Court's decisions during his tenure. The Jay and Ellsworth courts (1789–1801) hence command twenty-one pages, while the Marshall Court (1801–1835) occupies thirty-one. The book concludes with a treasure: a splendid fifteen-page bibliographic essay.

Individual chapters strive for twin objectives. First, the authors provide at least a thumbnail sketch of each person appointed to the High Court. The Court's more significant members and those who have served in recent decades receive greater attention. Thus, Lucius Quintus Cincinnatus Lamar (1888–1893), who saw service on both the Waite and Fuller courts and whose nonjudicial public career was more consequential than his years on the Bench, rates less than a page, while Tom C. Clark (1949–1967), who served with Chief Justice Fred Vinson and Chief Justice Earl Warren, is covered in two. Information about individual Justices and their families is augmented with observations about everyday life at the Court and changes in the internal decision-making process. What receives little emphasis is the increased role of law clerks during the decades since Justice Horace Gray initiated the practice of employing legal assistants in the late nineteenth century.[21]

The second objective of each of the chapters is inclusion of brief analysis of major decisions of the Court. These range from some of the oldest landmark rulings, such as *Chisholm v. Georgia*,[22] and *Calder v. Bull*,[23] long part of the canon of American constitutional law, to very recent cases such as *Hamdi v. Rumsfeld*[24] and *Parents Involved v. Seattle School District No. 1*.[25] Aside from rulings one would expect to find, the authors occasionally inject a surprise. For example, the chapter on the Court's first decade highlights *Elkay v. Ives and Moss*, an otherwise obscure decision by the U.S. Circuit Court for the District of Connecticut in 1793 in which the opinion was delivered by Justice James Wilson and U.S. District Judge Richard Law,[26] who were sitting as the circuit judges.[27] But *Elkay* is important, and an example of how obscurity and inadequate legal reporting beget unintended consequences. The case arose when a free black father sued two Connecticut slave traders for selling his daughters. The circuit court accepted the case as part of the diversity jurisdiction allowed to the federal courts by the second section of the Constitution's Article III, and the jury returned a verdict, with damages, for the father. As the authors explain, "The precedent was clear: a black man could be a citizen of Massachusetts for the purposes of federal diversity jurisdiction, and he could bring a suit against two white men who violated his family's rights. The case was widely reported in the newspapers at the time, and no one suggested the circuit court had gotten it wrong. In 1857, Chief

Justice Roger Taney, writing in *Dred Scott v. Sandford*, said that a person of African ancestry living in America could never be a citizen of a state (hence could never invoke federal diversity jurisdiction) because the framers of the Constitution would never have allowed it. Wilson was an important framer of the Constitution. Taney's history was wrong."[28] Significantly, *Elkay* was cited by neither Justice Benjamin Curtis nor Justice John McLean in their respective dissenting opinions in the *Dred Scott* decision.[29]

If **The Supreme Court** emphasizes the unexpected in places, it also assigns less prominence to certain subjects than one might anticipate. For example, the intricacies of the constitutional crisis of 1937 seem decidedly underplayed, despite the significance of that donnybrook. While the careful reader will find a useful summary of the decisions by the Hughes Court that precipitated the confrontation, the casual reader might altogether fail to grasp fully the reasons why the President eventually emerged victorious from the struggle. Indeed, the book allots the appointment of Hugo Black in 1937 nearly as much space as the details of President Franklin Roosevelt's legislative assault on the Court.

Moreover, one might have hoped for greater attention to what one scholar has termed the "enduring dilemma"[30] of the Hughes Court: the causes of the transformation that took place. One explanation tends to emphasize internal factors, stressing that the doctrinal shift that occurred in the famous "switch in time" was already underway and that the Roosevelt-friendly doctrines that typified the Court's jurisprudence—at least on matters of economic regulation—after 1936 were soundly rooted in pre-1936 decisions. Another approach, toward which the book apparently leans,[31] looks to an external explanation. Under this view, Roosevelt's landslide reelection in 1936, combined with the court-packing plan itself and the continuing social tragedy of the Great Depression, nudged Chief Justice Charles Evans Hughes and Justice Owen J. Roberts, who held the balance of power between the conservative and progressive wings on the Bench, to adopt more deferential attitudes toward the President's programs. Ultimately, however, what mattered most in changing the Court was not that Hughes and/or Roberts became wholehearted converts to judicial restraint in economic cases. Instead, beginning with Hugo Black, a parade of new Justices, made possible by the first departures from the Bench since the start of the President's first term, soon gave Roosevelt a Court consisting of a firm liberal majority.

This new majority had twin constitutional impacts. First, aside from decisions that validated New Deal statutes such as the National Labor Relations Act that removed the immediate need for court-packing, the majority also made clear, in holdings such as *United States v. Darby*[32] and *Wickard v. Filburn*,[33] that it had closed the door on adoption of a regulatory fallback position by which most, but not all, economic regulations would be allowed to stand. Had the majority chosen that option, the Court would no longer have been a roadblock to most social-reform legislation, but it would still have retained a veto over measures it deemed excessive or unreasonable. Yet by early in Roosevelt's third term, it had become obvious that the Court had abandoned the role it had exercised for half a century and instead relegated such monitoring of national economic and social policy entirely to Congress.

Second, it was this new majority that, having cemented judicial restraint onto litigation involving economic regulation, shifted to a new, nonproprietarian, rights-oriented activism, as presaged by Justice Harlan Stone's Footnote Four in *United States v. Carolene Products Co.*[34] The authors place appropriate emphasis on this key development that attempted to offer a justification for judicial review in particular instances.

This footnote of three paragraphs, which Justice Lewis Powell much later called "the

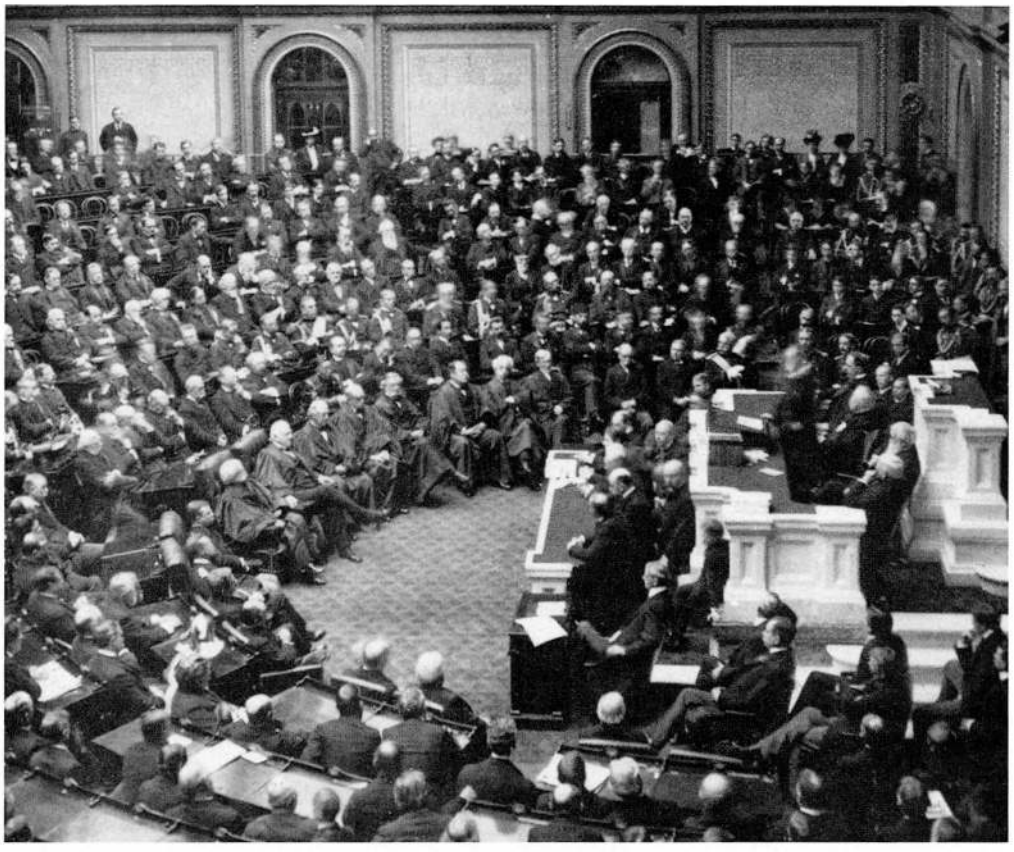
most celebrated footnote in constitutional law,"[35] contains a corresponding number of ideas. The first suggested that when legislation, on its face, contravened specific constitutional negatives such as those set out in the Bill of Rights, the Court's usual presumption of constitutionality might be curtailed or even waived. The second paragraph indicated that the judiciary had a special responsibility to defend those liberties essential to the effective functioning of the majoritarian political process. The Court would thus sit as the ultimate guardian against abuses that would poison what Madison, in **The Federalist** no. 51, termed the "primary control" on government: "dependence on the people," or the ballot box. That is, the Justices would protect those liberties on which the effectiveness of the political check depended. The third paragraph suggested a special judicial function as protector of minorities and unpopular groups particularly helpless at the polls in the face of discriminatory or repressive policies, as might happen when majoritarianism ran amuck. Stone's footnote became "the anthem of the new jurisprudence."[36] As Justice Black wrote in *Hines v. Davidowitz*, legislation dealing "with the rights, liberties, and personal freedoms of human beings, ... is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."[37]

While the appointment of Justices is part of the background story that enriches **The Supreme Court**, staffing the Supreme Court remains the central focus of the new edition of Henry J. Abraham's classic, **Justices, Presidents, and Senators**.[38] First published in 1974, the book has become the standard treatise on judicial selection.[39]

From Washington's appointment of John Jay in 1789 to George W. Bush's selection of Samuel Alito in 2005, Abraham, who is emeritus professor in the Department of Government and Foreign Affairs at the University of Virginia, traces the politics of presidential efforts to fill the Supreme Bench and the Senate's reaction to those efforts. What criteria have Presidents employed in selecting Justices? To what degree have presidential expectations for nominees been realized in their decisions? The questions are important because they have acutely concerned almost every President. "[F]ar more than any other nominations to the federal bench, those to the highest tribunal in the land are not only theoretically, but by and large actually, made with a considerable degree of *scienter* by the Chief Executive."[40]

Regarding the first question, Abraham identifies "a quartet of steadily occurring criteria," including merit, personal friendship, balance or representation on the Bench, and political and ideological acceptability. While most appointments have involved more than one of these factors, the last has most frequently been overriding. One might add "luck" as well, as did Justice O'Connor: "[T]hat decision from the nominee's viewpoint is probably a classic example of being the right person in the right spot at the right time. Stated simply, you must be lucky."[41] As Abraham describes the sequence of events leading to the appointment of the seventeenth Chief Justice in 2005, John G. Roberts was named to the Court of Appeals for the District of Columbia Circuit "in 2003 by Bush II; his father had nominated him unsuccessfully to that same court in 1992, and so had the son ten years later, but both were shelved by Democrats until the Republicans regained the Senate in 2003."[42]

While such dilatory tactics may hardly be commendable, the role of ideology in judicial selection at either end of Pennsylvania Avenue does not itself trouble Abraham. "All presidents have tried to pack the Court, to mold it in their own image. Nothing is wrong with this, provided, however that the nominees are professionally, intellectually, and morally qualified to serve. Yet sloganeering and labeling, be they 'strict constructionist,' 'liberal,' 'conservative,' or 'libertarian,' are as unhelpful to an understanding of the nature and function of the judicial process as they are often oversimplifying and misleading."[43]



This 1902 photo shows a joint session of Congress honoring the late President William McKinley. The Justices are seated on the far side of the aisle, while President Theodore Roosevelt sits on the near side of the center aisle. Henry Abraham's updated edition of *Justices, Presidents, and Senators* examines more than two centuries of relations between the White House and the Supreme Court.

As for fulfilling presidential expectations, Abraham finds that the record is mixed. The roster of Justices contains more than a few "surprises," as the book amply demonstrates. As Senator Joseph Biden opined during the hearings on the O'Connor nomination in 1981, "[O]nce a justice dons that robe and walks into that sanctum across the way, we have no control. . . . [A]ll bets are off."[44]

In addition to examining expectations and their fulfillment, Abraham wades into the murky waters of merit. Are there standards sufficiently clear to separate good appointments from bad ones? Nominations to the Court almost always generate positive and negative reactions that most frequently derive from partisan or ideological views, but does the historical record suggest objective criteria that can be used to judge merit? Furthermore, are there similar criteria by which to rate on-Bench performance? Abraham believes that such criteria exist and prefers the combination advanced more than three decades ago by Albert Blaustein and Roy Mersky:

> Scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity and impartiality; diligence and industry; the ability to express oneself orally with clarity, logic, and compelling force; openness to change, courage to take unpopular decisions; dedication to the Court as an institution and to the office

> of Supreme Court justice; ability to carry a proportionate share of the Court's responsibility in opinion writing; and finally, the quality of statesmanship.[45]

For Abraham, "'greatness' is not quantifiable." Yet "the evidence is persuasive that the term or concept is not only a meaningful one in the eyes of qualified observers . . ., but that there is something closely akin to consensus among them—observers who represent the gamut of the sociopolitical and professional spectrum."[46] This consensus in turn means that Presidents and their advisers are in a position to "opt for merit"[47] while presumably not overlooking other considerations that may fairly enter into the selection. From this vantage, the author proceeds to offer a quadruple assessment of "the motivations that underlie the process of presidential selection and appointment, the role of the Senate in the process, the degree of fulfillment of presidential hopes or expectations, and the professional performance of those entrusted with the responsibilities of the business of judging at the highest level."[48]

Readers who are familiar with Supreme Court appointments since 1968 know all too well that some nominations have sparked major confirmation battles in the Senate. Yet the sweep of Abraham's book is a reminder that such imbroglios are not entirely a recent political phenomenon. Indeed, the nineteenth century is replete with clashes between determined Presidents and equally determined Senators, with nominees often caught in between, as the appointment of Justice Stanley Matthews in 1881 illustrates. That Matthews eventually secured a seat on the Court was little short of a miracle. Not only did he reach the Court by way of a second-try, cliff-hanging confirmation vote, but his nomination marked the first time that organized interests attempted to block a Supreme Court appointment.[49]

With barely a month remaining in his term, most thought avowed one-term President Rutherford Hayes would leave selection of Justice Noah Swayne's replacement to his successor, President-elect and fellow Republican James Garfield. But Hayes nominated Matthews immediately. The two men had been friends at Ohio's Kenyon College, had served in the same regiment during the Civil War, and were related by marriage. Moreover, Hayes's presidency was partly due to Matthews' labors on his friend's behalf in helping to fashion the Compromise of 1877 as one of the Republican counsel to the congressionally authorized commission to resolve the disputed presidential election of 1876. Hayes owed Matthews a lot.

The appointment of Stanley Matthews (pictured) in 1881 marked the first time that organized interests tried to block a Supreme Court nomination. *Justices, Presidents, and Senators* underscores the fact that confirmation battles are not exclusive to modern times.

Both Hayes and Matthews were amazed at the formidable opposition that materialized almost overnight against the nomination. The problem was not Matthews' connections with Hayes or to the disputed election, but the nominee's identity with corporate power, especially the railroads. Despite a last-minute lobbying

campaign by Hayes, the Judiciary Committee refused to report favorably on the nomination, and it died as the session ended.

At that point, there was little evidence that Matthews had a future on the Supreme Court. President-elect Garfield had thus far offered no support to Matthews, and most thought that the new President would look elsewhere to fill Swayne's seat. The improbable happened on March 14, however, when the new President renominated Matthews. The reasons are not completely clear, although Abraham credits Matthews's stunning resuscitation to the financial and political influence of financier and Republican party magnate Jay Gould, for whom Matthews had served as Midwestern chief counsel.[50] The clout of the Gould-led forces apparently also accounts for the razor-thin confirmation vote of 24–23 after two months of acrimonious Senate debate. To date, Matthews remains the only Justice to have been approved by a one-vote margin. Although the *New York Times* had labeled the Matthews nomination one of Hayes's "most injudicious and objectionable acts" as well as "a sad and inexcusable error" on Garfield's part, the author considers Matthews an example of appointees whose careers demonstrate that they are able to "rise above associational and philosophical predispositions."[51]

Barely ten months before publication of the new edition of Abraham's book, Christine L. Nemacheck of the College of William and Mary's Department of Government further enriched the literature on judicial appointments with her **Strategic Selection**.[52] Her contribution is at once chronologically more compressed than Abraham's and more narrowly structured conceptually. While Abraham's encompasses all appointments since John Jay's, Nemacheck's limits itself to Supreme Court nominations in the series of presidencies from Herbert Hoover to George W. Bush. In terms of specific nominees, therefore, Nemacheck's extends from Hughes, John J. Parker, Roberts, and Cardozo through John G. Roberts, Jr., Harriet Miers, and Samuel A. Alito, Jr. While Abraham explores presidential expectations and the degree of their fulfillment and assesses the quality of an appointee's service on the Bench, Nemacheck's primary interest is more circumscribed. Although most studies of judicial appointments emphasize the confirmation stage of the process, hers, as the title indicates, focuses on the appointment process in its earliest stage, when a vacancy occurs or is imminent. Moreover, her research design is more akin to the one employed by Sheldon Goldman in **Picking Federal Judges** (1997) and David Yalof in **Pursuit of Justices** (1999), in that she builds her study around, and draws heavily from, available presidential papers and archives.

Like Yalof, Nemacheck observes that *selection*—why one individual as opposed to another is nominated—is "crucial to our understanding of who sits on the Supreme Court."[53] This is because the Senate eventually confirms most nominees. Indeed, in the period under examination in Nemacheck's book, Presidents sent forty-eight names to the Senate, and of these, only eight—barely 17 percent—were not confirmed. To comprehend the appointment process, then, she believes that one must begin with the reality that while the appointment process concludes in the Senate, it is the White House that sits as the true gatekeeper on the pathway to the High Bench. Thus, among all qualified individuals, why do some, rather than others, make it to the eventual "shortlist"?[54] Of the several names on the shortlist, what accounts for the eventual choice of one over the others? Nemacheck's goal is to see whether a process that is "typically seen as idiosyncratic, with the style of the sitting President, unpredictable political conditions, and simple luck determining the nominee,"[55] might more profitably be analyzed as the interplay of, and the presidential response to, several basic themes and realities.

From the perspective of a President, one of these themes is plainly uncertainty. Uncertainty, in turn, manifests itself in several ways. First, vacancies on the Supreme Court

are ordinarily unpredictable. The Framers provided in Article III that federal judges sit "during good Behaviour." In contrast to the President, who is elected for a term of four years that is renewable only once, and to Representatives and Senators, who are elected for renewable terms of two and six years respectively with no legal limits on their renewability, fixed terms are unknown to Article III. Upon taking office, a President might well hope that several vacancies will open during the next four or eight years, but their timing will appear on no White House calendar on the morning after Inauguration Day. Accordingly, a President might encounter a wealth of vacancies, as happened even during William Howard Taft's single term, or, as with Jimmy Carter, exit the White House after four years that witnessed no vacancies at all. Nonetheless, as illustrated by the court-packing plan of the 1930s, Franklin Roosevelt tried unsuccessfully to manufacture several vacancies legislatively,[56] and President Lyndon Johnson effectively created two vacancies: when he enticed Justice Arthur Goldberg from the Court to the United Nations in 1965, in order to make room for the President's friend Abe Fortas; and then in 1967, when the same President named Ramsay Clark Attorney General and so triggered the retirement of Justice Tom Clark to make room for the historic appointment of Thurgood Marshall.[57]

Uncertainty also manifests itself during the selection stage, in that Presidents do not know "how judicial candidates will behave once they are confirmed to the Supreme Court."[58] Nemacheck likens this uncertainty to the classic "principal-agent dilemma,"[59] whereby the principal delegates particular responsibilities to the agent and wishes the agent to carry out the wishes of the principal. However, in the case of an appointee to the High Court, the principal lacks an essential element of the successful principal-agent relationship: control. As much as a President might prefer otherwise, the Framers made sure that no President has the authority to rein in a Justice in the way a President might be able to restrain a subordinate in the Cabinet or in the Executive Office of the President.

Uncertainty enters appointment deliberations in another way as well. Because the point of making a nomination is to have the nominee confirmed, Presidents must consider the troubling statistic that, since 1789, the Senate has rejected some twenty percent of all Supreme Court nominations, compared to only about four percent for all executive branch appointments.[60] With Supreme Court nominations especially, the confirmation picture can become highly strained when divided government is present—that is, when the President is of one party and the Senate is under the control of the other party.[61] Thus, the confirmation environment in the Senate deeply matters, leading to the question—surely ever-present for any President—whether a particular nominee will be confirmed.

Uncertainty over the probable judicial behavior of a nominee and uncertainty over the prospects for the nominee's confirmation put a premium on different kinds of information. With the first, a President wants to avoid the proverbial judicial "surprise." Accordingly, much of the prenomination process consists of learning as much as possible about various individuals under consideration. Does this need explain the recent presidential preference for nominees with judicial experience? Perhaps the lure of a judicial paper trail has been overwhelming. After all, as of mid-2008, the roster of the Supreme Court revealed that all nine Justices arrived on the Bench with previous service as a judge. Indeed, for the first time since the courts of appeals were created in 1891, all Justices in 2008 had served on one of the federal courts of appeals, most frequently on the Court of Appeals for the District of Columbia Circuit. By contrast, as late as 1963, five Justices were sitting with no significant prior judicial experience on any court. Certainly recent Presidents seem to have rejected Justice Frankfurter's oft-quoted conclusion: "One is entitled to say without qualification

that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero."[62] However, counter to what one might expect, Nemacheck notes that "neither federal court nor federal appeals court experience increased the likelihood of selection from the President's shortlist, but this was almost certainly not because it did not matter but because it did not distinguish a candidate from others on the shortlist. That is, beginning in 1975, the great majority (76 percent) of individuals appearing on Presidents' shortlists had such experience, whereas prior to that only a minority (39 percent) did."[63] Nonetheless, "[p]residents, regardless of their administrative styles and individual goals, pursue an information strategy for selection."[64] In different administrations, the bulk of the analysis and information-gathering has taken place in the Justice Department or the White House itself, although the overall trend has been to emphasize what takes place in the latter at the expense of the former. For example, "President Clinton relied almost exclusively on White House advisers when selecting his Court nominees."[65] President George W. Bush apparently did so as well. Indeed, Nemacheck notes that "even after her own withdrawal as the President's nominee, White House Counsel Harriet Miers was said to be only one of two advisers to accompany President Bush to Camp David for deliberations on his next nominee."[66] Moreover, the record indicates that Presidents "are just as likely to try to centralize the selection process in the White House at the beginning of their term in office as they are near the end."[67] Such investigation includes not only what can be learned about the candidate from the candidate's record, but also insights gleaned from congressional sources. Still, Presidents must be careful, lest endorsements or encouragements from certain members of Congress unduly embolden potential opponents. That is, in trying to lessen their uncertainty over a candidate, Presidents may "actually hurt the candidate's chances for confirmation. Opposition senators will be less willing to confirm a candidate they are certain will act in line with presidential preferences."[68] Moreover, one can add that congressional sources might also reinforce a presidential preference that otherwise could have been discarded. For example, speaking disparagingly of geography in weighing the merits of potential nominees, Frankfurter recalled that the irrelevance "led President Hoover, who had the most impressive recommendations for naming Cardozo as Holmes's successor, to hesitate because there were already two New Yorkers on the Court. When he urged this difficulty on Senator [William] Borah, the latter, to the President's astonishment, said that Cardozo was no New Yorker. When asked to explain, the Senator replied that Cardozo belonged as much to Idaho as to New York."[69]

Uncertainty over potential confirmation suggests that Presidents prudently gauge probable senatorial support based on recommendations that the White House receives. "When a president is particularly uncertain about a candidate's prospects for confirmation, incorporating members' suggestions might be a useful way to increase the likelihood of a smooth confirmation process."[70] Congressional input is therefore doubly useful, both for information about a candidate's ideology and for insights on a candidate's prospects for confirmation. In both situations, Presidents should prudently engage in what the author calls "selective listening."[71] Nemacheck specifically credits George H.W. Bush's nomination of Judge David Souter as an example of the pursuit of a political strategy. "Indeed, Judge Souter was advised by his friend Senator Warren Rudman to remain evasive about his position on the controversial abortion issue so as to avoid engendering more opposition to his candidacy. In fact, Senator Rudman later referred to Souter as 'an ideal candidate if he could avoid being pinned down' on abortion."[72] With Rudman as the shepherd for the Souter nomination, the confirmed Justice became Rudman's "longest legacy."[73]

Across its eight chapters, Nemacheck's book shows that how a President and senior advisers respond to the twin uncertainties is largely a function of the prevailing political climate. A President confronting a favorable confirmation climate in the Senate, either because of the President's own popularity or because of the good fortune that flows from a Senate in the hands of the President's party, will usually emphasize an information strategy: making sure that the nominee accurately reflects the President's policy objectives. Conversely, a President who confronts a less-than-favorable confirmation climate, either because of the President's unpopularity or because of his party's misfortune in recent elections, will pursue a political strategy to increase a nominee's chances for confirmation, as well as the probability that the President will in fact succeed in shaping the Court. Future Presidents will surely confront similar uncertainties. What remains certain is that vacancies will occur.

Among appointments to the Supreme Court in recent decades, most observers would agree that Harry Andrew Blackmun's was among the least contentious. After little more than perfunctory consideration, the Senate Judiciary Committee unanimously endorsed him on May 5, 1970, with confirmation following on May 12 by a vote of 94–0. Yet what seemed to be a smooth process that allowed Blackmun to take his seat as the ninety-eighth Justice on June 9 was, in reality, the concluding round in an appointment spectacle that surely ranks among the most unusual, if not bizarre.

The saga began innocuously enough on June 26, 1968, when President Johnson announced Chief Justice Warren's intention to resign. Warren had been Chief Justice since 1953, and his tenure had been one of the most active and remarkable in American history. Hardly an aspect of life had gone untouched by landmark decisions on race discrimination, legislative apportionment, and the Bill of Rights. The following day, the President nominated Associate Justice Abe Fortas, a close friend of Johnson's, to succeed the controversial Chief. With charges of "cronyism" abounding, opposition formed immediately. Fortas was charged with various improprieties, including participation in White House strategy conferences on the Vietnam War and acceptance of high lecture fees raised by wealthy business executives who were clients of Fortas's former law partner. After four days of deliberation, the Senate voted 45–43 on October 1 to cut off debate, well shy of the margin necessary to impose cloture. Two days later, the ill-fated Justice withdrew his name. For the first time, a nomination to the Supreme Court Justice had been blocked by a filibuster. A lame duck by this point in his administration, and declining to submit another name to the Senate, Johnson left this high-level appointment to President Richard M. Nixon, whose 1968 campaign had been, in part, a campaign against the Warren Court.

Nixon's choice for Warren's successor was Warren E. Burger, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit. Burger's confirmation came eighteen days later, on June 9, 1969, by a vote of 74–3, an event that closely followed Justice Fortas's resignation on May 14, after *Life* magazine published details of possible improprieties by the former nominee for the Chief Justiceship.[74] Fortas's departure—the first by a Justice because of public criticism—opened the way for Nixon's nomination of Clement F. Haynsworth, Jr., chief judge of the Court of Appeals for the Fourth Circuit. Because of concerns about conflict of interest and other matters, the Senate, still in Democratic hands, rejected the nominee 45–55.

This turn of events apparently strengthened Nixon's determination to appoint "strict constructionist" Justices. Accordingly, his next nominee was G. Harrold Carswell, who had served seven years as a U.S. district judge in Florida and six months on the Court of Appeals for the Fifth Circuit. Opponents accused Carswell of racism and mediocrity. Accepting the latter criticism, Nebraska Senator Roman

Hruska tried to convert it into an asset: "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Cardozos and Frankfurters and stuff like that there."[75]

Carswell's nomination failed 45–51. Not since the second presidency of Grover Cleveland in 1893 and 1894 had the Senate refused to accept two nominees for the same Supreme Court vacancy. It was at this point that Nixon turned to Blackmun, who had been on the Court of Appeals for the Eighth Circuit since 1959. The process to fill the Fortas vacancy had come to an end. Ironically, Nixon signed Blackmun's commission on May 14, 1970, precisely one year after Fortas resigned. Given Nixon's preference early in his presidency for nominees with appeals-court experience (neither Lewis J. Powell nor William H. Rehnquist, named to the Court in the year after Blackmun, had any prior judicial experience), Blackmun indirectly owed his seat on the Supreme Court as much to President Dwight Eisenhower as to President Nixon, in that he was among Ike's last federal court nominees.[76]

Blackmun, who commonly referred to himself as "old number three,"[77] retired in 1994 and died in 1999. Although twenty Justices since 1789—including Justice Byron White, who retired in 1993—had served longer than Blackmun's twenty-four years, only two, Oliver Wendell Holmes and Roger Brooke Taney, were older at the time they left the Court. Blackmun has now been the focus of two books. *New York Times* reporter Linda Greenhouse authored the first, **Becoming Justice Blackmun**, in 2005, based largely on early access to the extensive Blackmun papers. Her admiring work has now been heavily supplemented by **Harry A. Blackmun: The Outsider Justice**,[78] a meticulously researched, readable, and engaging full-scale judicial biography by political scientist Tinsley Yarbrough of East Carolina University.

Given the fact that Yarbrough already ranks among the most accomplished contemporary judicial biographers,[79] a few realities surely caused him to pause before undertaking an exploration of Blackmun's life and work. At the Justice's retirement in 1994, few regarded him as a jurisprudential giant, a coalition-builder, or a tactician within the Court. On the other hand, other considerations surely combined to encourage the author to move ahead. First, a career on the Court spanning nearly a quarter-century would alone at least begin to attract a scholar's interest. Then there is the fact that Blackmun's long tenure included years when he and his colleagues engaged a host of constitutionally contentious matters, including the moment in August 1974 when the Court's decision led to the resignation of the same President who sent Blackmun's name to the Senate. And one could hardly forget that Blackmun authored the opinion of the Court in *Roe v. Wade*.[80] Indeed, there have probably been few Supreme Court Justices any more closely identified with a single decision than Blackmun was with this one. It was Blackmun and his Chambers that bore the brunt of anti-abortion invective from January 22, 1973, practically until the day he died. Even press and wire service reports in 2006 about the death of his wife Dorothy almost invariably identified her as the surviving spouse of the man who had spoken for the Court in the landmark abortion ruling.[81]

Second, aside from the opinions he authored and the decisions in which he participated, Blackmun left abundant manuscript sources that are now available in the Manuscript Division of the Library of Congress. The Blackmun collection fills 1,576 cartons, more than enough to tempt and fully to occupy any researcher, and more than enough to dwarf the archives of most other former members of the Court. It is fair to say that Blackmun was a judicial pack rat. His instructions to staff apparently were to save every scrap of paper that came into his Chambers.

And the Blackmun papers include more than scraps. There is the diary that he began keeping in 1919 when he was eleven, and which he continued for nearly twenty years; his analyses of cases dictated prior to oral argument; and exchanges with his clerks, with whom he usually had a close mentoring relationship, and with the other Justices. Given such generous quantities of primary sources, one suspects that Yarbrough's will not be the last book on Blackmun.

Third, the pattern of Blackmun's Court years presents questions any scholar would want to probe. Among the few concerns raised about him at the time of his confirmation was whether he could maintain sufficient independence from Chief Justice Burger, whom he had known since boyhood in Minnesota and who had been instrumental in his appointment to the Eighth Circuit and even possibly to the Supreme Court. Most students of this period agree that Nixon looked for nominees he thought would halt and possibly roll back the liberal activism of the Warren Court. Indeed, Blackmun's early voting tendency to align himself with the Chief Justice, particularly in criminal-justice cases, prompted some law clerks and journalists to refer to Burger and Blackmun together as the "Minnesota Twins"[82] and to Blackmun as "Hip Pocket Harry."[83] By the time of his retirement, however, he was voting reliably on many questions with the liberal wing of the Bench. This was perhaps most pronounced with respect to capital punishment. "For capital punishment lawyers," wrote Michael Meltsner of the Legal Defense Fund soon after Blackmun's appointment, "he was a disaster."[84] For those engaged in the courtroom campaign against the death penalty, neither Blackmun's record as an appeals-court judge nor his votes in Supreme Court decisions such as *Furman v. Georgia*[85] and *Gregg v. Georgia*[86] were good news. Yet in the 1992–1993 Term, Blackmun voted to uphold the claim of the petitioner against the government on all seven occasion in which the Court issued full opinions in cases involving the death penalty. What was implicit in Blackmun's thinking in 1992 became explicit in 1994. In a dissent from the Court's unsigned order in *Callins v. Collins*,[87] denying review in a capital case, Blackmun forthrightly declared that the death penalty "remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . From this day forward, I no longer shall tinker with the machinery of death."[88] Although Blackmun never adopted the per se rejection of the constitutionality of capital punishment, as had Justices William Brennan and Marshall in *Furman* and *Gregg*, his voting record in capital cases after the mid-1980s matched theirs. His early propensity to vote for the state in death-penalty cases vanished. A comparison of his later years with his first seven years reveals a shift of 180 degrees in capital cases. He became an advocate for those on whom the arm of government weighed most heavily.

Were shifts like those manifested in capital cases the result of ideological drift? Was Blackmun changing? Was he being unduly influenced by Justice Brennan or by law clerks who enthusiastically embraced judicial protection of civil liberties and civil rights? Had Blackmun been trying to prove that he was no longer Hip Pocket Harry? At retirement, Blackmun insisted that the Court and the issues, not he, had changed. Yarbrough's view is that Blackmun, like all Justices, did undergo change once on the Bench, but he finds considerable evidence "that he did not change nearly so much as the Court and the issues changed."[89] Instead, the author believes that Blackmun's judicial record was "remarkably consistent" over time.[90] Much of what appeared to be a shift to the ideological left and a growing empathy for outsiders and the downtrodden (hence the significance of the book's subtitle) was present from the beginning "and arguably flowed from his own feeling of inadequacy and self-doubt, with early apparent deviations from that central theme of his career explainable by the circumstances of particular early cases, rather than as a reflection of a

marked change in his later jurisprudence."[91] In this connection, what the reader does not find in the book is sufficient attention to what was frequently a government-friendly posture in Fourth Amendment cases, particularly those involving automobile searches. For example, Blackmun's dissenting position in *Arkansas v. Sanders*[92] effectively became the Court's position, thanks to the majority opinion Blackmun filed in *California v. Acevedo*.[93]

Yarbrough's general thesis is that Blackmun's intriguing record as a Justice was a product of his experiences as a child and teenager, that throughout his life he "appeared to see himself as an outsider, as someone who did not belong. . . . Family tragedies and growing up in humble surroundings with a loving but melancholy mother and a father who seemed destined to failure would not have inspired confidence in the future Justice whatever his academic successes. Nor would the intimidating atmosphere of Cambridge have been any comfort to a poor Midwestern boy surrounded by children of privilege."[94] Despite his accumulation of honors at Harvard, a prestigious law-firm partnership, a decade as counsel for the Mayo Clinic, service on the Eighth Circuit, and elevation to the Supreme Court, "Blackmun's deep-seated feelings of insecurity and self-doubt" persisted and were probably the source of the humility and humbleness he displayed throughout his professional life. After being criticized in 1970 by Justice Hugo Black, whom he admired greatly, for taking too long in turning out an opinion, Blackmun began delegating "virtually all opinion drafting to his clerks—confident, one suspects, that they would do a better job of the task than he could ever have hoped to do. From that point . . . he spent hundreds of hours each term cloistered in the Justices' library, painstakingly checking his clerks' citations and closely monitoring their drafts, ever alert to their grammatical and spelling errors—while they largely sculpted the substance of his jurisprudence."[95] These same self-doubts "probably also contributed significantly to his well-deserved reputation as champion of life's underdogs."[96] "By striking blows for society's relatively dispossessed," Yarbrough concludes, "the justice was perhaps also able to do battle with his own demons." Thus, his unsuccessful vote on behalf of "Poor Joshua" in *DeShaney v. Winnebago County*[97] "was in a real sense a blow for 'Poor Harry.'"[98] Nonetheless, the author believes that suggesting "that Justice Blackmun's judicial tenure constituted a sort of continuing psychological therapy in no way diminishes the tremendous courage and resolve he displayed on the high bench. . . . Throughout his life, there was a decidedly stubborn streak in the slight, bespectacled boy who defiantly wrote his parents from Harvard, 'We will show them,' and the man who refused to be dominated by Warren Burger or intimidated by detractors."[99]

Many of the cases in which Blackmun participated that are highlighted in Yarbrough's book illustrate the ongoing tension in American constitutionalism between fundamental law and popular sovereignty. Probably nowhere has that tension been more pronounced than with respect to race, a point that is amply demonstrated by **The Day Freedom Died** by Charles Lane, editorial writer for the *Washington Post*.[100] His book is a meticulously researched, riveting, and fast-paced case study of *United States v. Cruikshank*[101] and should appeal to anyone interested in the Court, the Reconstruction era, Louisiana history, and/or racial justice. The chronicle that unfolds is not a happy story; indeed, it is a grim narrative, but it is a story that should be more widely known than it is.[102]

The Cruikshank case sprang from prosecutions under the Enforcement Act of 1870,[103] which Congress had passed and which President Ulysses S. Grant had signed to combat white-led terrorism against the newly freed population in the states of the former Confederacy by providing federal criminal penalties for violations of voting and other constitutional rights. The prosecutions followed

Charles Lane's new book *The Day Freedom Died* examines the prosecutions that followed the Colfax massacre, one of the bloodiest and most vivid examples of race-inspired violence in the United States after the Civil War. The carnage erupted several months after a disputed statewide election in Louisiana in 1872.

the Colfax massacre, one of the bloodiest and most vivid examples of race-inspired violence in the United States after the Civil War. The carnage erupted several months after a disputed statewide election in Louisiana in November 1872. More so perhaps than in other Southern states, politics in Louisiana during Reconstruction was in turmoil, as various factions vied for domination. African Americans aligned with the Republicans, who represented the party of Reconstruction, while whites aligned with Democrats or with elements of a Republican offshoot that in Louisiana were known as Fusionists (Fusionists paralleled the Liberal Republicans[104] at the national level). Because the November election left different groups asserting legitimacy, opposing factions then laid claim to parish (county) offices across the state. This volatile political mixture exploded in the village of Colfax in Grant Parrish on Easter Sunday, April 13, 1873. A posse composed of black men authorized by the state's Republican governor occupied the courthouse. Whites stormed and then torched the building, killing some number of black men as they fled; others were rounded up later and shot. The actual number of casualties, Lane reports, has proved "elusive."[105] He sets the best minimum estimate at sixty-two, with the best maximum estimate being eighty-one.[106]

Led by the extraordinary efforts of U.S. Attorney James Beckwith—whose wife, the reader learns, was a published novelist[107]—the Justice Department[108] sought to indict more than 100 whites under the Enforcement Act, section six of which prohibited the banding together or conspiring of persons "with the intent to violate any provision of this Act, or ... to prevent or hinder [an individual's] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[109] Eventually—and only with the help of U.S. Marshals and federal troops—eight whites, including William Cruikshank, were brought to trial, on charges that they had conspired to deprive two citizens "of African descent and persons of color" of a number of rights, all of which were secured to them "by the

constitution and laws of the United States."[110] For Beckwith, what was at stake "was nothing less than the true meaning of the Civil War."[111]

At the trial in federal circuit court in New Orleans, Justice Joseph Bradley sat with Judge (later Justice) William B. Woods, but the two eventually disagreed over the validity of the indictments in ruling on a defense motion in arrest of judgment.[112] Woods saw ample federal authority; Bradley did not. While the Fifteenth Amendment admittedly created a right to be free from racial discrimination in voting and provided for congressional enforcement of this right, the indictments in the Colfax killings were unauthorized, the former believed, because neither state action nor racial basis for the attack was shown. Because of the division between Bradley and Woods, the case moved to the Supreme Court on certification. Otherwise, the High Court at this time would have had no appellate jurisdiction over an ordinary federal criminal case.

For the full Court—with Justice Nathan Clifford concurring on quite different grounds—Chief Justice Morrison Waite adopted Bradley's view of the case, with its very narrow view of federal power.[113] To grasp Waite's opinion, however, it is helpful to recall the Supreme Court's decision in the *Slaughterhouse Cases*,[114] which, paradoxically, had come down on the day after the tragic events at Colfax had transpired and which ultimately proved to be an insurmountable barrier for the government's case.

In that 1873 litigation, butchers in the New Orleans area had challenged a state-created slaughtering monopoly on grounds that the statute violated the Fourteenth Amendment (as the argument was directed, principally its Privileges and Immunities Clause), which had been ratified in 1868.[115] Rejecting their contention, Justice Samuel Miller insisted for the five-Justice majority that any liberties claimed by the butchers—such as a right to pursue a lawful calling against interference by a state government—derived from state, not national, citizenship and so fell outside the protection of the amendment. To read the Constitution more generously would make the Court "a perpetual censor upon all legislation of the States" and "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[116] It was this opinion by Justice Miller that carried the day in the Colfax case.

"To bring a case within the operation of" the Enforcement Act, Waite explained in an opinion that reached almost 5,000 words, "it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States."[117] So, when the indictments read that the defendants had hindered others in their right peaceably to assemble, Waite was quick to point out that the First Amendment secured that right against infringement by Congress, but that it did not create the right. "For their protection in its enjoyment, . . . the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."[118] Because the rights claimed to have been violated did not inhere in national citizenship, they lay outside the amendment's, and therefore the statute's, protection. Consistent with the doctrine laid down in the *Slaughterhouse Cases*, Waite concluded that the Reconstruction amendments had not given the national government a new responsibility in protecting those rights. Nor was there sufficient basis to charge the Colfax defendants with interfering with the right to vote. According to Waite, "the right of suffrage is not a necessary attribute of national citizenship[, but] exemption from discrimination in the exercise of that right on account of race . . . is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution; but the last has been."[119] Implicit was a sharp distinction that Waite drew between private

action that was under *state* control and state action in violation of federally protected rights that was under *national* control. The Colfax mob lay under the former's jurisdiction, not the latter's. Because the indictments did not rest on racially motivated conduct, whatever had occurred in Colfax did not interfere with a right protected by the national government. "We may suspect that race was the cause of the hostility; but it is not so averred."[120] The majority would not infer even that that seemed plainly apparent. Yet, without a racial component, one supposes that the killings in Colfax would never have occurred.

Lane finds it amazing that not once did Waite "mention the fact that dozens of freedmen had been killed at Colfax. ... There was nothing about the burning courthouse; ... not a word about the way the white men marched their colored prisoners two by two, after dark."[121] The Republican and largely Lincoln-appointed majority on the Court had apparently become disenchanted with Reconstruction, as had the Northern press, which generally gave Waite's opinion "favorable reviews."[122]

The effects of the decision extended well beyond a reversal of the convictions in the case. While the Enforcement Act had not been invalidated, and while more carefully drawn indictments were certainly possible, the decision was surely demoralizing for federal prosecutors across the South. The conviction rate for prosecutions brought under the Enforcement Act had already dropped sharply, from about seventy-four percent in actions brought in 1870 to less than ten percent in 1874 and after.[123] These figures, coupled with a growing local hostility to prosecutions, made indictments hard to secure, even as violations were on the rise. Practically, then, the 1870 Act had become nearly a dead letter even by the time *Cruikshank* was decided.[124] The decision could only encourage racially inspired violence to keep former slaves politically powerless. As the author concludes, "Reconstruction was over."[125] Indeed, the timing of the Cruikshank decision was significant. The case came down on the eve of the Compromise of 1877, which resulted in a withdrawal of federal troops from the previously occupied Southern states.

Lane's book is a stunning reminder that the tension between fundamental law and popular sovereignty that McCloskey highlighted almost fifty years ago depends on a delicate balance that was hardly secured in 1787 but has remained very much an unfinished work. The reader is left reflecting on those supports essential for constitutional democracy that failed so completely on that Sunday morning in 1873.

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

ABRAHAM, HENRY J. **Justices, Presidents, and Senators**, 5th ed. (Lanham, Md: Rowman & Littlefield, 2008). Pp. xiii, 238. ISBN: 0-7425-5895-9. Paper.

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ENDNOTES

[1]Robert G. McCloskey, **The American Supreme Court** (1960). McCloskey died in 1969. Since 1994, updating of the book has been in the hands of Sanford Levinson.

[2]Andrew L. Kaufman, Book Review, 74 *Harvard Law Review* 1476, 1476 (1961).

[3]McCloskey (1994), 7.

[4]*Id.*, 9.

[5]Robert H. Jackson, **The Struggle for Judicial Supremacy** (1941).

[6]Felix Frankfurter, "Mr. Justice Jackson," 68 *Harvard Law Review* 637, 639 (1955).

[7]Jackson, **Struggle for Judicial Supremacy**, 311.

[8]*Id.*, viii.

[9]Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, **The Supreme Court: An Essential History** (2007) (hereafter cited as Hoffer, Hoffer, and Hull.)

[10]*Id.*, 1–2.

[11]Emphasis added.

[12]*Id.*, 2.

[13]Benjamin N. Cardozo, **The Nature of the Judicial Process** (1921), 168.

[14]Felix Frankfurter, "Some Observations on the Nature of the Judicial Process of Supreme Court Litigation," 98 *Proceedings of the American Philosophical Society* 233, 237 (1954).

[15]*Scott v. Sandford*, 60 U.S. (19 Howard) 393, 426 (1857).

[16]*McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 415 (1819) (emphasis in the original).

[17]John Edward Smith, **John Marshall: Definer of a Nation** (1996), 1.

[18]Hoffer, Hoffer, and Hull, 11.

[19]*Id.*, 358.

[20]*Id.*, 10.

[21]*Id.*, 136.

[22]2 U.S. (2 Dallas) 419 (1793).

[23]3 U.S. (3 Dallas) 386 (1798).

[24]542 U.S. 507 (2004).

[25]168 L.Ed. 2d 508 (2007).

[26]Stanton D. Krauss, "New Evidence That *Dred Scott* Was Wrong About Whether Free Blacks Could Count for the Purpose of Federal Diversity Jurisdiction," 37 *Connecticut Law Review* 25, 30 (2004).

[27]The authors seem incorrectly to attribute participation in *Elkay* to Wilson and "Richard Peters." Hoffer, Hoffer, and Hull, 49. That would have been improbable, since in 1793 Peters was a very recently confirmed judge on the U.S. District Court in Pennsylvania. Beside service as a state legislator and time in private practice, he had also been a member of the Continental Congress in 1782–1783.

[28]*Id.*, 49–50.

[29]*Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[30]William G. Ross, **The Chief Justiceship of Charles Evans Hughes, 1930–1941** (2007), 243.

[31]Hoffer, Hoffer, and Hull, 264.

[32]312 U.S. 100 (1941).

[33]317 U.S. 111 (1942).

[34]304 U.S. 144, 152 (1938).

[35]Lewis F. Powell, Jr., "*Carolene Products* Revisited," 82 *Columbia Law Review* 1087, 1087 (1982).

[36]Hoffer, Hoffer, and Hull, 278.

[37]312 U.S. 52, 68 (1941).

[38]Henry J. Abraham, **Justices and Presidents: A History of U.S. Supreme Court Appointments from Washington to Bush II** (5th ed., 2008) (hereafter cited as Abraham). Previous editions appeared in 1985, 1974, and 1992. The early editions were entitled **Justices and Presidents.**

[39]Sadly, a defect of the first and successive editions remains in the most recent: The book lacks a proper index. An index of names follows an index of cases, but the former is literally only an index of names and nothing else. For example, there are nineteen page references given for Justice Antonin Scalia, but the list points the reader only to pages on which Justice Scalia's name appears. There is nothing in the index to indicate whether the particular page numbers refer to biographical data, appointment politics, jurisprudence, or his position in certain judicial decisions. In short, the index is singularly unhelpful because of the inefficient way in which it is organized.

[40]Abraham, 4.

[41]Quoted in *id.*, 3. Justice O'Connor's comment was made during an address at the American Law Institute on May 19, 1983.

[42]Abraham, 317.

[43]*Id.*, 326.

[44]Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (8th ed., 1987), 10.

[45]Albert Blaustein and Roy Mersky, **The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States** (1978), 50–51, quoted in Abraham, 6.

[46]Abraham, 7.

[47]*Id.*, 7.

[48]*Id.*, 8.

[49]John A. Maltese, **The Selling of Supreme Court Nominees** (1995), 36.

[50]Abraham, 109.

[51]*Id.*

[52]Christine L. Nemacheck, **Strategic Selection** (2007) (hereafter cited as Nemacheck).

[53]*Id.*, 14.

[54]To her credit, Nemacheck enlivens her analysis by including as an appendix a series of such shortlists for each nomination. *Id.*, 147–55.

[55]*Id.*, 14.

[56]Other Presidents—namely, Jackson and Lincoln—have benefited from congressional creativity when increases were made in the size of the Supreme Court.

[57] *Id.*, 17–18.
[58] *Id.*, 30.
[59] *Id.*, 33.
[60] *Id.*, 31.
[61] Party control matters, not just in influencing the final tally on a confirmation vote, but at the committee hearing stage as well, in terms of how a nominee is portrayed to the nation.
[62] Felix Frankfurter, "The Supreme Court in the Mirror of Justices," 105 *University of Pennsylvania Law Review*, 781, 795 (1957).
[63] Nemacheck, 166, n. 1.
[64] *Id.*, 131.
[65] *Id.*, 106.
[66] *Id.*
[67] *Id.*, 105.
[68] *Id.*, 111.
[69] Frankfurter, "The Supreme Court in the Mirror of Justices," at 795. Ironically, according to Nemacheck, Senator Borah was on the shortlist to fill Justice Holmes' seat. Nemacheck, 148.
[70] Nemacheck, 34.
[71] *Id.*, 61.
[72] *Id.*, 112.
[73] *Id.*, 41.
[74] *See* William Lambert, "Fortas of the Supreme Court: A Question of Ethics," *Life* (May 9, 1969), 32.
[75] Abraham, 12, quoting *Congressional Record*, 91st Cong., 2d session, vol. 116, 1970, 7498.
[76] Eisenhower's successors, Presidents John Kennedy and Lyndon Johnson, followed the practice of most of their predecessors by overwhelmingly appointing members of their political party to the federal courts. The Democratic percentage for Kennedy and Johnson were ninety-one percent and ninty-five percent respectively. D. Grier Stephenson, Jr., *et al.*, **American Government** (2d ed., 1992), 542. Moreover, Minnesota's Senators during the Kennedy and Johnson administrations—Hubert Humphrey, Eugene McCarthy, and Walter Mondale—were all Democrats. Had Eisenhower not appointed Blackmun to the Eighth Circuit, the combination of two successive Democratic Presidents and Democratic Senators from Blackmun's home state would have been fatal to any aspirations the Republican Blackmun might have harbored for a federal judgeship in the 1960s. Furthermore, since Blackmun was sixty years old when Nixon was elected President in 1968, he probably would not have been considered for a vacancy on the district or appeals court benches and so would have had no chance to acquire even a modicum of judicial experience by the time the Haynsworth and Carswell nominations failed in the Senate.
[77] Wanda S. Martinson, "My Twenty-Five Years with Old Number Three," 99 *Columbia Law Review* 1405, 1406 (1999). According to his secretary, Ms. Martinson, Blackmun claimed that the moniker served to "keep him in his place." *Id.*, 1407.
[78] Tinsley E. Yarbrough, **Harry A. Blackmun: The Outsider Justice** (2008) (hereafter cited as Yarbrough).
[79] For example, among other studies by Yarbrough, see **Judicial Enigma: The First Justice Harlan** (1995), **John Marshall Harlan: Great Dissenter of the Warren Court** (1992), and **David Hackett Souter: Traditional Republican on the Rehnquist Court** (2005).
[80] 410 U.S. 113 (1973).
[81] Yarbrough, 344.
[82] *Id.*, 169.
[83] Jeffrey B. King, Comment, "Now Turn to the Left," 33 *Houston Law Review*, 277, 278 (1996).
[84] Michael Meltsner, **Cruel and Unusual** (1973), 197.
[85] 408 U.S. 238 (1972).
[86] 428 U.S. 153 (1976).
[87] 510 U.S. 1141 (1994).
[88] 510 U.S. at 1145 (Blackmun, J., dissenting).
[89] Yarbrough, xii.
[90] *Id.*, xiii.
[91] *Id.*, xiii.
[92] 442 U.S. 753 (1979).
[93] 500 U.S. 565 (1991).
[94] Yarbrough, 346.
[95] *Id.*
[96] *Id.*, 347.
[97] 489 U.S. 189 (1989). In this case, Blackmun dissented from the majority's holding that federal courts had no authority to intervene in a case challenging the failure of social workers to protect a young boy named Joshua from an abusive father. *See* 489 U.S. at 213 (Blackmun, J., dissenting).
[98] Yarbrough, 348.
[99] *Id.*, 348.
[100] Charles Lane, **The Day Freedom Died** (2008) (hereafter cited as Lane).
[101] 92 U.S. 542 (1876).
[102] References to the event are missing even in unlikely places. For example, see Paul S. Boyer, ed. **The Oxford Companion to United States History** (2001), the index of which contains no mention of either the Colfax massacre or the *Cruikshank* case.
[103] Act of May 31, 1870, 16 Stat. 141.
[104] Liberal Republicans nominated Horace Greeley in 1872 to oppose the reelection of Ulysses Grant. Greeley was the Democratic nominee in 1872 as well.
[105] Lane, 265.
[106] *Id.*, 266.
[107] Mrs. J. R. Beckwith, **The Winthrops** (1864).
[108] Although the office of Attorney General dated from the Washington administration, the Department of Justice, with authority over all federal civil and criminal cases, came into being only in 1870, partly for the purpose of

putting the Enforcement Act and related post–Civil War legislation into effect. Lane, 4.

[109]Quoted in *U.S. v. Cruikshank*, 92 U.S. 542, 548 (1876).

[110]92 U.S. at 548.

[111]Lane, 113.

[112]Woods actually presided at the trial; Bradley was absent for much of the time. Lane, 197. At the end of a second trial that followed a mistrial, the jury found three of the Colfax defendants guilty and five not guilty. *Id.*, 203.

[113]Cruikshank also profited from effective advocates. Former Justice John Archibald Campbell, whose arguments as counsel on behalf of the butchers for increased federal power had been unpersuasive in the *Slaughterhouse Cases*, was listed among those filing briefs for Cruikshank. Counsel for oral argument in the Supreme Court included Reverdy Johnson, former U.S. Senator from Maryland, who had argued and prevailed in *Dred Scott* in 1857, and David Dudley Field, one of the most highly respected legal minds in the country, who was also a brother of sitting Justice Stephen J. Field. Lane notes that ethical norms of the day allowed Field to take part even though a member of his family was involved, just as the norms allowed Justice Bradley to sit in judgment on the ruling of the circuit court where he had been a member of the panel. *Id.*, 236.

[114]83 U.S. (16 Wallace) 36 (1873).

[115]The second sentence of section 1 of the Fourteenth Amendment declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[116]83 U.S. at 78.

[117]92 U.S. at 549.

[118]92 U.S. at 551.

[119]92 U.S. at 556.

[120]92 U.S. at 556.

[121]Lane, 246.

[122]*Id.*, 247.

[123]Homer S. Cummings and Carl McFarland, **Federal Justice: Chapters in the History of Justice and the Federal Executive** (1937), 238.

[124]Everette Swinney, "Enforcing the Fifteenth Amendment, 1870–1877," 28 *Journal of Southern History* 202, 217–218 (1962).

[125]Lane, 249.

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