

Introduction

Melvin I. Urofsky

The world of American constitutional history is, on the one hand, vast; it covers everything from the sources that the Founders knew and consulted in drafting the Constitution: the colonial experiences in self-government, the debates over ratification, the decisions of the Supreme Court, and the economic and political events of the times that shaped our constitutional heritage.

On the other hand, it is narrow, in that there are a finite number of practitioners, and nearly everyone knows everyone else in the field. The annual meeting of the American Society for Legal History is one of the smallest of professional meetings, attended by 200 or 250 men and women, most of whom know each other on a first name basis.

In some ways this makes the work of your editorial board much simpler, because when we get a piece from Christopher Waldrep or a Paul Kens, we know the person, we know their reputation, and more often than not we have been involved with them in one scholarly enterprise or another. It also made it much easier for me when I first took over the editorship of this journal to be able to tap men and women

I knew were working on various aspects of Supreme Court History and ask them to contribute articles. That relationship has been a strength of the *Journal* for many years now.

In this issue three articles come from established scholars. Chris Waldrep and Paul Kens have long been among our leading scholars of nineteenth-century legal history, and both are now working on surveys of the post-Civil War landscape. Professor Waldrep looks at how one of the major figures of this era, Joseph Bradley, tried to deal with the Privileges and Immunities Clause of the Fourteenth Amendment, and the impact his jurisprudence would have on future interpretation of that clause.

Paul Kens is familiar to readers of the *Journal* as editor of the autobiographical writings of Justice Stephen J. Field. Given the exposés of corruption in high finance that we have been reading about for the past year or so, we can drop back a century and a half to look at one of the great scandals of the nineteenth century, the *Crédit Mobilier* scheme, which before it had run its course involved millions of dollars and implicated dozens of

government figures. Professor Kens looks at an area that usually escapes the conventional textbook treatment, namely, how the scandal involved the Supreme Court.

George Rutherglen was one of my teachers at the University of Virginia Law School more than a quarter-century ago, and I am delighted that he thought about sending his note to the *Journal*. Professor Rutherglen was working on some civil rights jurisprudence when he noticed an anomaly in the text of the *Civil Rights Cases* (1883) that he thought might be of interest to Court scholars. It is, and we are delighted to have him in our pages.

Although the season so far has not been kind to the Washington Nationals, baseball fans in the nation's capital always hope. For constitutional scholars, baseball also presents an opportunity for story-telling, since one of the on-going conversations involves why the Supreme Court allowed organized baseball an exemption from the antitrust laws. We have no less than the newest member of the high court, Justice Samuel Alito, contributing to this discussion in the lecture he gave to the Society last spring.

Today when someone says "Justice Roberts," we assume that he or she is referring to Chief Justice John Roberts. But for the

1930s and early 1940s, the person in question would have been Associate Justice Owen Joseph Roberts, who played a key role in the Court-packing crisis of 1937, and whom many believed changed his vote because of it. Why Roberts acted as he did has long fascinated scholars; nearly a half-century ago I wrote a paper in one of my undergraduate history classes at Columbia trying to figure this out. I therefore have a historical reason for welcoming the latest effort by Burt Solomon at untangling the puzzle.

A few years ago the Society sponsored a lecture series on the great litigators before the Court. Obviously, we could not cover all of them in just five events, and since then we have had correspondents suggesting others who might also have been included. In this issue we are pleased to have an article on one of the great lawyers of the twentieth century, Edward Bennett Williams, by Connor Mullin. We assume that the nominations, and hopefully some articles as well, will continue to come in to us.

Finally, but certainly not least, Grier Stephenson brings us up to date on some of the recent literature on the Court that will interest those of us who pay close attention to its history.

As always, a feast to enjoy!

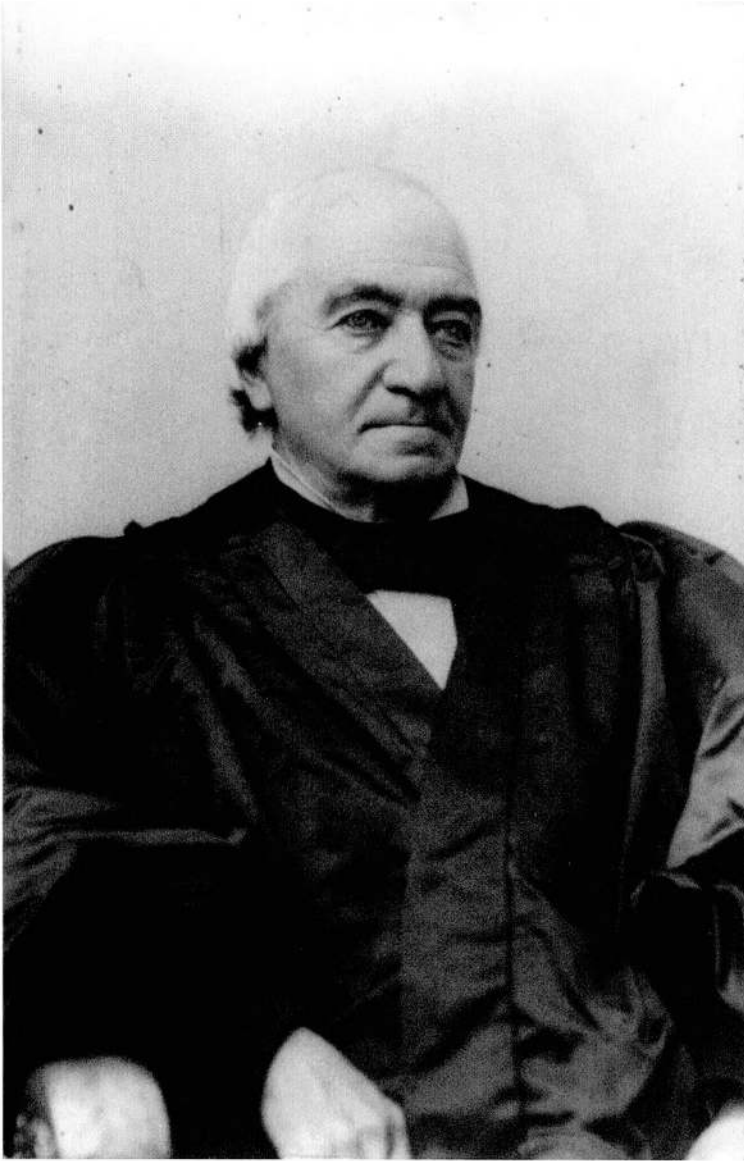
Joseph P. Bradley's Journey: The Meaning of Privileges and Immunities

CHRISTOPHER WALDREP

Justice Joseph P. Bradley of New Jersey will forever be remembered as the judge who in 1883 cruelly scorned black rights in the *Civil Rights Cases*.¹ Yet Bradley's position that year marked the end of a journey that had started in a quite different place. Thirteen years before, when he first joined the Court, Bradley had read Fourteenth Amendment protections of citizens' rights expansively, believing that "it is possible that those who framed the [Fourteenth Amendment] were not themselves aware of the far reaching character of its terms." In 1870 and 1871, Bradley wrote that the Fourteenth Amendment's Privileges and Immunities Clause reached "social evils . . . never before prohibited" and represented a commitment to "*fundamental*" or "sacred" rights of citizenship that stood outside the political process and "cannot be abridged by any state."² By 1883, however, Bradley had turned away from such views. In the *Civil Rights Cases*, he wrote that nothing in the Thirteenth or Fourteenth Amendments countenanced a law against segregation. Blacks, he said, must take "the rank of mere citizen" and cease "to be the special favorite of the laws."³

President Ulysses S. Grant nominated Bradley and William Strong to the Supreme Court on February 7, 1870, the day Chief Justice Salmon P. Chase ruled the Legal Tender Act unconstitutional in *Hepburn v. Griswold*.⁴ Though a Republican and adamantly opposed to slavery, Chase agreed with Democratic critics of the expanded national authority that Congress's power should be curbed and Jeffersonian principles of small government

reasserted. Chase's antebellum legal practice had largely consisted of fights against such federal laws as the Fugitive Slave Acts and for the states' right to protect their citizens from a wrong-headed nationalism bent on invading the rights of black Americans. Even on those occasions when Chase had advocated national power, as when he urged Congress to abolish the slave trade and end slavery in the District of Columbia,



President Ulysses Grant appointed Joseph P. Bradley (pictured) to the Supreme Court on the same day in 1870 that the Court held the Legal Tender Act unconstitutional. Grant hoped that Bradley would vote in favor of legal tender should the issue arise again.

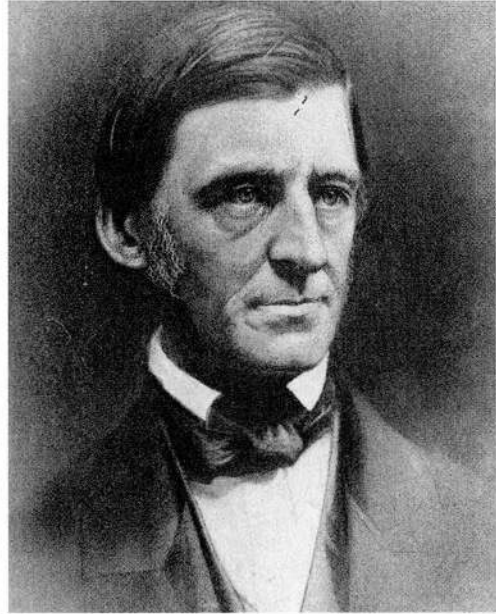
he did so on strict constructionist terms. The federal government had only enumerated powers, he said, and slavery was not one of them.⁵

Grant had every reason to believe Bradley more committed to national power than Chase. Bradley's opinions were "generally known" through speeches he had been giving for two decades attacking states' rights and favoring national power.⁶ In those speeches, Bradley narrated American history as a long strug-

gle for national strength against decentralizing forces. While the defenders of states' rights pointed to the Revolutionary period as proof that state sovereignty had a long history, legitimately emerging from the colonies' conflict with England, Bradley argued that the English had tried to sabotage the colonists' national aspirations by deliberately planting many independent societies on the North American continent. The British had engineered a diversity of interests in North America,

intending to make each colony dependent on the mother country. According to Bradley, this created an obstacle for patriotic Americans to overcome. He pointed out that strong jealousies did arise between the colonies, rivalries that continued after independence. Those attending the 1787 Constitutional Convention, he said, had learned to fear the "infinite danger" of such "evils." The Constitution rejected British localism, Bradley believed, implying great powers for the government, "the most ample powers to preserve, protect, and defend itself." Nonetheless, some mistaken leaders contended that the federal government lacked the power to compel obedience from the states. Bradley condemned that as "a pestilent heresy." The U.S. government was supreme, he proclaimed, "in all respects national," with "unlimited powers of self preservation." "So thought every true hearted lover of his County," he continued, at least those with eyes "not blinded by a superstitious regard for the consideration and importance of the State Governments and the sacredness of state sovereignty."⁷ Grant's administration may have picked Bradley for the Court in hopes he would vote in favor of legal tender should the question arise again. Grant may also have had a grander ambition in mind for Bradley. He probably considered Bradley a more reliable vote than Chase on a whole host of constitutional principles favoring national power at a time when public support for the kind of centralized government authority Reconstruction needed had wavered.

Bradley joined the Court at a time when many Americans especially valued higher law ideals discovered through individual reflection. After watching white Southerners put allegiance to the Union up to a majority vote, Northerners experienced the bloody fruits of majority rule on Civil War battlefields. No one symbolized this new commitment to personal reflection more than Ralph Waldo Emerson. By 1870, he had become the icon for individualism, personal reflection, and a commitment to natural law over majority rule. Ac-



The ideas of Ralph Waldo Emerson (pictured)—individualism, personal reflection, and a commitment to natural law over majority rule—permeated American culture by the time Bradley was appointed to the Court.

ording to the best current scholarship, this should matter. As one recent writer explains, "Because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broadest social and political context of the times."⁸ By the end of the Civil War, elements of Emerson's thinking had become pervasive in American culture. As another scholar has observed, Emerson was "a veritable oracle, an American icon . . . recognized as a person whose vision helped to shape the destiny of his nation and the course of Western thought."⁹ If Justices necessarily follow the culture and the political environment they inhabit, then it is an irony that after the Civil War, important segments of the public believed true law could not be found by a majority vote or by following public opinion.

The Framers of the Fourteenth Amendment were all politicians, products of the political process. Nonetheless, after the Civil War they questioned the role politics should play in

determining rights. Roughly one-third of those voting for the Fourteenth Amendment in the House of Representatives—the only branch of the national government elected directly by the people in 1866—took no position other than voting; they made no speech revealing their position on rights. Rutherford B. Hayes, his biographers explain, had grown suspicious of political speechmaking while serving in the army.¹⁰ Of the two-thirds of House members that did make speeches, half made a political argument, saying that public opinion had shifted in favor of civil rights. James M. Ashley of Ohio exulted that a “great anti-slavery revolution . . . [had] swept over the country” which Congress had only to follow.¹¹ The final third of House members made a constitutional argument, several openly announcing that they intended to follow the Framers no matter what their constituents thought. Pennsylvanian William D. Kelley declared that he had “consulted no popular impulse . . . I have seated myself at the feet of the fathers of our country.”¹² This last group received sustenance from the universe of thought Emerson represented. While Emerson developed deep skepticism about the Bible, his faith in absolute truth never waned. Every individual must search for “the law of the soul,” a quest necessarily pursued without maps or markers, but one with a single destination nonetheless. He told one audience, “You cannot conceive yourself as existing . . . absolved from this law which you carry within you.” Some scholars have emphasized Emerson’s commitment to the potential inherent in the Declaration of Independence, but others—especially Judith Shklar—have observed that Emerson really struggled with democracy. His theory of greatness recognized that not all people had minds capable of finding higher law, a realization that clashed with his commitment to self-evident equality. In his darker moods (and Emerson could be quite moody), he had real contempt for the masses and condemned anyone relying on the brute force of numbers for truth. Just because most people favored some-

thing did not make it right, Emerson believed. He had a deep skepticism for the political process. Those people capable of finding truth did so alone, in private reflection. Truth did not emerge from the tumult of public debate.¹³

Emerson made a name for himself promoting universal truths higher than American law or even the U.S. Constitution, becoming a spokesperson for an American individualism so cosmopolitan that, according to one writer, it anticipated globalization. In the words of Gregg Crane, Emerson rejected “law as a tribal inheritance.” Unlike Daniel Webster, who believed the national identity produced justice, Emerson searched for ethical norms outside the United States, outside Christianity.¹⁴

So did Bradley. As a member of the Supreme Court, Bradley rode the Fifth Circuit, holding court across the South. On the borderlands between the United States and Mexico, he confronted unfamiliar legal systems, land disputes involving Spanish land grants, and law from Spain, Mexico and the United States—truly terra incognita for a New Jersey lawyer. Bradley labored over the unfamiliar principles, but he gloried in the work, delighting in the collision between cultural worlds. Bradley lived at a time when borderlands had effectively become “bordered lands,” but he could still sentimentalize the mingling of diverse traditions and look forward to a rejuvenation of law based on cultural exchange.¹⁵ Bradley certainly did not introduce foreign law into American jurisprudence, but in his most private moments, he really luxuriated in the work of understanding foreign legal concepts. “What a great country ours is,” Bradley exulted to his son, “lying at the breasts of so many traditions and grand histories, and making the milk of political wisdom from so many fountains.”¹⁶ Like other Supreme Court Justices, Bradley taught constitutional law to Washington, D.C. law students. In those classes, he said that the same “uniform and permanent principles” govern all law in every society, in any nation. For this reason, no person in any community need



When the *Slaughterhouse Cases* were tried in his circuit court, Alabama judge William Woods sat with Justice Bradley, who was riding circuit, to hear arguments. Woods (pictured) would go on to be appointed to the Supreme Court in 1881, sharing the Bench with Bradley for six years.

become learned in local law to live a peaceful life. Echoing Emerson, Bradley believed that individuals could look within themselves for transcendent legal values. "All he has to do is follow the dictates of his conscience and endeavor to do right." Law is not arbitrary but immutable, Bradley said, visible to anyone willing to "gaze profoundly into its depths" and gain that insight only available through "deep study and reflection." By this standard, all law comes from nature. All rights are natural.¹⁷

During his first tour of the Fifth Circuit, Bradley heard the case that would prove crucial to the Supreme Court's determination of civil rights after the Civil War. In 1869, Louisiana's Republican-dominated legislature passed a law centralizing all slaughtering operations in New Orleans in a single slaughterhouse. The numerous independent butchers hired John A. Campbell to argue that the Fourteenth Amendment's Privileges and Immunities Clause protected workers from onerous

state legislation. Campbell had a political purpose. A Democrat and a former Confederate, Campbell wanted to thwart Louisiana's Republican legislature and Reconstruction generally. Campbell's political motives initially repelled both Bradley and the circuit judge, William Woods, who sat with Bradley on the case. According to his opinion, Bradley recoiled from Campbell's manipulation of the Privileges and Immunities Clause on behalf of a bunch of ex-Confederate white men. "When the question was first presented," Bradley wrote, "our impressions were decidedly against the claim put forward by the plaintiffs." Bradley understood that Campbell and the New Orleans butchers intended their lawsuit as a strike against Reconstruction.¹⁸

Bradley and Woods nonetheless set aside their distaste for Campbell's motives and did what he asked. Bradley wrote that Campbell's suit "brings upon the question" of "whether the Fourteenth Amendment to the Constitution is intended to secure to the citizens of the United States of all classes merely equal rights; or whether it is intended to secure to them any absolute rights." Bradley and Woods answered that the Fourteenth Amendment secured rights from nature, rights absolute and not merely equal.¹⁹

When he initially read his opinion, Bradley dismissed the Civil Rights Act from consideration. He thought the Fourteenth Amendment more empowering:

As to the Civil Rights bill, we are clearly of the opinion that it does not apply; that it was intended merely to secure to citizens of every race and color the same civil rights and privileges as are enjoyed by white citizens; and not to enlarge or modify the rights or privileges of white citizens themselves. The Fourteenth Amendment is much broader in its terms, and must be examined with more attention and care.²⁰

That was what Bradley said on June 10, 1870. The next day he changed his mind and deleted

that passage from his opinion. It appears in the published report of the case, but in brackets and taken from Myra Bradwell's report on the case in the *Chicago Legal News*. On June 11, Bradley appended a note to his original opinion saying that he had spoken "somewhat hastily." On reflection, he decided that the Civil Rights Act had been written to reach the same object as the Fourteenth Amendment. The Civil Rights Act, he said, "must be construed as furnishing additional guarantees and remedies to secure" privileges and immunities.²¹

In finding that the Fourteenth Amendment increased the power of Congress to authorize judicial protection of rights, Bradley did not feel limited by the legislators' original intent. He thought it possible that the Framers of the Fourteenth Amendment did not understand the far-reaching nature of the language they chose to use. "It is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed." The Fourteenth Amendment took language from Article IV, giving it "a broader meaning" that extended "its protecting shield over those who were never thought of when it was conceived." The Fourteenth Amendment, Bradley wrote, "was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character." The result was that Congress now had power to reach "social evils" that had once been the states' exclusive domain. Congress could even furnish additional guarantees protecting citizens' Fourteenth Amendment rights.²²

The phrase "social evils" is arresting, particularly in light of Bradley's later declaration that he "modified" his views after "subsequent reflection so far as relates to the powers of Congress to pass laws for enforcing social equality between the races."²³ When white Southern slaveholders had written about their "social institutions," they meant slavery,

obviously, but also the racial ideologies and practices that underlay and authorized the "peculiar institution." At the outset of the Civil War, Jefferson Davis had denounced Northerners for proclaiming "the theory that all men are created free and equal" as "the basis of an attack upon [the South's] social institutions."²⁴ In his debates with Stephen Douglas, Abraham Lincoln denied that he intended to bring about political or social equality of the white and black races "in any way."²⁵ Lincoln had understood political equality as requiring, for example, that blacks be admitted to juries. As an example of social equality, he cited marriage: "I do not understand because I do not want a negro woman for a slave, that I must necessarily want her for a wife."²⁶ With such discourse so closely identifying slavery and racial practices as social, it strains credulity to suggest that when Bradley spoke of reaching "social evils," he meant something other than racial discrimination. But what kind of discrimination did he mean? At the moment when Bradley spoke of reaching "social evils," he did not favor throwing juries open to blacks, and the question of marriage was not at the forefront of public debate. The greatest social evil faced by blacks came in the form of whites' brutally effective racial violence. Bradley's statement that he had changed his mind about "social equality" came after whites had shifted their focus from one social evil to another, from racial violence to public accommodations.

Bradley did not say he thought the question of federal intervention against such "social evils" turned on the question of state action. The state-action doctrine was not an issue in the *Slaughterhouse Cases* because the Louisiana legislature had so obviously committed a state action by passing its butcher shop law. As a result, the limits Bradley envisioned on congressional power to reach social evils were not yet clear. In his private correspondence, Bradley acknowledged that both the Fourteenth and Fifteenth Amendments protected only against state action, not private conduct, but that does not necessarily mean

that he yet saw the state-action requirement as a serious barrier to federal intervention.²⁷

This became evident in 1870, after Alabama whites attacked a political gathering of black Republicans in Eutaw, Alabama, murdering an unknown number of persons. In Alabama, Judge Woods heard complaining witnesses and wrote a narrative of the affair in his own hand, accusing the whites of violating the Republicans' rights to free speech and assembly. Woods worried that the Supreme Court might object to such a prosecution, involving as it did no state action whatsoever. Bradley assured Woods that he was on firm ground, because the state of Alabama had abandoned its responsibilities. "Suppose the state authorities are inactive," he asked Woods, "and will do nothing to punish the crime?" White men shooting into a political rally did not have the right to prevent persons from exercising the right of suffrage secured by the Fifteenth Amendment. This violated Section 4 of the 1870 Enforcement Act, which made it a crime for any person, "by force" to "hinder, delay, or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election."²⁸ Bradley added that the white gunmen also violated Section 6, which prohibited banding and confederating together

to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or the laws of the United States . . .²⁹

Bradley then pointed to Section 5, making it a crime for anyone to prevent someone from exercising the right of suffrage under the Fifteenth Amendment.³⁰

In March 1871, Bradley wrote that federal prosecutors did not even have to prove that violent racists *intended* to violate the Constitution. He summed up Woods' concerns this way: "You ask whether the breaking up of a peaceable political meeting by riot and mur-

der when committed simply for that purpose, without any definite intent to prevent the exercise of the right of suffrage, is a felony . . . in view of the 1st Amendment."³¹ As Bradley put it, the question was exactly what Congress had debated but not conclusively resolved: "where Congress is prohibited from *interfering with* a right by legislation, does that authorize Congress to *protect* that right by legislation?" Before the Fourteenth Amendment, Bradley told Woods, there was no question but that only the states could protect the people's rights. Bradley refined his question: "Does the XIVth Amendment in giving Congress power to enforce its provisions by appropriate legislation, make any alteration in this respect?"³²

The answer, Bradley said, was yes, because the Privileges and Immunities Clause "undoubtedly" included fundamental rights. For this, Bradley cited without comment a case that had repeatedly come up during congressional debates over the Privileges and Immunities Clause, *Corfield v. Coryell*.³³ Among the fundamental rights Congress had the power to protect, "I suppose we are safe in including those which [in the Constitution] are expressly secured to the people, either as against the action of the Federal Government or the State Governments."³⁴ And so, Bradley concluded, Congress "undoubtedly" had the right to protect such fundamental rights through appropriate legislation. If the states refused to protect their citizens' rights, then Congress could. In such a lawless environment, Bradley wrote, the law authorized federal prosecution, "and the law is within the legislative power of Congress."³⁵

The Eutaw rioters went on trial, and Woods laid out the government's theory of the case in his charge to the jury on January 13, 1872. Woods read sections of the 1870 Enforcement Act to the jury and told the jurors that the government pursued the murders, not from political motives, but simply because the rioters had violated the constitutional rights of private citizens. "This statute is the law of the land," he said, "and it is your duty and mine



When Alabama whites attacked a political gathering of black Republicans in Eutaw, Alabama in 1870, killing several of them, Woods accused the whites of violating the Republicans' rights to free speech and assembly. But Woods worried that the Supreme Court might object to such a prosecution on the ground that it did not involve a state action. Pictured are Eutaw sharecroppers.

... to enforce it." Woods emphasized that the law protected all races and all parties: "Its operation is equal." He continued,

It is a just and wholesome act, and designed to promote peace and order, to protect every man, whether lofty or lowly, rich or poor, learned or ignorant, who can say, "I am an American citizen," in the full enjoyment of all the privileges and immunities which are granted or secured to him by the Constitution of his country.³⁶

Woods explained to the jury that they had to find that the government had proven every element of the offense charged before they could return a guilty verdict. Woods said that in this case, there were only two elements the government had to prove. The law was a conspiracy statute, so the prosecutor first had to prove that two or more of the defendants had banded to-

gether, making an agreement to do an unlawful act. Second, the government had to prove that the defendants had conspired for "the purpose of preventing or hindering the free exercise and enjoyment of any right or privilege granted or secured him by the Constitution of the United States."³⁷

Woods spelled out for the jurors rights protected by the 1870 Enforcement Act that the Eutaw whites had attacked, including free speech, free assembly, and the right to bear arms:

I feel it my duty to say to you, that it is the right of an American citizen, whether he be black or white, to bear arms, provided he does so for his defense or for no unlawful purpose, and in a manner not forbidden by law.³⁸

Woods did not see the three rights he outlined for the jury as a definitive list; instead,

he articulated the rights relevant for this particular case. The point is that they all came from the Bill of Rights. After consulting with Bradley, Woods felt confident that the Fourteenth Amendment had incorporated the Bill of Rights.

What is most interesting in Woods' charge to the Eutaw riot jury was what he did *not* say. He never mentioned state action. There can be no proof that Bradley read or approved Woods' interpretation of his letters, but nor can there be doubt that Woods faithfully followed what he understood Bradley to be saying. In his January 3, 1871 letter to Woods, Bradley had summarized the Fourteenth Amendment in a way that emphasized its state action limitations: "By the 14th Amendment, *No State* shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the U.S." Bradley put the emphasis on "*No State*" himself. He did this as a way of discounting the problem of state action, suggesting that it posed no obstacle to federal prosecution of murdering whites. "But suppose the state authorities are inactive," he wrote. He then further discounted state action as a limitation. "Is not the case referred to one in which an offense *has* been offered to the sovereignty or jurisdiction of the United States?" Merely firing into a political meeting was not a federal crime, Bradley acknowledged. "That is only a private, municipal offence." The offenders acted in "an attempt by force, threats and violence to prevent citizens of a certain class from voting." That, Bradley believed, was a federal crime and one that required no state action to trigger a federal intervention. Accepting this logic, Woods saw no reason to bring up state action. For gunmen interfering with the federally protected right to vote, prosecutors need prove no state action to make their case.³⁹

Bradley's ideas about privileges and immunities encouraged not only Woods, but a biracial group of women organized to assert their right to vote in the District of Columbia. The women crowded into the registrar's office

at city hall, occupying the office for two hours, making speeches. They laid the groundwork to demand their rights in court. Their lawyers, A. G. Riddle and Francis Miller, intended to base their legal argument on the Fourteenth Amendment and especially on Bradley's *Slaughterhouse* circuit opinion. Riddle claimed voting was a natural right protected by the Fourteenth Amendment's Privileges and Immunities Clause. To support this position, Riddle relied on Bradley, including a lengthy excerpt from Bradley's circuit opinion in his brief. Riddle quoted Bradley as saying that the amendment attacked "social and political wrong." It reached "social evils" never before prohibited. The amendment bore a "broader meaning" and threw "its protecting shield" over those never thought of by its authors. "It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired," Bradley had said in soaring rhetoric that Riddle quoted. After he took Bradley's ideas to the Supreme Court of the District of Columbia, Riddle concluded with a flourish: "Thus stands the argument."

Riddle argued his case in 1871. Unfortunately for him, and for the women he represented, the District of Columbia supreme court did not render its decision until September 1873, after the U.S. Supreme Court had decided the *Slaughterhouse Cases* the previous April. Based on their reading of the *Slaughterhouse Cases*, the District of Columbia judges rejected Riddle's argument.⁴⁰

When Bradley's circuit opinion on the *Slaughterhouse Cases* reached the Supreme Court, his views collided with those held by Justice Samuel Miller, and the Iowan organized a five-man majority against Bradley's argument. Miller's opinion sustained the Republican-dominated Louisiana legislature, but he nonetheless attacked the central element in the Republicans' Reconstruction plan. Like Bradley, he understood that reconstructing power arrangements between the states and the federal government depended

on the Fourteenth Amendment's Privileges and Immunities Clause. Miller cited *Corfield v. Coryell* as well as other Court rulings that addressed the meaning of privileges and immunities, but he significantly narrowed the term's meaning, so much so that privileges and immunities ceased to have much constitutional significance. Bradley's intuition that that privileges and immunities might bring a host of natural rights under the care of the federal government came to naught.⁴¹

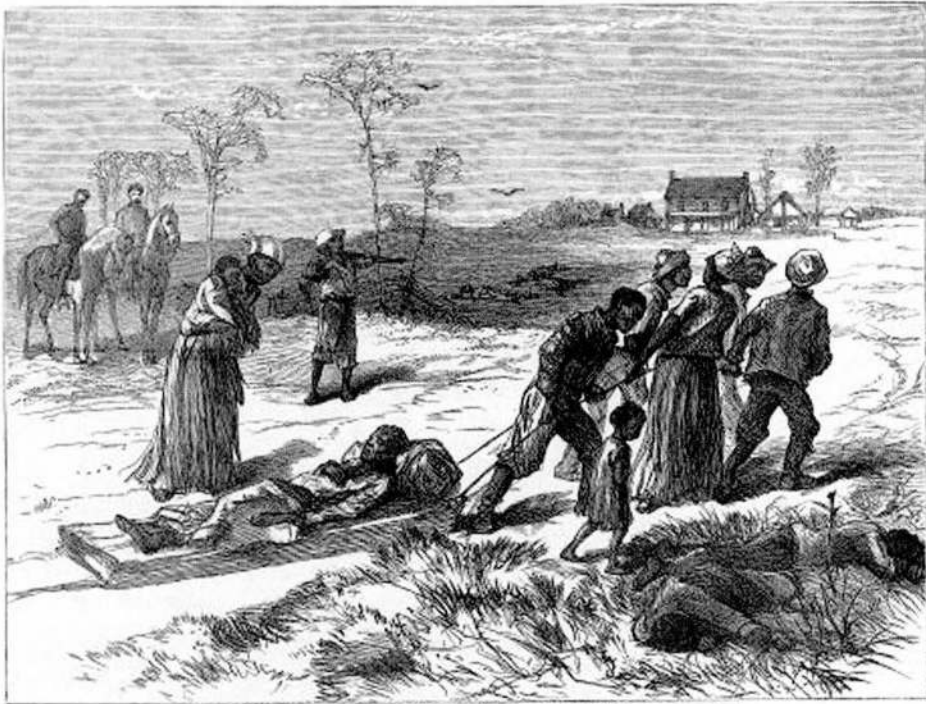
Miller correctly described *Corfield v. Coryell* as "the leading case" on privileges and immunities. But, while Bradley and many others understood *Corfield v. Coryell* generously as protecting many national rights, including the right to vote, Miller read it parsimoniously, as putting few rights under the care of Congress. Miller's biographer doubts he really put much stock in precedent, and his concern with managing public opinion is evident throughout the text of his decision. He wrote that founders of the country had disagreed over where to draw the line between federal and state authority, and that the question remained undecided.⁴² Miller appealed to public opinion while asserting the Court's role as a steadying influence. Public opinion, he said, fluctuated on this subject, but "we think it will be found that this court . . . has always held with a steady and an even hand the balance between State and Federal power." Miller trusted that the Court would continue that function.⁴³

Miller effectively neutralized the Privileges and Immunities Clause, rejecting Bradley's hope that it had placed citizens' natural rights under the protection of Congress. The public's response to his opinion measured its success, Miller believed. Miller also taught a law class, and he later told his students that his opinion won public sentiment "with great unanimity."⁴⁴

Bradley fought back with a vigorous dissenting opinion.⁴⁵ But his commitment to a broad reading of the Privileges and Immunities Clause wavered after his defeat in the *Slaughterhouse Cases*. Whereas he had ear-

lier stressed the Fourteenth Amendment's expansive qualities, after *Slaughterhouse* his private correspondence stressed its limits: "Has it not always been the fact, Bradley asked, that the Constitution implicitly conferred citizenship?" Bradley then asked, "And has any such power as that now claimed ever been asserted or pretended?" Bradley no longer worried about conflict between national and state jurisdictions. The rights Congress could protect had to be circumscribed, or Congress could legislate on any subject whatsoever. Bradley rejected this possibility because it would allow the federal government to duplicate state authority for all purposes, creating a structure with the states and the federal government performing the same tasks and assuming the same responsibilities. No sensible man would contemplate such a monstrosity, Bradley believed. "I do not think," Bradley continued, "that the rights, privileges and immunities of a citizen embrace all private rights."⁴⁶

In April 1874, while riding on circuit, Bradley returned to the question of privileges and immunities in *United States v. Cruikshank*.⁴⁷ William Cruikshank had joined a group of whites in an attack on African-American Republicans in Colfax, Grant Parish, Louisiana, murdering an unknown number of blacks. A jury convicted three of the whites under the same May 31, 1870 Enforcement Act Bradley had approved in 1871. Woods was still the circuit judge and must have drawn on his notes from the 1872 Eutaw riot case to craft his charge to this jury. Sentences and whole paragraphs reappeared exactly as he had stated them before. He again read from the 1870 Enforcement Act and again told jurors they had to accept it as the law of the land. He again stated that the law protected all citizens, "whether white or black." He again insisted politics had nothing to do with the prosecution. And he again acknowledged that the government had to prove every element of the offense before jurors could return a guilty verdict. This time, there were three such elements:



THE LOUISIANA MURDERS—GATHERING THE DEAD AND WOUNDED.—[SEE PAGE 195.]

While riding circuit, Bradley returned to the question of privileges and immunities in the 1874 case of *United States v. Cruikshank*. The case involved the massacre of African Americans by a group of whites who wanted to prevent them from voting.

1. There must be a banding or conspiring together of two or more of the accused persons named in the indictment.
2. This banding and conspiring must be with the intent to injure, oppress, threaten or intimidate Levi Nelson or Alexander Tillman.
3. This intention to injure, oppress, threaten or intimidate must be thereby specified in the several counts of the indictment; as, for instance, as stated in the first count, the purpose to hinder and prevent Nelson and Tillman in the right peaceably to assemble, as stated in the third count, the purpose to deprive Nelson and Tillman of their lives and liberty and person without due process of law.⁴⁸

Once again, state action was not an element the government had to prove, according to Woods. In contrast to his Eutaw riot

charge, though, this time Woods addressed the issue directly. He explained that the Fifth Amendment declared that no person should be held to a capital crime except upon indictment by a grand jury and that no person can be deprived of life without due process of law. The Fourteenth Amendment, Woods continued, said that no state shall deprive any person of life without due process of law. Louisiana's constitution likewise declared that prosecution shall be by indictment or information and that the accused shall be entitled to a speedy and public trial. The 1870 Enforcement Act declared that all persons shall have the right in every state to the same full and equal benefit of all laws as that enjoyed by white persons. Woods concluded:

These provisions of constitutional and statute law show that the right of due process of law where the life

or liberty of a citizen of the United States and of the State of Louisiana are involved is secured by the Constitution and laws of the United States.⁴⁹

The black victims of the Colfax massacre had a right to a trial if whites thought they had committed some crime. Woods said, "If the natural result of the conduct of the indicted persons in killing Tillman and attempting to kill Nelson was to deprive Nelson and Tillman of their constitutional and lawful right to a fair and impartial jury trial, then you are justified in holding that such was their intent" and finding them guilty.⁵⁰

When Woods delivered his charge to the jury, repeating key passages from his 1872 charge to the Eutaw riot jury, he spoke as though the Supreme Court had never decided the *Slaughterhouse Cases*. Cruikshank's lawyers responded by attacking the 1870 Enforcement Act Woods had endorsed as unconstitutional, "municipal in character, operating directly on the conduct of individuals."

Although Bradley had endorsed Woods' approach in 1871, he now ruled in favor of Cruikshank. He began by addressing an issue he had seen as central at least since 1871 and that Congress had vigorously debated in 1866: Did Congress have the power to enforce privileges and immunities? Bradley used *Prigg v. Pennsylvania*⁵¹ to say, "It seems to be firmly established by the unanimous opinion of the judges . . . that Congress has the power to enforce . . . every right and privilege given or guaranteed by the Constitution."⁵² That sounded expansive, but he actually limited federal protection of rights and privileges Congress chose to guard. The voters, through their representatives, could pick and choose rights and groups worthy of protection. Judges, Bradley now emphasized, could not find rights to protect, as he had said in 1871.

When he distinguished the rights protected by the states from those guarded by Congress, Bradley adopted the same states'-rights arguments he had once denounced, ar-

guments based on a history quite different from the one Bradley himself had once taught. Some rights and privileges derived from the mother country, "challenged and vindicated by centuries of stubborn resistance to arbitrary power," and belonged to all citizens as part of their birthright. These rights predated the Constitution. When the Constitution declared them, "it is understood that they are not created or conferred by the Constitution" but recognized as existing rights originally won by the states from the British. Bradley said that enforcement of these rights was therefore the job of each state, "as a part of its residuary sovereignty."⁵³

This would seem to leave the federal government with very few rights to protect, but Bradley refused to yield completely on the question of federal power. He singled out trial by jury as a federal right. Citizens had "a constitutional security against arbitrary and unjust legislation." If states proceeded against their citizens "without benefit of those time-honored forms of proceeding in open court and trial by jury," then the federal government could act. Congress could legislate, Bradley said, when states misbehaved. "The duty and power of enforcement take their inception from the moment that the state fails to comply with the duty enjoined." The manner of enforcing these rights depended on the character of the privilege and immunity in question. He concluded that "there can be no constitutional legislation of Congress for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the courts of the United States." Bradley agreed with the defense lawyers: Congress could not create a "municipal code" against ordinary crimes, such as murder.⁵⁴

Bradley had begun to move away from his original commitment to privileges and immunities, as documented in the private letters he wrote in 1871 and 1874 as well as in his *Slaughterhouse* opinions. In 1883, Bradley wrote the Court's infamous decision striking down the 1875 Civil Rights Act outlawing

segregated public accommodations. Fragments of Bradley's earlier thinking persisted on this new landscape. State action of every kind that impairs the privileges and immunities of American citizens, Bradley wrote, was the subject of the Fourteenth Amendment. "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment," he said. But Bradley then wrote that the victims of discrimination had to look to the political process for relief, not to judicial interpretation of the Fourteenth Amendment. Those victims should look to the laws of their own states for relief. If those states offered no protection, the "remedy will be found in the corrective legislation which Congress has adopted, or may adopt." Instead of absolute rights protected in Court, Bradley now said, "If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth

Amendment, Congress has full power to afford a remedy."⁵⁵ Congress—not the Court.

Bradley no longer believed it "possible that those who framed the [Fourteenth Amendment] were not themselves aware of the far reaching character of its terms."⁵⁶ When Bradley wrote those words, he believed judges could identify "far reaching" characteristics inherent in privileges or immunities not recognized by lawmakers. No longer. Bradley placed an undated note in his private files saying that his views had been "much modified by subsequent reflection so far as relates to the power of Congress to pass laws for enforcing social equality between the races."⁵⁷ Justice Miller's concerns with public opinion had displaced Bradley's principled approach, which had roots in the public culture and mind as well. Emerson's influence, however, had its limits.

Bradley's Evolving Ideas About the Power of Congress to Regulate Social Evils

- 1870 *Live-Stock Dealers & Butchers Assn. v. Crescent City Live-Stock Landing & Slaughter-House Co. et al.*, 15 F. Cas. 649: It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phrase of social and political wrong. . . . Yet, if the amendment . . . does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional amendment, it is to be presumed that the American people . . . understood what they were doing . . .
- ? Bradley, undated note, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ: The views expressed . . . were much modified by subsequent reflection so far as relates to the powers of Congress to pass laws for enforcing social equality between the races.
- 1874 *United States v. Cruikshank, et al.*, 25 F. Cas. 707: It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses . . . This would be to clothe the Congress with power to pass laws for the general preservation of social order in every state. The enforcement of the guaranty does not require or authorize Congress to perform the duty which the guaranty itself supposed to be the duty of the state to perform . . .
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ENDNOTES

¹109 U.S. 3 (1883); 16 Wall. (83 U.S.) 36 (1873). Historians have very often found consistency when looking at Bradley's career, but not all have done so. John A. Scott does not in "Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughter-House Cases to the Civil Rights Cases," *Rutgers Law Review* 25 (1971): 553–69. Ruth Whiteside also argues for inconsistency, "Justice Joseph Bradley and the Reconstruction Amendments," (PhD diss., Rice University, 1981). Michael McConnell has called Bradley's change of heart a nineteenth-century "switch in time." Michael McConnell, "The Forgotten Constitutional Moment," *Constitutional Commentary* 11 (1994): 115; Charles Fairman, "Mr. Justice Bradley," in Allison Dunham and Philip B. Kurland, eds., *Mr. Justice* (Chicago: University of Chicago Press, 1956), 69–95. Fairman seems hagiographic, entitling one article "What Makes a Great Justice?" and writing that he meant to cultivate a "just appreciation" of judges and defending Bradley against accusations that he had been placed on the Court to "pack" it for legal tender. Charles Fairman, "What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870–1892," *Boston University Law Review* 30 (1950): 49ff; Fairman, "The Education of a Justice: Justice Bradley and Some of His Colleagues," *Stanford Law Review* 1 (January 1949): 217–55; Fairman, "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," *Harvard Law Review* 54 (1941): 977–1034. Other scholars have followed Fairman in arguing for consistency. Jonathan Lurie, "Mr. Justice Bradley: A Reassessment," *Seton Hall Law Review* 16 (1986): 343–75; Pamela Brandwein, "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law and Society Review* 41 (June 2007): 343–81.

²*Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Live-Stock Landing and Slaughter-House Co. et al.*, 15 F. Cas. 649, 652 (D. Louisiana 1870) (first and second quotations); Bradley to Woods, Marsh 12, 1871, Box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ (third quotation; emphasis in original); Bradley to Woods, January 3, 1871, Box 3, Bradley Papers (fourth and fifth quotations).

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

⁴75 U.S. 603 (1870).

⁵Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006), 133–37.

⁶Charles Fairman, "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," *Harvard Law Review* 54 (1941): 1032. For Bradley's speeches, see Bradley, "The American Union and the Evils to Which It Has Been Exposed," *Proceedings of the New Jersey*

Historical Society 5 (1850–1851): 105–29; Paper Read before Lecture Association, Morristown, March 22, 1865, Box 15, Bradley Papers.

⁷Paper Read before Lecture Association, Morristown, March 22, 1865, Box 15, Bradley Papers.

⁸Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 5.

⁹Len Gougeon, *Emerson and Eros: The Making of a Cultural Hero* (Albany: State University of New York Press, 2007), 2.

¹⁰Charles R. Williams, *The Life of Rutherford Birchard Hayes: Nineteenth President of the United States*, 2 vols. (1914; reprint ed., New York: DaCapo Press, 1971), 1:278.

¹¹Congress, House, Representative Ashley of Ohio, 39th Cong., 1st sess., *Congressional Globe* (May 29, 1866), pt. 4, 2882.

¹²Congress, House, Representative Kelley of Pennsylvania, 39th Cong., 1st sess., *Congressional Globe* (January 10, 1866), pt. 1, 180.

¹³Emerson, "Introductory Lecture," December 2, 1841, in *The Collected Works of Ralph Waldo Emerson* (Cambridge: Harvard University Press, 1971), 1: 167–76; Judith N. Shklar, "Emerson and the Inhibitions of Democracy," *Political Theory* 18 (November 1990): 601–14; Gustaaf Van Cromphout, *Emerson's Ethics* (Columbia: University of Missouri Press, 1999), 22–3, 34–5, 53, 101.

¹⁴Gregg D. Crane, *Race, Citizenship, and Law in American Literature* (Cambridge: Cambridge University Press, 2002), 87–95.

¹⁵Jeremy Adelman and Stephen Aron, "From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History," *American Historical Review* 104 (June 1999): 814–41; James F. Brooks, *Captives and Cousins: Slavery, Kinship, and Community in the Southwest Borderlands* (Chapel Hill: University of North Carolina Press, 2002), 2–79.

¹⁶*Brownsville v. Cavazos*, 4 F. Cas. 460 (1876); Paul Finkelman, "Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition," *New York University Annual Survey of American Law* 63 (2007): 29–61; *Dred Scott v. Sandford*, 60 U.S. 393 (1857); Bradley to Charley, June 4, 1876, Box 4, Bradley Papers.

¹⁷Charles Bradley, ed., *Miscellaneous Writings of the Late Hon. Joseph P. Bradley* (Newark: L.J. Hardham, 1902), 246–47.

¹⁸*Live-Stock Dealers & Butchers' Ass'n. v. Crescent City Live-Stock Landing & Slaughter-House Co., et al.*, case 8408, 15 F. Cas. 649 (D. Louisiana 1870).

¹⁹*Live-Stock Dealers*, 15 F. Cas. at 650.

²⁰*Live-Stock Dealers*, 15 F. Cas. at 651.

²¹*Live-Stock Dealers*, 15 F. Cas. at 655.

²²*Live-Stock Dealers*, 15 F. Cas. at 649.

²³Bradley, undated note, Box 18, Bradley Papers.

- ²⁴*Congressional Globe*, 36th Cong., 2d sess., part 1, 487.
- ²⁵*Chicago Press and Tribune*, September 21, 1858.
- ²⁶*Id.*
- ²⁷Bradley to Woods, January 3, 1871, Box 3, Bradley Papers.
- ²⁸An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for other Purposes, chap. CXIV, 16 Stat. 140, 141 (1870). Congressional hearings investigating the Ku Klux Klan took considerable and detailed testimony on the Eutaw riot, including testimony by Congressman Charles Hays, one of the Republicans at the Eutaw rally. Hays told Congress that he did not think it safe to testify in court about what had happened. Charles Hays' testimony, June 2, 1871, Congress, House, Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, *Testimony . . . Alabama*, 42d Cong., 2d sess., 1872, 1:12–25. Willard Warner testified that one Eutaw riot case went to trial but had to be postponed because Hays did not want to testify. Warner testimony, June 3, 1871, Congress, House, Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, *Testimony . . . Alabama*, 42d Cong., 2d sess., 1872, 1:37, hereafter cited as Warner testimony.
- ²⁹*Id.*
- ³⁰Bradley to Woods, January 3, 1871, Box 3, Bradley Papers.
- ³¹Bradley to Woods, March 12, 1871, Box 18, Bradley Papers.
- ³²*Id.*
- ³³6 F. Cas. 546 (E.D. Pa. 1823).
- ³⁴Bradley to Woods, March 12, 1871, Box 18, Bradley Papers.
- ³⁵*Id.* Legal scholars have disagreed over whether the Fourteenth Amendment incorporated the Bill of Rights. In a superb summary of this scholarship, Michael Les Benedict shows that the scholarly consensus has now shifted in favor of believing that the Fourteenth Amendment did incorporate. Les Benedict, **Preserving the Constitution**, 222–3n46. For the death of the Alabama solicitor in Greene County, see Warner testimony, 1:39. Warner said, “Boyd was killed while the matter was pending, and that was the end of it.”
- ³⁶“Important Trial,” *Semi-Weekly Louisianian*, March 28, 1872.
- ³⁷*Id.*
- ³⁸*Id.*
- ³⁹Bradley to Woods, January 3, 1871, Box 3, Bradley Papers.
- ⁴⁰Jill Norgren, **Belva Lockwood: The Woman Who Would be President** (New York: New York University Press, 2007), 59–65; J. O. Clephane, reporter, **Suffrage Conferred by the Fourteenth Amendment. Woman's Suffrage in the Supreme Court of the District of Columbia, in General Term, October 1871 . . . Argument of the Counsel for the Plaintiffs** (Washington: Judd and Detweiler, 1871), 29; *Sara S. Spencer v. the Board of Registration, Sarah E. Webster v. the Superintendents of Election*, 1 MacArth. 169 (1873).
- ⁴¹*Slaughterhouse Cases*, 83 U.S. 36 (1873); Richard L. Aynes, “Freedom: Constitutional Law: Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the *Slaughterhouse Cases*,” *Chicago-Kent Law Review* 70 (1994): 627–86; Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era** (Baton Rouge: Louisiana State University Press, 2003), 189–210; Ronald M. Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (Lawrence: University Press of Kansas, 2003).
- ⁴²*Slaughterhouse Cases*, 83 U.S. at 81–82.
- ⁴³*Slaughterhouse Cases*, 83 U.S. at 85–86.
- ⁴⁴Samuel F. Miller, **Lectures on the Constitution of the United States** (Littleton, CO: Fred B. Rothman & Co., 1981), 411.
- ⁴⁵*Slaughterhouse Cases*, 83 U.S. at 111–24.
- ⁴⁶Bradley to Frederick T. Frelinghuysen, July 19, 1874, Box 18, Bradley Papers.
- ⁴⁷*United States v. Cruikshank*, 25 F. Cas. 707 (1874).
- ⁴⁸*New Orleans Republican*, March 14, 1874.
- ⁴⁹*Id.*
- ⁵⁰*Id.*
- ⁵¹41 U.S. 539 (1842).
- ⁵²*Cruikshank*, 25 F. Cas. at 710.
- ⁵³Bradley to Frelinghuysen, July 19, 1874, Box 18, Bradley Papers.
- ⁵⁴*Cruikshank*, 25 F. Cas. at 707; Pamela Brandwein, “A Judicial Abandonment of Blacks? Rethinking the ‘State Action’ Cases of the Waite Court,” *Law and Society Review* 41 (June 2007): 356. Brandwein seeks to resurrect an argument made by Michael Les Benedict in “Preserving Federalism: Reconstruction and the Waite Court,” *Supreme Court Review* (1978): 39–79.
- ⁵⁵*Civil Rights Cases*, 109 U.S. 3 (1883).
- ⁵⁶*Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Live-Stock Landing and Slaughter-House Co.*, 15 F. Cas. 649, 652 (D. Louisiana 1870).
- ⁵⁷Bradley, undated note, Box 18, Bradley Papers.

Textual Corruption in the *Civil Rights Cases*

GEORGE RUTHERGLEN*

The *Civil Rights Cases*¹ do not quite rival *Plessy v. Ferguson*² for notoriety as the decision that most clearly confirmed the failure of Reconstruction and the rise of Jim Crow. Yet the *Civil Rights Cases* did far more than *Plessy* to limit federal power to address the continuing consequences of slavery. They declared unconstitutional the Civil Rights Act of 1875 insofar as it prohibited discrimination in public accommodations operated by private parties. Congress passed that act under its powers to enforce the Thirteenth and Fourteenth Amendments, but the Court held the act unconstitutional on the ground that private discrimination was neither a badge or incident of slavery under the Thirteenth Amendment nor a manifestation of state action under the Fourteenth. Although the Court's holding under the Thirteenth Amendment was effectively overruled by the Warren Court,³ its holding under the Fourteenth Amendment continues to be influential, supporting a decision of the Rehnquist Court striking down the Violence Against Women Act.⁴

There is much to disagree over in the *Civil Rights Cases*, and much of it has continuing significance. What should not be subject to disagreement is what the opinion says, in particular what it says about the relationship between the Thirteenth and Fourteenth Amendments. Yet just at this crucial point in the opinion, where the relative scope of congressional power under each amendment is explained, the official version of the opinion lapses into incoherence. This passage occurs at the very end of the Court's discussion of the Thirteenth Amendment:

Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the *Thirteenth* and Fifteenth Amendments.⁵

The second reference to the Thirteenth Amendment, italicized in this quotation, does

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the XIIIth Amendment, (which merely abolishes slavery,) but by force of the XIVth and XVth Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the XIIIth or XIVth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States v. Michael Ryan*, and of *Richard A. Robinson and wife against The Memphis and Charleston Railroad Company*, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. And it is so ordered.

True copy.

Test:

Clerk Sup. Court U. S.

Did the printer of the U.S. Reports make a mistake in the Supreme Court's opinion in the *Civil Rights Cases*? The part where the relative scope of congressional power under the Thirteenth and Fourteenth Amendments is explained does not make sense. Shown is the Joint House Resolution proposing the Thirteenth Amendment to the Constitution in 1865.

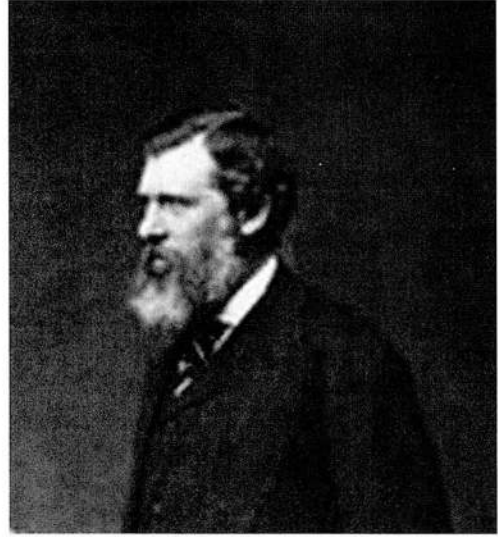
not make sense. It vitiates the contrast between the Thirteenth Amendment and other sources of law. What is "not by force of the Thirteenth Amendment" could not be "by force of the Thirteenth and Fifteenth Amendments." It would have to be by force of something other

than the amendment itself. The only plausible alternative is “the Fourteenth and Fifteenth Amendments.”

The immediately preceding sentences, quoted in full in the Appendix to this article, make this clear. These sentences discuss the prevalence of racial discrimination against free blacks before the Civil War. Justice Bradley, who wrote the opinion for the Court, then distinguishes the treatment of free blacks from the treatment of slaves, using the latter as the baseline to determine what constitutes the “badges and incidents of slavery” that Congress could prohibit under the Thirteenth Amendment. Since free blacks were subject to racial discrimination before the amendment, they could be subject to discrimination afterwards as well, regardless of congressional power to enforce the amendment.

This reasoning yields the following interpretation of the quoted passage: “since that time”—the antebellum era—the only “constitutional enactment” that could support legislation against racial discrimination is not the Thirteenth Amendment, but some other amendment. The only amendments available at the time, 1883, were the Fourteenth and Fifteenth Amendments. This interpretation makes sense of the passage, although it does not make sense of the nation’s commitment to civil rights, at least as we have come to understand it. It turns out that what was beyond congressional power under the Thirteenth Amendment was also beyond its power under the other Reconstruction amendments: The Fourteenth was limited to state action, not private discrimination such as that prohibited by the Civil Rights Act of 1875, and the Fifteenth covered only voting rights, not rights to public accommodations.

The limitation on the Fifteenth Amendment is obvious enough, but the limitation on the Fourteenth Amendment is open to dispute. It was confirmed only in the first part of the opinion in the *Civil Rights Cases*, holding that the state-action doctrine applied to enforcement legislation as well as to the rights di-



Why didn't the Reporter of Decisions catch the error? Perhaps because the new reporter, J. C. Bancroft Davis (pictured), had just taken over the job and was swamped with a backlog of cases.

rectly conferred by the Fourteenth Amendment. It followed that Congress could not enact any general prohibition against private discrimination—a chilling conclusion that followed Justice Bradley’s reasoning from the widespread discrimination practiced against free blacks before the Civil War. Did Justice Bradley mean to impose such a draconian restriction on enforcement of the Reconstruction Amendments? Even his defenders do not doubt that he did.⁶

In terms of the official text, did Bradley mean to refer to the Fourteenth Amendment when the text refers to “Thirteenth and Fifteenth Amendments”? Everyone assumes that as well, and has done so since the opinion was issued. The *New York Tribune* and the *Chicago Daily News* both printed excerpts from the opinion immediately after it was handed down, and they refer, respectively, to the “XIVth and XVth Amendments” and to “the fourteenth and fifteenth amendments.”⁷ The latter is also the form (with capitalization) in which the opinion appears in the Supreme Court Reporter, which had just begun to appear in the early 1880s and claimed to be printed from the original opinions of the Justices. The

volume in the Supreme Court Reporter in which the opinion appears was published in 1884, the same year that the official text was published in the **United States Reports**.⁸ The only discrepancy in all of the contemporaneous reports is in the official one.

There is some question, however, whether this discrepancy can be called one at all. The current position of the Supreme Court is that it cannot. The Court's website states its position unequivocally in favor of the final, bound volume of the **U.S. Reports** as the authoritative source for the text of its opinions:

Only the bound volumes of the United States Reports contain the final, official text of the opinions of the Supreme Court of the United States. In case of discrepancies between the bound volume and any other version of a case—whether print or electronic, official or unofficial—the bound volume controls.⁹

Errata are published to correct mistakes in the bound volumes, and errata were published for the volume in which the *Civil Rights Cases* appear, but none applies to the pages on which the majority opinion appears.¹⁰

What explains such a mistake? The practice at the time was for the Clerk to set each opinion in type, with a proof sent to the Justice who wrote the opinion. The proof would be corrected by the Justice, and if necessary, a revised proof would be returned by the Clerk to the Justice. This revised printed opinion would then be sent to the Reporter of Decisions for publication in the **U.S. Reports**.¹¹ The Reporter's powers were somewhat broader at the time than they are now. Then, as now, the Reporter would add a headnote (if one was not already supplied), but he could also add to the statement of facts, and he could add a summary of the arguments of counsel.¹²

The National Archives hold the printed versions of the opinion produced by the Clerk's office: a preliminary print and the "engrossed opinion" sent to the Reporter of Decisions.¹³

The first was sent to Justice Bradley for corrections (he made none), and the second was sent to the Reporter, with the addition only of the Clerk's certification that it was a true copy of the opinion. The relevant passage in these texts is the same, and it agrees with the contemporaneous but unofficial versions of the opinion:

Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the XIIIth Amendment (which merely abolishes slavery), but by force of the XIVth and XVth Amendments.¹⁴

As this passage reveals, the opinion in its original printed versions referred correctly to the "XIVth and XVth Amendments." Evidently, the process of translating the Roman numerals to spelled-out numbers resulted in the printer mistakenly repeating the reference to the "XIIIth Amendment," which appears in the line immediately above "XIVth" in the original prints of the opinion.

The only other changes that the Reporter made in the rest of the opinion involved the addition of two short paragraphs to the statement of facts; a summary of the arguments of counsel; some minor typographical changes concerned with capitalization, spelling, verb tense, and one case citation; and two added paragraph breaks. These are changes that the Reporter was expected to make. The original versions of the opinion, those seen and approved by Justice Bradley, do differ systematically from the version in the **U.S. Reports** in referring to the amendments in question by Roman numerals, not by English words. The transition from one to the other was flawless, except in the passage quoted above.

Why didn't the Reporter catch this mistake? At the time, the Reporter's office was in some disarray, with a new reporter, J. C.

Bancroft Davis, taking over and catching up with a backlog of unreported decisions by his predecessor, William T. Otto, who resigned on October 8, 1883. The opinion in the *Civil Rights Cases* was handed down a week later, on October 15, but was not published until 1884. In fact, the volume of United States Reports in which it appears, volume 109, was published before volume 108, and the *Civil Rights Cases* were published at the very beginning of volume 109, making them among the first that Davis reported.¹⁵ Apparently, this out-of-sequence publication was necessitated by the statutory command that Davis publish opinions within eight months after they were handed down as a condition of being paid.¹⁶ He accordingly published opinions from the current Term, for which he was responsible, before the backlog of opinions from the previous Term, for which he was not. The confusion in the transition from Otto's tenure was so great that an opinion from the previous Term ended up being printed twice, once by Otto and once by Davis.¹⁷

This general confusion was compounded by specific problems with the other opinion in the *Civil Rights Cases*, Justice Harlan's dissent. There are more than 200 handwritten changes on the engrossed version of his opinion, some of them adding whole sentences or paragraphs to the text.¹⁸ By contrast, no handwritten changes were made in Justice Bradley's engrossed opinion, leading the Reporter apparently to concentrate his efforts on the dissent. And, in fact, four further corrections had to be made to the dissent in the errata published at the back of volume 109 of the U.S. Reports.

All in all, it is not surprising that the mistake in the majority opinion occurred and that it remained initially uncorrected. The Reporter of Decisions was distracted by general problems in taking over that office and by particular problems with Justice Harlan's dissent. The only surprise is that this mistake has remained uncorrected for 125 years. The dominant reaction perhaps is that the mistake is so obvi-

ous that it can be silently corrected, as it has been in the Supreme Court Reporter. Nevertheless, it has led the Supreme Court never to quote the sentence in question.¹⁹ Moreover, it is a mistake that goes to the heart of the opinion, one of the few in our history that directly addresses the relationship between the Thirteenth and Fourteenth Amendments. The *Civil Rights Cases* remain a living precedent, one that is both important and controversial. The text of the opinion should not itself be a matter of puzzlement and dispute.

Appendix

The Civil Rights Cases, 109 U.S. 3, 25 (1883)

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment, (which merely abolishes slavery,) but by force of the Thirteenth and Fifteenth Amendments.

The Civil Rights Cases, Preliminary Print of Nos. 1, 2, 3, 26, and 28—October Term

1883, at 10, Records of the Supreme Court of the United States, Record Group 267.3.2, and Engrossed Opinions of the Supreme Court 1883, at 46, National Archives, Washington, D.C.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the XIIIth Amendment, (which merely abolishes slavery,) but by force of the XIVth and XVth Amendments.

ENDNOTES

*I would like to thank Robert Ellis at the National Archives and Christine Fallon at the Reporter of Decisions for the Supreme Court of the United States for their assistance with my research inquiries.

¹ 109 U.S. 3 (1883).

² 163 U.S. 537 (1896).

³ *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409, 441 n.78 (1968).

⁴ *United States v. Morrison*, 529 U.S. 598, 621-22 (2000).

⁵ 109 U.S. at 25 (emphasis added).

⁶ Michael G. Collins, "Justice Bradley's Civil Rights Odyssey," 71 *Tul. L. Rev.* 1979, 1996-98 (1996).

⁷ *New York Tribune* at 3 (Oct. 26, 1883); *Chicago Daily* at 1 (Oct. 26, 1883).

⁸ See the title page of 3 S. Ct. and 109 U.S., respectively. For an account of the sources used by the Supreme Court Reporter, see Book Notices, 2 *Am. L.J.* 66 (1884-85).

⁹ Supreme Court of the United States, Information About Opinions, available at http://www.supremecourtus.gov/opinions/info_opinions.html (last visited April 16, 2009). The statutory authority for printing the reports is 28 U.S.C. § 411(a) (2000).

¹⁰ The errata appear after the index to volume 109 on an unnumbered page. Justice Harlan's dissent is subject to four errata listed there, but none is listed for the majority opinion. The office of the current Reporter of Decisions also has no record of any corrections to the majority opinion.

¹¹ The Supreme Court Rules at the time prescribed this procedure. S. Ct. Rule 25, 62 U.S. xiv (1858); S. Ct. Rule 25, 108 U.S. 588 (1884).

¹² Charles Fairman, **Reconstruction and Reunion 1864-68 Part One**, in 6 **The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States** 70-71 (Paul A. Freund ed. 1971).

¹³ Preliminary Print of Nos. 1, 2, 3, 26, and 28—October Term 1883, in Records of the Supreme Court of the United States, Record Group 267.3.2, and Engrossed Opinions of the Supreme Court 1883, pp. 37-46, National Archives, Washington, D.C. "Engrossed" refers to the official version of the opinion, fairly copied and certified by the Clerk of the Supreme Court.

¹⁴ Preliminary Print at 10 and Engrossed Opinion at 46. The only difference between these two versions is the addition of "True copy. Test: *Clerk Sup. Court U.S.*" at the end of the engrossed opinion.

¹⁵ Davis explained this in a note at 108 U.S. vi. He also experimented with publication according to serial number, which would place the *Civil Rights Cases* first, since they included cases numbered 1, 2, and 3.

¹⁶ Act of May 21, 1866, 14 Stat. 51.

¹⁷ Fairman, *supra* note 12, Part Two, at 640-42. Davis's account of the mistake appears in an appendix at 131 U.S. xviii.

¹⁸ Engrossed Opinions of the Supreme Court of the United States, 1883, at 47-64.

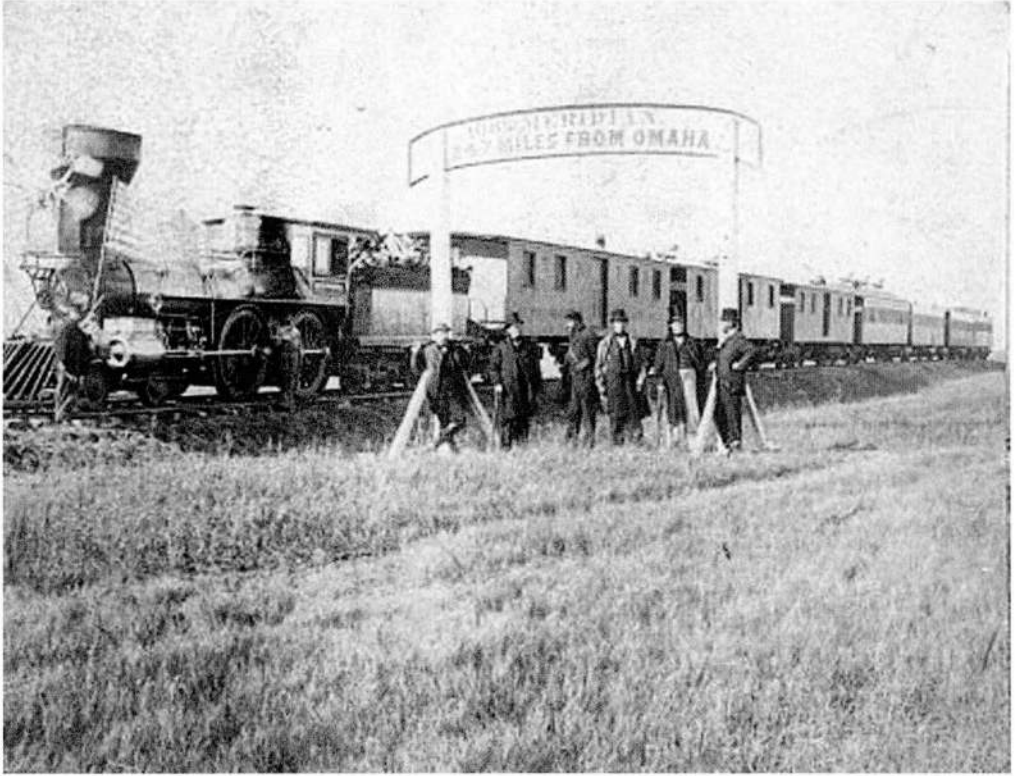
¹⁹ As revealed by a search of the Westlaw database for the phrase "by force of the Thirteenth and Fifteenth" and for the phrase "by force of the Fourteenth and Fifteenth." The search for the latter phrase is necessary because Westlaw follows the Supreme Court Reporter and so reports the latter phrase in the *Civil Rights Cases* (but nowhere else in opinions of the Supreme Court).

The Crédit Mobilier Scandal and the Supreme Court: Corporate Power, Corporate Person, and Government Control in the Mid-nineteenth Century

PAUL KENS*

In 1867, Francis Train, a powerful director of the Union Pacific Railroad, devised a surefire way to make some money. Train established a trust company, Crédit Mobilier of America, which was completely owned by a small group of directors of the Union Pacific. The group soon became known as the Pacific Railroad Ring. Because they controlled the board of directors of the Union Pacific, the ring was able to award building contracts to Crédit Mobilier, giving wildly favorable terms and paying exorbitant prices for the work. They used this scheme to siphon money out of the Union Pacific and into the coffers of their own company. In actuality, the primary function of the Crédit Mobilier Company was to shift money—money that came from the U.S. Treasury and the pockets of the Union Pacific's minor shareholders. As railroad reformer Charles Frances Adams Jr. put it, "They receive money into one hand as a corporation, and pay it out into the other as a contractor." The profit they kept for themselves.¹

When it came to light, the Crédit Mobilier scheme became the era's foremost symbol of corporate greed, corporate corruption, and corporate power. It brought to the surface an already growing public concern that, after making vast fortunes for promoters, financiers, and entrepreneurs, the Pacific railroads would not be able to repay the enormous sums of money the government had loaned to them to build their railroads. Tales of business and political corruption made the Crédit Mobilier scandal sensational, but the reaction to it also fueled an already intense debate about the status of corporations in American politics and



Directors of the Union Pacific Railroad were photographed at the 100th Meridian in October 1866 next to the newly built track of the transcontinental railroad. The directors had siphoned off money for the railroad from the U.S. Treasury and from its shareholders into their own trust company, called *Crédit Mobilier*.

society, and ultimately about the status of corporations in American constitutional law. That debate reached the Supreme Court in the late 1870s with several cases that tested Congress's efforts to assure that the Pacific railroad companies paid back the loans.

One might have thought that building and operating railroads provided a good means for making money without an underhanded scheme such as *Crédit Mobilier*. This was especially true of the Union Pacific Railroad and Central Pacific Railroad, the two companies Congress engaged to build the first transcontinental railroad. The building of the first transcontinental railroad is a success story deeply imbedded in American lore. A marvel of engineering, persistence, and drive, it was initially a source of great national pride. Beginning at the Mississippi River, the Union Pacific worked its way westward across the Great

Plains and Rocky Mountains. At the same time the Central Pacific worked its way eastward, blasting and cutting through the rugged Sierra Nevada Mountains. When the two railroads met at Promontory Summit, Utah on May 10, 1869, Americans were empowered by the feeling that, more than ever before, they lived in a nation that stretched from coast to coast.²

Congress provided the builders of the transcontinental railroad with two forms of aid. One came in the form of land given to the railroads as right-of-way and land grants. The other, which is more important to the *Crédit Mobilier* scandal, was a subsidy in government bonds. Under this plan, Congress promised to give to the railroads bonds valued at between \$16,000 and \$48,000 per mile of track laid. In effect, these bonds constituted a loan from the federal government to the railroad at six percent interest. The plan provided some means

for partial repayment of the loans over time, but it required the companies to eventually repay all of the principal and interest thirty years after the railroad was completed.³

Estimates of the amount of money the railroads received vary widely. Whatever the actual figure, however, there is no doubt that it represented an extremely large amount of money by nineteenth-century standards. Some members of Congress later complained it was more than \$100 million.

Large as it was, the government subsidy may have been only enough to prime the pump. Railroad entrepreneurs faced the problem of converting the government bonds and land into cash. In order to raise the cash they needed, they typically sold the government bonds on the open market for less than face value. They also supplemented the funds they received from the government bonds with private financing. Once construction began, they had to supply enough money to keep the project moving. This task was complicated by the fact that the government did not give the railroads the land and bonds all at once, but only as each company completed construction of twenty continuous miles of track. From the entrepreneurs' point of view, building the transatlantic railroad was a risky venture, and it was accomplished primarily through the savvy, persistence, energy, and skullduggery of men of destiny—men like them. It would have been natural for them to believe that they should be left free to guide the growth of this new transportation industry.

Nobody could doubt the accomplishment. And Americans tend to admire savvy, persistence, energy, and even skullduggery up to a point. But as the new wore off of the Transcontinental Railroad, the public began to see railroad entrepreneurs as robber barons who, through monopoly and collusion, were bleeding the common people of their economic well-being. Many people also came to believe that railroad entrepreneurs were getting excessively wealthy by feeding at the public trough, and they feared that the influence of railroad

interests in politics threatened the liberty and political authority of the people.

The *Crédit Mobilier* scheme was not a deeply held secret. In an 1869 article in the *North American Review*, Charles Francis Adams Jr., explained in detail how the scheme worked.⁴ But it took the glaring headlines of a political scandal to really draw the American public's attention to how key directors of the Union Pacific were manipulating the company. On September 4, 1872 the *New York Sun* broke the news that *Crédit Mobilier* had been distributing shares of its stock to influential political figures. Congressmen John B. Alley and Oaks Ames were said to have developed the scheme, but other key figures of the Grant administration were implicated when they received gifts or offers to buy the stock cheap.

In response to these revelations, Congress initiated several investigations. Because it was difficult to prove bribery, however, most of the public officials implicated in the scandal were exonerated.⁵ Nevertheless, the *Crédit Mobilier* scandal reinforced the suspicions of a growing number of politicians, civic leaders, shippers, and farmers who were pressing for more forceful government control of railroad and corporate business practices.

News of the scandal could not have come at a worse time for railroad entrepreneurs. Although the political, economic, and social influence of railroads and their leaders was undeniable, the 1870s and '80s were actually not very good years for many railroad companies. Within months of the breaking of the *Crédit Mobilier* scandal, the country was mired in the Depression of 1873. That, along with overbuilding, large fixed debt, fraud, and competition often proved disastrous to railroad companies. So many companies were bankrupt that between fifteen and thirty percent of the nation's railroad mileage was in court-ordered receivership at any given time.⁶ Many of these local railroads had been financed with the help of county and municipal bonds. Prevalence of railroad receiverships led many people to

worry that states and local governments would never be paid back for what were, in effect, loans to the railroads. Now they began to worry that the federal government would not be paid back, either.

The terms of the government's loan to the Pacific railroads were initially set out in the Pacific Railroad Act in 1862. This act provided that the companies would complete repayment of the bonds with six percent simple interest thirty years after completion of the railroad. To secure repayment of the loans, the government took a first lien against the companies' property. Under the Act, the companies were not required to make cash payments on the principal or interest until the date of maturity, which would be some time between 1895 and 1899. The government, however, was responsible for paying yearly interest to the holders of the bonds. With this in mind, the Act also

provided a means for the railroads to indirectly help pay that annual interest. It specified that, rather than being paid to the railroads, *all* compensation the government owed to the railroads for services such as carrying troops and mail would be applied toward the interest.⁷

Two years later, Congress amended this law, giving the companies more favorable terms. The amendment of 1864 reduced the amount applied to the annual payment of interest to one-half of the money the railroads earned for services rendered to the government. It also allowed the companies to issue private bonds and made the government's lien subordinate to that of the new private lenders. In both the 1862 and 1864 acts, Congress expressly reserved the right to alter or revise the terms of the grants.

The *Crédit Mobilier* scandal motivated an anxious Congress to reconsider these new



Thomas Nast's 1873 cartoon highlights the corruption of the *Crédit Mobilier* scandal. It shows Justice pointing to men under a sign reading "disgraced in the eye of the public for owning *Crédit Mobilier* stock . . ."

terms. Critics worried that the Pacific Railroad directors, who had been paying high dividends to themselves and shareholders and siphoning off money to their own corporations, would leave the railroads in such a poor financial condition that they would not be able to repay their debt to the government when it became due. Congress responded with the *Crédit Mobilier Act* of 1873, an awkwardly designed statute that sent mixed signals about how it intended to solve the problem. Section 1 of the Act directed the Secretary of the Treasury to withhold all payments the government owed to the railroads for freights and transportation. Standing alone, that would have seemed clear enough. But Congress added Section 2, which gave the companies the right to sue in the Federal Court of Claims “to recover [from the federal government] the price of such freights and transportation” as the court determined was owed to them.⁸

Following the directive of the first section, the Secretary withheld the entire amount of payments for services rendered by the Union Pacific between February 1871 and February 1874. Under the second section, the company then filed a suit in the Court of Claims to recover the amount owed to it.

At trial, the government pointed out that the Union Pacific owed more than \$12 million in interest to the government and had never paid any part of it to that date. The *Crédit Mobilier Act*, it maintained, was intended to allow the government to recover that debt. The Company argued that the terms of the 1864 Act still applied, and that the government had a right to apply only one-half of the payment to the interest. It therefore demanded that it be paid one-half of the amount the Secretary of Treasury had withheld. When the Court of Claims ruled in favor of the company, Attorney General Edwards Pierrepont appealed the case to the Supreme Court.

Given the circumstances under which the *Crédit Mobilier Act* was enacted, it was reasonable to assume that Congress had intended to repeal the changes it made in 1864. It

would have made sense that Congress hoped to protect the public interest by providing, once again, that all compensation the government owed to the railroads for services rendered would annually be applied toward the interest and return to the original terms of the Pacific Railroad grant. That is not how the Court interpreted the new statute, however.

Instead, in *United States v. Union Pacific Railroad Company* (1875), the Court ruled that the *Crédit Mobilier Act* did nothing more than provide the government and the companies with a procedure for enforcing their respective rights.⁹ According to the majority of the Court, nothing in the Act actually changed the amount that the government could apply to interest. Section 1 merely allowed the Secretary to initially withhold all payments the railroads charged for services rendered to the government. Section 2 then gave the railroads a means by which they could retrieve what money the government ultimately owed them. Under this interpretation, the *Crédit Mobilier Act* simply provided a procedure for carrying out the terms of the grant as amended in 1864. It did not change substantive rights of the parties, the Court concluded.¹⁰ Only one-half of the money the government owed to the railroads could be used to pay interest on the bonds.

Justice Stephen Field desperately wanted to write the opinion of the Court. Field, one of the most outspoken of the Justices, had a well-established reputation as an advocate of entrepreneurial liberty and as a friend of big business in general and railroads in particular. Political rivals in his home state of California linked him to the Central Pacific’s Collis Huntington and Leland Stanford, and to a group of the state’s powerful business leaders that reformers called the “Pacific Club Set.”¹¹

Given the level of public excitement about the *Crédit Mobilier* scandal and the fact that the outcome of *United States v. Union Pacific Railroad Company* would be in favor of the railroad, Chief Justice Morrison R. Waite was inclined to assign it to “someone who would

not be known as the personal friend of the parties representing the railroad interest." He decided to temper the potential negative reaction by assigning the case to Justice David Davis, a Lincoln appointee who was known as one of the Court's most liberal members.

Waite had been Chief Justice for just a little more than a year when *United States v. Union Pacific Railroad Company* reached the Court. The modest lawyer from Ohio had been appointed in March 1874 to lead a Court inhabited, at the time, by men of exceedingly immodest egos. Many thought Waite was not up to the task. Perhaps that is why Justice Field, the most irascible member of the Bench, strenuously argued in conference that he, not Davis, should write the opinion. If Field believed that he could intimidate Waite, however, he was mistaken. Soon after Field had complained about the assignment, Waite responded with a letter to Field that demonstrated the Chief Justice was both tactful and fully in charge. "There is no doubt of your intimate personal relations with the managers of the Central Pacific," he reminded Field, "and naturally you, more than anyone else on the court, realize the vast importance of the great work that has been done."¹²

The decision in *United States v. Union Pacific Railroad* was undoubtedly a victory for the railroad. Justice Davis's short opinion devoted almost two pages to praising the accomplishments of the Pacific Railroad companies. But his opinion ultimately turned on an uninspired and detailed reading of statutory language.

A subsequent case interpreting another section of the *Crédit Mobilier* Act produced a similar result. Section 4 of the Act directed the Attorney General to sue companies and individuals who had misused or misdirected assets of the Pacific railroads. The section also provided that the government could initiate a suit in any circuit court of the United States. Following this directive, in the summer of 1873 Attorney General George H. Williams brought suit in the Circuit Court for Connecti-

cut. The government charged that the Union Pacific Railroad, the *Crédit Mobilier* Company, the Wyoming Coal Company, and some 150 other persons had misdirected funds and defrauded the Union Pacific. When the case came to trial, Justice Ward Hunt, who was riding circuit, and District Judge Shipman dismissed the charges. The government appealed the case to the Supreme Court, where it became commonly known as the *Crédit Mobilier Case*.¹³

The Court heard arguments on the case twice. First arguments were on December 13 & 14, 1876, but the Justices failed to reach a conclusion regarding the outcome and, on February 28, 1877, the Court ordered a re-argument. In the meantime, Justice Davis resigned on March 7, 1877 and was replaced by John Marshall Harlan on December 10, 1877. The re-argument did not take place until November 26 & 27, 1878, almost two years after the first argument.¹⁴

Like the first case, the *Crédit Mobilier Case* ended in a victory for the railroad.¹⁵ But the Court again refrained from addressing any grand constitutional issues. Once again, the decision turned on a technical reading of the statute and the circumstances to which it was being applied. And, once again, Chief Justice Waite assigned the opinion to a person who was not perceived to be a friend of the railroad and corporate interests.

On the contrary, Justice Samuel Miller was exceedingly skeptical of the system of finance that had grown out of government aid in support of railroad construction. Miller was one of the early settlers of Keokuk, Iowa, a Mississippi River town that saw its dreams of becoming a hub of railroad commerce unfulfilled. He had experienced first-hand the allure of the railroad's promise of prosperity and the disappointment when it failed to pan out. As the circuit judge for much of the Midwest, he had observed that the practice of government assuming debt to help finance a railroad was as likely to produce calamity as prosperity.¹⁶



Senator Allen G. Thurman of Ohio sponsored the Pacific Railroad Sinking Fund Act, a plan enacted by Congress in 1878 to put into a public trust fund the money that the government owed to railroads for services rendered, such as carrying the mail or troops.

He had also seen railroads take advantage of a new type of receivership that allowed companies to continue operating at the same time that they avoided fully paying their debts to private individuals and governments. Dissenting in one of these bankruptcy cases, he observed that railroad receiverships had become all too common. The receivers, he observed, usually operate the railroads in their own way, with occasional suggestions from the court. They pay back some money to the debts of the corporation, but quite as often add to them. While operating the company, they make contracts and incur obligations that they often fail to perform.¹⁷

For Miller, the system of railroad financing had resulted in “the gradual formation of a new kind of wealth in this country, the income of which is the coupons of interest and stock dividends.” He believed this system had created “a class of individuals whose only interest or stake in the country is the owner-

ship of these bonds and stocks.” “They engage in no commerce, no trade, no manufacture, no agriculture,” he observed. “They produce *nothing*.”¹⁸

Even Miller’s reputation did not insulate the Court from criticism for its *Crédit Mobilier* decision, however. Reformers complained that the majority’s formalistic interpretation of the statute defeated the obvious purpose of the law. That may have been true to some extent, but Miller argued that the fault lay with Congress and seemed genuinely frustrated by what he saw as Congress’s flawed attempt to assure that the government would be repaid.

Miller’s opinion started from a fairly straightforward observation. The *Crédit Mobilier* scheme may have constituted fraud, he admitted, but the United States could not sue the perpetrators because it was not the party who had been defrauded. Similarly he observed that, although Congress might fear that the Union Pacific would not be able to pay its debt to the United States when it became due, the company had not yet defaulted on its obligations and therefore was not liable for any breach of the agreement. It was really the Union Pacific Railroad itself—more particularly, bona fide stockholders who were not part of the scheme—who were the victims of *Crédit Mobilier*.

Miller virtually scolded Congress. He pointed out that the *Crédit Mobilier* Act was predicated on the idea that, as a party to a contract with the Union Pacific, Congress could sue for fraud to protect the interests of the nation and for the benefit of the company itself. Neither of those assumptions was accurate, he said.

But Miller went on to observe that the United States was not merely a party to a contract with the Union Pacific. It was also the sovereign, and as sovereign, it had an obligation to protect the rights of the public. Moreover, he said, Congress had at its disposal ample powers to do so. One of these was the power to create a trust. There might be trusts that the United States could enforce against the

company, Miller concluded, but the Court was of the opinion that none had been set forth in this statute.¹⁹

Miller was obviously aware that Congress had been debating just that type of solution. In fact, by the time he was ready to write the opinion in the *Crédit Mobilier Case*, Congress had already passed the Pacific Railroad Sinking Fund Act, a plan that put into a public trust fund the money that the government owed to railroads for services such as carrying the mail or troops. The new law was popularly known as the Thurman Act after its sponsor, Senator Allen G. Thurman of Ohio.²⁰ Thurman had calculated that, on the date the Pacific railroads' bonds matured, their annual payments under the 1864 law would have yielded only \$15 million. The problem was that the amount of debt remaining unpaid at that time would be more than \$119 million. Given the revelations of the *Crédit Mobilier* scheme and the fact that the companies were sometimes paying huge dividends, Thurman worried that the companies would not be able to make up the \$104-million difference when the debt became due.

Thurman's solution was to amend the Act of 1864 so that, once again, all the money the railroads earned from providing services to the government would be applied to secure payment of the debt. He knew that in the *Crédit Mobilier Case*, the Court had overruled Congress's plan to apply all such earnings to payment of the railroads' debt. His plan, however, was different. Under it, only one-half of the amount would be used to immediately pay the outstanding debt. The other half would be held in a sinking fund: an account maintained in trust by the U.S. Treasurer, not to be used except to pay the railroads' debt when it became due.²¹

Railroad leaders were not completely opposed to the idea of creating a sinking fund. Huntington, for example, offered an alternative piece of legislation that would set up a sinking fund in exchange for an extension of the time when the bonds would become due.²²

Nevertheless, when the Thurman Act passed in its final form, the railroads immediately initiated lawsuits to challenge it. In one suit, Albert Gallatin, a shareholder of the Central Pacific, filed a contrived suit against the company in the Federal District Court of California to test the new law. Almost simultaneously, the Union Pacific brought suit against the government in the U.S. Court of Claims. When they reached the Supreme Court, the suits were combined and became the *Sinking Fund Cases*.²³

Although the first two opinions growing out of the *Crédit Mobilier* scandal had yielded victories for railroad financiers, both were based upon technicalities. Justice Field's desire to write the Court's opinion in *United States v. Union Pacific Railroad* suggested that the railroad interests yearned for more. In fact, the *Crédit Mobilier* incident was embedded in a broader struggle about the nature and status of corporations and other large business concerns in American society and law, as well as about the influence of big business on politics. It was a struggle for control. In the most sweeping of terms, reformers maintained that government retained the right to regulate corporations such as the railroads to assure that they operated in the best interests of the community. Railroad leaders argued to the contrary, that the Constitution limited the degree to which government could interfere with business practices.

This debate's first major scrimmage in the courts occurred two years before the *Sinking Fund Case*, when the Court decided *Munn v. Illinois* in March 1877.²⁴ In *Munn*, the owners of several immense grain elevators argued that an Illinois law setting maximum rates they could charge for the storage of grain violated the Fourteenth Amendment because it deprived them of their property without due process of law. Earlier precedent treated due process, not as an absolute guarantee, but rather as a guarantee against arbitrary taking of property. In the traditional view, the state could not take a person's property except by properly enacted legislation or through correct judicial procedure. The elevator owners' theory was

that due process was more than a guarantee of correct procedure. They argued that the law setting maximum rates was so unjust that it deprived them of property without due process, even though it was legally enacted by a democratically elected legislature. This theory, which would eventually be called “substantive due process,” was not unique, but it was very unusual and would become extremely controversial.

Although Justice Field agreed with the elevator operators’ theory, the majority of the Court did not.²⁵ It ruled in *Munn* that the Illinois law setting maximum rates for the storage of grain was constitutional. The states, it reasoned, had the authority to protect the general welfare by regulating “businesses affected with public interest.” To that extent, the case represented a victory for state economic regulation. But the Court also offered a caveat that, under some circumstances, state regulation could constitute a deprivation of liberty and property without due process of law. It thus opened the door for continued development of a theory that would eventually provide a constitutional barrier to the ability of government to interfere with business practices.

Perhaps that is why the railroads pulled out all stops in their legal attacks on the Thurman Act. Cases involving the financing of the Pacific railroads had given them two victories under their belts. Perhaps they now hoped this case would establish the kind of legal precedent they wanted. Thus, in contrast to Huntington, who had opposed the Thurman Act only because its particular plan for the sinking fund was not financially favorable enough to the railroads, attorneys for the railroads argued that the creation of a sinking fund violated their clients’ constitutional rights.

They began with the proposition that, by changing the terms of the grants to the Union Pacific and Central Pacific, the Thurman Act violated the Constitution’s prohibition against impairing the obligation of contracts. Although the Contract Clause of Article I, Section 10 of the Constitution ex-

pressly provides that no *state* shall pass any law impairing the obligation of contract, they argued that the prohibition applied by implication to the federal government as well. Borrowing a theory from *Munn*, they next argued that the government’s plan to divert payments into a sinking fund violated the Fifth Amendment guarantee that no person be deprived of life, liberty, or property without due process of law. Into this mix they added the charge that the Thurman Act simply violated their clients’ fundamental rights.

The Court heard arguments on March 19–21, 1879. Less than a month later, in unusually fast time, it announced its opinion upholding the Thurman Act. With public emotion regarding the case running high, Chief Justice Waite decided to take it upon himself to write the majority opinion. Justices Field, William Strong, and Joseph Bradley read separate dissenting opinions on the same day.

Waite did not reject the railroads’ constitutional theories outright. “The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes,” he observed. The Article I, Section 10 prohibition against passing laws impairing the obligation of contracts is directed only at the states. But the federal government equally with the states is prohibited from depriving persons or corporations of property without due process of law.²⁶

Although Waite thus placed the case within the framework of the Fifth Amendment’s Due Process Clause, the analysis that followed was a coagulated mix of due-process thinking and principles related to the Contract Clause. In the Pacific Railroad Acts of 1862 and 1864, Congress had reserved the right to alter or amend its contracts with the railroads, he observed. Its power to do so was not unlimited. It could not, for example, take away property already acquired by the corporation. As a party to the contract, it did not have the power to repudiate its obligations under the contract, he said. But the change wrought by the Thurman Act did none of these things. It

merely represented an attempt to assure that the railroads would be able to meet their obligations under the contract.²⁷

Waite emphasized that the United States government was not just a party to the contract—it was also the sovereign. As sovereign, it had not only the right but also the duty to see to it that the current stockholders of the companies did not appropriate for their own use that which in equity belonged to others. In Waite's mind, that equity belonged to future stockholders and to the public. The Thurman Act took nothing from the railroads that actually belonged to them, he said: "It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities."²⁸

To determine whether Congress acted properly, Waite applied the same presumption that would have been appropriate in a pure Contract Clause case. While admitting that it is the Court's duty to declare an act of Congress void if it is not within the legislative power of the United States, he emphasized that legislation should never be overruled except in a clear case. "Every possible presumption is in favor of the validity of the statute," he wrote, "and this continues until the contrary is shown beyond a reasonable doubt."²⁹

In their separate opinions, the three dissenting Justices offered a variety of skilled lawyerly arguments to get around the reserve clauses in the Pacific Railroad Acts of 1862 and 1864. Justice Strong took the position that the contracts relating to the bonds were not part of the Acts, but rather separate agreements that occurred later.³⁰ Justice Bradley maintained that while the government could reserve the power to alter, amend, or repeal a corporate charter, it could not reserve the power to violate a contract. Reservation of the power to violate a contract would be repugnant to the contract itself, and void.³¹ Focusing on the precise language of the reserve clause in the Act of 1862, Justice Field maintained

that the government's power to alter or amend the contract was limited to assuring that the railroads were built, kept in working order, and secured for postal delivery, military transportation, and other government uses. Since the Thurman Act did not fall into these categories, he concluded, the reserve clauses did not apply.³²

Far more interesting, however, was how the dissenters maneuvered the question in this case from one involving the Contract Clause to one involving the Fifth Amendment prohibition against taking property without due process of law. Their reasoning was as simple as it was ingenious. Justice Bradley captured it best. "A contract is property," he said. "To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law."³³

All the dissenters took a similar approach. Having asserted that a federal law that wholly or partially destroys a contract would violate the Fifth Amendment prohibition against taking the railroads' property without due process, they then turned to the common law of contract to explain why the Thurman Act did so. Justice Field, after admitting that the government had specific and limited duties as sovereign, emphasized its role as a party to the contract. "As a contractor it is bound by its engagements equally with a private individual," he wrote; "it cannot be relieved of them by an assertion of its sovereign authority."³⁴ The authority of interpreting or construing the contract, they all agreed, was not a legislative prerogative. It was a judicial question.³⁵

Railroad leaders knew they could depend on Field. Central Pacific manager David Colton made this clear in a letter discussing the case. "Judge Field will not sit in the Gallatin Case [in the U.S. District Court]," he wrote, "but instead will reserve his best efforts (I have no doubt) for the final determination of the case in Washington before the full bench."³⁶ Field did not disappoint them. His best efforts may not have yielded the opinion most

firmly rooted in law, but they certainly yielded the most forceful of the dissenting opinions. He cut right to the heart of the political dispute that produced the *Sinking Fund Cases*. There was, he observed, a general feeling in the country against the Pacific railroad companies. It was an attitude that the railroads had become so powerful that they should “be brought by strongest measures into subjection to the state.” But while admitting that a general feeling against the Pacific railroad companies might be justified, Field argued that the power and influence of the railroads did not justify the government’s invasion of its contracts. There was a general principle involved here, he warned: “The law that protects the wealth of the most powerful, protects also the earnings of the most humble; and the law that would confiscate the property of the one would take the earnings of the other.”³⁷ For Field, it did not matter that the “powerful” were corporations. Their rights were the same.

Field’s opinion highlighted one aspect of the *Sinking Fund Cases* that is often overlooked. The opinions in the case also reflected a debate about whether corporations were persons entitled to full protection of the Constitution. In arguing for the broadest protection of the corporation, and in comparing the rights of a corporation to the rights of a humble worker, Field painted an image of the anthropomorphic corporation—one having human attributes and, therefore, human rights.

As a matter of convenience, courts often drew analogies treating corporations as persons for specific legal purposes. In order to determine the proper jurisdiction of a diversity suit, for example, federal courts recognized corporations as “citizens” of the state in which they were incorporated.³⁸ Obviously, corporations were not actually citizens. Rather, courts used the concept of citizen as an analogy, what judges call a “legal fiction.” Judges indulged in that fiction as a matter of convenience. As railroad and business attorneys began to argue that their corporate clients had

rights to due process of law, equal protection of the law, and even natural law, however, the benign convenience of the corporate person took on a new and more controversial significance.

The majority’s opinion in the *Sinking Fund Cases* expanded somewhat on the conventional legal fiction of the corporate person, in that it recognized that a law that takes property from a corporation might violate due process. In contrast to Field, however, Waite was not ready to fully equate a corporation with a human being. “This corporation is a creature of the United States,” he said, speaking of the Union Pacific—a private corporation created for public purposes. A corporation might own property, but it also was “a peculiar species of property, which is subject to legislative control so far as its business affects the public interest.” Furthermore, Waite observed, the corporation is not sentient. It does not have a mind of its own; managers make the decisions for it.³⁹

Field may have been certain about the anthropomorphic essence of the corporation, but most people were more ambivalent. Justice Miller typified this when he described the history of the Union Pacific Railroad. “In the feeble infancy of this child of its creation,” the United States government had done all it could to strengthen, support, and sustain it, Miller wrote. “Since it [the Union Pacific] has grown to a vigorous manhood, it may not have displayed the gratitude which so much care called for. If that be so, it is but another instance of the absence of human affections which is said to characterize all corporations.”⁴⁰

This debate about the status of corporations as persons and the degree to which they remained under the control of legislative bodies gave the *Sinking Fund Cases* their lasting importance. Reformers both in and out of Congress could revel in their victory. For railroad and big-business advocates, however, the *Sinking Fund Cases* were a severe disappointment. Their frustration even made its way into

the usually staid proceedings of the Supreme Court. When presenting his dissent orally, Justice Field concluded with this sharp rebuke of Waite and the majority: "He must be dull indeed who does not see that under the legislation and the course of decision of late years, our government is fast drifting from its ancient moorings, from the system established by our fathers into a vast centralized and consolidated government."⁴¹

Ultimately, Field's written decision was toned down. But he and others continued to complain of the danger and unfairness of the Court's decision. The Central Pacific's Huntington, for example, warned that the opinion "was calculated to fill the country with alarm." With no little sarcasm, he asked whether the principle that "neither corporation nor person can acquire any right of ownership or enjoyment in property which the majority of the legislative power cannot at its discretion abridge, annul, or take away under the pretense of giving it to the public is becoming the guiding principle of jurisprudence among us."⁴²

The legal disputes arising from the Crédit Mobilier scandal revealed a Court still struggling with questions of whether, or to what degree, the Constitution limited government regulation of business and to what extent it afforded rights to corporations. Attorneys for railroads and the business elite hoped to use the opportunity to establish precedent that would insulate their clients from legislative interference. Although disappointed by the result of this round, they did not give up. By the end of the nineteenth century, the Court would adopt the theory that the Due Process Clause limited government regulation of business. It would also accept the idea that corporations were persons and thus entitled to all the rights and liberties that the Constitution's guarantee of due process afforded.

ENDNOTES

*This article is adapted from the author's forthcoming book with University of South Carolina Press.

¹Charles Francis Adams, Jr., "Railroad Inflation," *North American Review* 108 (January 1869) 130–64, 148. For descriptions of the scheme, see John Hoyt Williams, *A Great and Shining Road: The Epic Story of the Transcontinental Railroad* (New York: Times Books, 1988), 84; Albro Martin, *Railroads Triumphant: The Growth, Rejection, and Rebirth of a Vital American Force* (New York: Oxford University Press, 1992), 281–89. The Central Pacific had a similar scheme. Williams, *A Great and Shining Road*, 183–84; Stuart Daggett, *Chapters in the History of the Southern Pacific* (New York: Ronald Press, 1922), 75–82.

²Williams, *A Great and Shining Road*; Stephen Ambrose, *Nothing Like It in the World: The Men Who Built the Transcontinental Railroad 1863–1869* (New York: Simon & Schuster, 2000).

³Williams, *A Great and Shining Road*, 42–48; Daggett, *Chapters in the History of the Southern Pacific*, 54–56; Charles Fairman, *Reconstruction and Reunion 1864–88*, Holmes Devise History of the Supreme Court of the United States, vol. VII (New York: Macmillan Publishing Company, 1987), 589–90. The statutes are found at 12 Stat. 489 (1862) and 13 Stat. 356 (1864).

⁴Charles Francis Adams, Jr., "Railroad Inflation," *North American Review* 108 (January 1869), 130–64.

⁵Williams, *A Great and Shining Road*, 177, 281–83.

⁶Peter Tufano, "Business Failure, Judicial Intervention, and Financial Innovation: Restructuring U.S. Railroads in the Nineteenth Century," *The Business History Review*, 71 (Spring 1997), 1–40, 24 provides a graph charting railroad receiverships in the late nineteenth century. Gerald Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865–1917* (Baltimore: Johns Hopkins University Press, 1994), 47 places receiverships at thirty percent in the 1870s, fifteen percent in the 1880s, and twenty-five percent in the 1890s.

⁷In addition, the statute provided that each year, five percent of the net earnings of the companies would also be applied to repayment of the debt the companies owed.

⁸Fairman, *Reconstruction and Reunion*, 591.

⁹*United States v. Union Pacific Railroad Company*, 91 U.S. (1 Otto.) 72 (1875).

¹⁰*Union Pacific*, 91 U.S. at 91.

¹¹See Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence: University Press of Kansas, 1997), 197–235.

¹²C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* (New York: Macmillan, 1963), 258–60, citing Waite to Field, November 7 and 10, 1875, Morrison R. Waite Papers, Library of Congress, Washington, D.C.

¹³*United States v. Union Pacific Railroad Company*, 98 U.S. (8 Otto.) 569 (1879), known as the *Crédit Mobilier Case*. The language of the statute can be found in Fairman, *Reconstruction and Reunion*, 599–600. It can also be found in the case, 98 U.S. at 569–70.

¹⁴Fairman, **Reconstruction and Reunion**, 600, citing Waite's docket book.

¹⁵The Court actually heard arguments in the *Crédit Mobilier Case* twice. After the first argument in December 1876, the vote was apparently 5–4, with Bradley, Davis, Swayne, and Clifford in the minority. Davis resigned from the Court on March 7, 1877, and Justice John Harlan took his place. Harlan's presence did not make any difference: He voted the same as Davis. Fairman, **Reconstruction and Reunion**, 600.

¹⁶Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era** (Baton Rouge: Louisiana State University Press, 2003), 167–74.

¹⁷*Barton v. Barbour*, 104 U.S. (14 Otto.) 126, 137–38 (1881) (Miller, J., dissenting).

¹⁸Ross, **Justice of Shattered Dreams**, 175.

¹⁹*United States v. Union Pacific R.R. Co.*, 98 U.S. (8 Otto.) 569, 619 (1879). I have paraphrased this conclusion for simplicity. Miller actually says that none is set forth in the bill of equity authorized by the statute.

²⁰The Thurman Act became law when President Hayes signed the bill on May 7, 1878. Fairman, **Reconstruction and Reunion**, 604–05.

²¹20 Stat. 56 (1878).

²²*Nation*, October 30, 1879, 290; Daggett, **Chapters in the History of the Southern Pacific**, 388, n. 29.

²³*The Sinking Fund Cases*, 99 U.S. (9 Otto.) 700 (1879).

²⁴*Munn v. Illinois*, 94 U.S. 113 (1877).

²⁵*Munn*, 94 U.S. at 136 (Field, J., dissenting).

²⁶*The Sinking Fund Cases*, 99 U.S. at 722.

²⁷*The Sinking Fund Cases*, 99 U.S. at 724.

²⁸*The Sinking Fund Cases*, 99 U.S. at 726.

²⁹*The Sinking Fund Cases*, 99 U.S. at 718.

³⁰*The Sinking Fund Cases*, 99 U.S. at 732–38 (Strong, J., dissenting).

³¹*The Sinking Fund Cases*, 99 U.S. at 749 (Bradley, J., dissenting).

³²*The Sinking Fund Cases*, 99 U.S. at 756–58 (Field, J., dissenting).

³³*The Sinking Fund Cases*, 99 U.S. at 746–47 (Bradley, J., dissenting).

³⁴*The Sinking Fund Cases*, 99 U.S. at 747, 751, 731 (Bradley, J., dissenting; Field, J., dissenting; Strong, J., dissenting).

³⁵*The Sinking Fund Cases*, 99 U.S. at 746, 759–60 (Bradley, J., dissenting; Field, J., dissenting).

³⁶Colton Letters, September 20, 1878; *San Francisco Chronicle*, April 18, 1885. Carl Brent Swisher, **Stephen J. Field: Craftsman of the Law** (Hamden, CT: Archon Books, 1963), 247, 240 doubts the authenticity of this letter; C. Peter Magrath, **Morrison R. Waite: Triumph of Character** (New York: The Macmillan Company, 1963), 231 does not.

³⁷*The Sinking Fund Cases*, 99 U.S. at 767 (Field, J., dissenting).

³⁸See, e.g., *Railway Company v. Whitton*, 80 U.S. (13 Wall.) 270 (1871).

³⁹*The Sinking Fund Cases*, 99 U.S. at 719, 722–23.

⁴⁰*United States v. Union Pacific Railroad Company*, 98 U.S. (8 Otto.) 569, 620 (1879).

⁴¹Field's oral delivery was reported by the press. See Fairman, **Reconstruction and Reunion**, 611; *New York Times*, Oct 21, 1879.

⁴²Letter from Huntington to the *Nation*, reprinted in the *New York Tribune* and other newspapers nationwide and cited in Magrath, **Morrison R. Waite**, 235. See *Galveston Daily News*, November 7, 1879.

The Origin of the Baseball Antitrust Exemption: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*

SAMUEL A. ALITO, JR.*

It is a pleasure to have the chance to speak to you this afternoon. It was back in December, if I recall correctly, when I finally decided on the topic of the talk that I am going to give this afternoon. It was a dark, cold day. I knew that the date of the speech was June 2[, 2008]. That brought to mind thoughts of spring. Thoughts of spring brought to mind thoughts of baseball. And thoughts of baseball brought to mind the case that I am going to talk about: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,¹ a unanimous decision handed down by the Court on May 29, 1922—86 years ago last Thursday.

Of all the Court's antitrust cases, the *Federal Baseball* case may well be the most widely known, but what most people know about the case is not quite accurate. The case is generally known as having held that baseball has an "antitrust exemption." And critics of the decision—and they are legion—sometimes suggest that the decision was attributable to either (1) the Justices' affection for baseball and a desire to bend the rules to promote its well-being² or (2) the Justices' woeful ignorance

about what professional baseball had become by 1922.³ In truth, as we shall see, Justice Holmes' unanimous opinion for the Court represented a fairly orthodox application of then-prevalent constitutional doctrine.

I

To understand the *Federal Baseball* case, one must understand both the game and the relevant law as they were in 1922.

Antitrust

The law at issue in the *Federal Baseball* case was the Sherman Antitrust Act,⁴ which Congress enacted pursuant to its authority under Article I, Section 8 of the Constitution to regulate commerce among the several states. President William Henry Harrison signed the Sherman Act into law on July 2, 1890. The bill had passed the House unanimously and passed the Senate with only one nay—and that from a Senator who “had taken no part in the debates on the bill.”⁵

Despite its virtually unanimous congressional support, the Act’s legislative history reveals competing strains of thought on the purpose of the legislation.⁶ Some thought the Act should strike a blow at the cartelization of essential industries. Others wanted the Act to ensure a place in the national economy for smaller, higher-cost producers struggling to compete with more efficient, national concerns. The industrialization of the nineteenth century had unsettled the lives of different Americans in different ways, and the affected parties did not share the same vision for reform.

In order to accommodate these competing interests, the legislation was deliberately short on detail. Section 1 of the Act outlawed “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”⁷ Section 2 made it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”⁸ As others have observed, this language is too broad to be taken at face value.⁹ After all, every contract restrains trade insofar as it imposes obligations on the parties to deal with each other on certain terms rather than with other parties on other terms. Yet it could not be the case that Congress intended to outlaw every contract and every business. The Clayton Act,¹⁰ enacted in 1914, clarified the law somewhat by declaring certain arrangements

per se unlawful, but the scope of federal antitrust in most contexts remained murky. Congress had left it to the Third Branch to develop workable, rational principles for identifying conduct within and without the scope of the Act.

That process played out slowly, in part because the Court in the early period shared some of the ideological differences of the Act’s framers. The Court’s leading antitrust hawk was Justice John Marshall Harlan. An old-fashioned moralist, Harlan has been aptly described as “a southern gentleman”¹¹ and “the last of the tobacco-spitting judges.”¹² His colleague David Brewer joked that Harlan retired each evening at eight “with one hand on the Constitution and the other on the Bible, and so [slept] the sweet sleep of justice and righteousness.”¹³

Although Harlan came from a slave-owning family, he became the Court’s leading defender of the rights of African Americans and is perhaps best known today for his impassioned dissents in such cases as *Plessy v. Ferguson* and the *Civil Rights Cases*. Harlan saw enforcement of the antitrust laws as having a moral dimension. It is noteworthy that in the great *Standard Oil* case of 1911,¹⁴ Harlan compared the Gilded Age trusts to antebellum slavemasters. He claimed that turn-of-the-century America risked being subjected to “another kind of slavery[:] . . . the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life.”¹⁵

Justice Peckham largely shared that view. In the *Trans-Missouri Freight* case of 1897, he lamented that colossal business combinations were “driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.”¹⁶ In Peckham’s view, “[m]ere reduction in the price of the commodity dealt in might be dearly

paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital."¹⁷

Justice Holmes' worldview could not have been more different. Holmes, of course, is almost a mythic figure, remembered as "all things to all commentators."¹⁸ On the one hand, there is the Holmes of the play and movie, *The Magnificent Yankee*. On the other, there is the revisionist picture of Holmes painted by, among others, one of my old professors, Grant Gilmore, who wrote that "[t]he real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak."¹⁹ According to Professor Albert Alschuler of the University of Chicago Law School, Holmes' wartime experiences and the Social Darwinism of the time made him a moral skeptic and convinced him that life was a struggle in which might made right.²⁰ Consistent with this view, Holmes disdained the federal antitrust laws. In private correspondence, he referred to the Sherman Act as "a humbug based on economic ignorance and incompetence."²¹

Holmes was appointed to the Court in 1902 by President Theodore Roosevelt, and the first major antitrust case in which he participated was the famous *Northern Securities* case of 1904.²² Two railroad barons, J. P. Morgan and James J. Hill, had created a new enterprise, the Northern Securities Company, to hold the stock of railroads that owned the track needed to provide service through Chicago to the West Coast. Critics saw this as a transparent attempt to monopolize the nation's transcontinental railroad system, and shortly after taking office, President Theodore Roosevelt ordered his Attorney General to bring suit to break up the company. The government was successful in the lower court, and when the case reached this Court it was said to be the most closely watched case since *Dred Scott*.²³ Justice Harlan, writing for a 5-4 Court, held that the Sherman Act reached the merger

because the merger had a direct effect on interstate commerce.

Holmes dissented. He found the case indistinguishable from one of the Court's earlier antitrust cases, *United States v. E. C. Knight Co*, which repelled a Sherman Act attack against the merger of companies that together refined approximately ninety-eight percent of the nation's sugar.²⁴ According to Holmes, "[t]he point decided in [*E. C. Knight*] was that 'the fact . . . that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.'"²⁵ Holmes also hinted at his feelings about antitrust, predicting that the Court's interpretation of the Sherman Act "would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."²⁶ President Roosevelt, who, as noted, had appointed Holmes to the Court, was not pleased by Holmes' position. He later famously claimed that Holmes had displayed "all the backbone of a banana."²⁷

Baseball

With this brief discussion of early twentieth-century antitrust jurisprudence, let me shift to baseball. According to legend, the first baseball game was played at Cooperstown, New York, in 1839,²⁸ two years before Justice Holmes was born. In fact, versions of the game date back much farther, but organized baseball did not emerge until the middle of the nineteenth century.²⁹ The first organized game is said to have been played in 1845 in Hoboken, New Jersey, at a place called the Elysian Fields.³⁰ The first game between college teams took place in 1859.³¹ The first professional team, the Cincinnati Red Stockings, made its debut in 1869.³² And in 1876, the National League of Professional Baseball Clubs, the ancestor of today's National League, was formed.

Thereafter, rival leagues periodically sprouted up. In the late nineteenth century, one of the great players of the day, Monte

Ward, a law school graduate, started the Players' League, but aggressive tactics by the National League drove the Players' League out of business.³³ A more formidable rival, the American League, was established in 1901. For a time, the two leagues competed for players, but in 1903, they signed a truce known as the National Agreement. Pursuant to the National Agreement, the two leagues agreed to recognize each other as equals and to honor each other's contracts and observe the reserve clause, which tied a player to his team. The agreement put in place the essential structure of professional baseball that lasted for decades, and it was followed by the emergence of the game as the true national pastime.

Baseball soon became big business. In 1910, President Taft threw out the first pitch at National Park, the home of the Washington Senators. In the early 1920s, Babe Ruth came on the scene, shattered home-run records, made fans forget the Black Sox scandal of 1919, and became a larger-than-life celebrity. In England, George Bernard Shaw asked, "Who is this Babe Ruth, and what does she do?"³⁴ In 1921, the Yankees drew 1.2 million fans, and their cross-town rivals, the Giants, drew nearly a million.³⁵ More than a quarter million fans bought tickets to watch the two teams face off in the 1921 World Series.

II

Like the American League before it, the Federal League got its start as an independent confederation of teams with no pretense of competing with major league baseball. It was founded in 1913 with six teams representing the cities of Chicago, Cleveland, Indianapolis, Pittsburgh, St. Louis, and Covington, Kentucky (which served the Cincinnati market). The league's schedule was drawn up to avoid competition with major league games, and the league's clubs took care not to recruit players under contract with the major leagues.³⁶ This

business model proved modestly successful. Although we do not have attendance figures for the 1913 season, we know that they were strong enough to keep the league afloat despite a lackluster pennant race.³⁷

The league soon abandoned its humble designs with the election of a new league president, James Gilmore, following the 1913 season. Gilmore, one of the financial backers of the Chicago club, had made his fortune in the coal and heating business,³⁸ and he lent the league his vigorous executive leadership. Under Gilmore, the league expanded from six to eight teams, adding franchises in Baltimore and Buffalo. The league also replaced the Cleveland club with a team in Brooklyn, slowly shifting its center of gravity eastward. The league was now home to the Baltimore Terrapins (or "Baltfeds"), the Brooklyn Tip-Tops (or "Brookfeds"), the Buffalo Blues (or "Buffeds"), the Chicago Wales (or "Chifeds"), the Kansas City Packers (or "Kanfeds"), the Pittsburgh Rebels (or "Pittfeds"), the St. Louis Terriers, and the Indianapolis Hoosiers (who were moved to Newark, New Jersey, and renamed the Peppers in 1915).

Like Gilmore, many of the league's backers came to baseball from the business world. The Brookfeds, for example, were controlled by baked-goods baron Robert B. Ward, while oil tycoon Harry Sinclair owned the Peppers. Other financial heavyweights backing the league included hotel magnate Edward Krause, brewer Otto Stiffel, and of course Gilmore himself. Their wherewithal gave the Federal League a sound financial footing.

Although captains of industry dominated the Federal League, it is important to note that two of the league's teams, the Baltfeds and the Buffeds, were publicly owned. Both signed up when the league expanded to eight teams before the 1914 season. The Baltfeds were formed to bring major league baseball back to Baltimore after the Orioles left the city in 1903 to become the New York Yankees. Some 600 Baltimore citizens claimed ownership in the club, most with just a handful of shares.³⁹



In 1910, President Taft threw out the first pitch at National Park (pictured), the home of the Washington Senators. This was yet another sign that baseball had become the national pastime.

The Buffeds likewise raised capital by running ads in local newspapers. One ad promised that the Buffed organization would be “one of the greatest financial successes in the history of baseball.”⁴⁰ The ad went on:

If you want to be identified with this new project—and it seems to us that every live, red-blooded man, woman, and child should have such an ambition—you must obey that impulse NOW. Visit or telephone our temporary office . . . and make your application.

DO IT NOW! TODAY IS THE LAST DAY!⁴¹

The local public’s stake in the Baltimore and Buffalo franchises shaped the vision that those two clubs had for the Federal League—a vision that their sister clubs may not have shared. Notably, the antitrust suit that came

before this Court in the *Federal Baseball* case was originally filed by the Baltimore franchise.

Armed with fresh capital and a full complement of eight teams, in 1914 Gilmore’s Federal League declared itself a major league and went into open competition with the National and American Leagues for fans and talent. On the surface, the gambit seemed successful. The league’s attendance in the 1914 and 1915 seasons rivaled attendance in the big leagues.⁴² Beneath the surface, however, the league’s business model was cracking. League management had sought to win over big league fans by poaching talent from big league teams, but that talent did not come cheap—and often it would not come at all. Major league player salaries, long depressed by the anticompetitive effects of the reserve clause and the ineligible lists, ballooned in the face of competition from the Federal League. But most of the big league

FEDERALS TO GIVE MAJORS A SURPRISE

President Gilmore's Baseball Announcement Is Awaited / with Keen Interest.

On December 23, 1913, *The New York Times* noted that Federal League President James A. Gilmore was about to make a decision that would threaten major league baseball. Gilmore later announced he would turn his baseball teams into a major league and go into competition with the American and National Leagues by poaching players and fans.

players had no intention of defecting. They just used the threat of defection as leverage to renegotiate their contracts with the major league clubs. Players who did defect risked blacklisting; those willing to take that risk were generally in the twilights of their careers, with little to lose. As a result, the Federal League was forced to pay steep salaries to secure mostly aging talent. Coupled with the league's heavy capital expenditures (in only a couple of years, it erected eight new stadiums),⁴³ the salary wars put the Federal League in the hole. By the end of the 1915 season, the Baltimore Terrapins had lost \$65,000, while the Brooklyn Tip-Tops had accumulated losses of \$800,000, and the Buffalo and Kansas City franchises were insolvent.⁴⁴

The Federal League's end came swiftly. Its final days are vividly captured in the record

and briefs filed with this Court in the *Federal Baseball* case. As late as November 1915, Gilmore, the president of the Federal League and a defendant in the suit, was writing member clubs about preparations for the 1916 season. In a letter dated November 21, 1915, Gilmore wrote Harry Goldman, the Baltimore club's secretary, asking him to prepare a rough budget for the Baltfeds' 1916 season.⁴⁵ Even as late as November 30, 1915, Gilmore was writing the club president, Carroll Rasin, to recommend a promising player for the club's 1916 roster.⁴⁶ Less than three weeks after that, on December 16, 1915, Gilmore sent another, more cryptic correspondence: an urgent telegram addressed to Rasin and Baltfed director (and future Hall of Famer) Ned Hanlon. It read simply: "You and Hanlon be at Biltmore in morning. Important."⁴⁷



The Baltimore Terrapins (or Baltfeds) were formed as a public company in 1913 to bring major league baseball back to Baltimore after the Orioles left the city in 1903 to become the New York Yankees. Members of the Federal League, the Terrapins were the original franchise to file the antitrust suit against major league baseball in the Supreme Court. Above is a Terrapins uniform; at left is the logo the players wore on their pockets.

Rasin, Hanlon, and the club's general counsel, Stuart Janney, took the midnight train to New York and, upon arrival the following morning, went straight to the Biltmore Hotel on Madison Avenue. Gilmore greeted them with the devastating news: The Federal League's 1916 season was "all off."⁴⁸ The league had sued for peace with organized baseball. As a result of the truce, several Federal League owners accepted buyouts, a couple more were permitted to buy franchises in the major leagues, and three franchises—including the two that were publicly owned, Baltimore and Buffalo—were left to twist in the wind.

The details of the transaction were ironed out at meetings at the Biltmore and, later that evening, at the Waldorf-Astoria. The participants did posterity the good service of stenographically recording the Waldorf meeting, so we have a transcript of what transpired. Although the secondary literature has not reached consensus on why Baltimore opted out of the settlement, the Waldorf transcript implies that the club did not even have a

seat at the table. That would make sense. The major leagues did not need to eliminate every franchise in order to hobble their competitor. Moreover, the Baltimore market did not appeal to organized baseball, which had already left the market once in 1903. Charles Comiskey, owner of the White Sox, expressed the view that Baltimore was "a minor league city, and not a hell of a good one at that."⁴⁹

To settle the Baltfeds' claims against the rest of the league, its sister clubs offered the franchise \$50,000 as its "equitable distribution" of the league's value, but that sum was a pittance compared to what other members of the league were getting. Robert Ward, owner of the Brooklyn Tip-Tops, received \$400,000 for giving up his team. The Baltfeds said no thanks. Following the holidays, they convened an emergency meeting of their shareholders in Baltimore, at which management received authority to take the organization's grievances to court. The Baltfeds sold their remaining assets to raise money for legal fees and then filed suit in federal court.

III

It should be noted that the *Federal Baseball* case was not the first antitrust action to arise out of the Federal League imbroglio. Well before the Federal League was disbanded, it brought its own suit against organized baseball in the Northern District of Illinois. The complaint, filed after the league's 1914 season, named as defendants the National League, the American League, all sixteen club presidents, and the National Commission. The plaintiffs alleged that the defendants had monopolized and conspired to monopolize the business of giving baseball exhibitions, in violation of Section 2 of the Sherman Act. They also alleged that the National Agreement amounted to a contract in restraint of trade, in violation of Section 1 of the Act.

A number of commentators have speculated that the Federal League filed suit in the Northern District of Illinois because that was where District Judge (and future baseball commissioner) Kenesaw Mountain Landis held sway.⁵⁰ Judge Landis, a Roosevelt appointee, had already burnished his reputation as a trust-buster. In 1907, he had ordered the Standard Oil Company to pay a fine of \$29,240,000 for violations of the Elkins Act.⁵¹ At the time, this was the largest fine ever levied in American history.⁵²

Judge Landis was also a keen baseball fan, and he was apparently concerned that a decision adverse to the major leagues would undermine the game. During trial, he declared from the bench that "any blows at . . . baseball would be regarded by this court as a blow to a national institution."⁵³ Judge Landis never ruled on the case before him. It languished on his docket until the end of 1915, when it was mooted by the peace agreement described above.

And that brings us to the *Federal Baseball* case. In September 1917, the Federal Baseball Club of Baltimore filed suit in the Supreme Court of the District of Columbia pursuant to Section 4 of the Clayton Act. The com-

plaint named everyone in sight as a defendant: the National League of Professional Baseball Clubs and each of its eight member teams; the American League of Professional Baseball Clubs and each of its eight member teams; National League president (and former Pennsylvania governor) John K. Tener; American League President Bancroft Johnson; National Commission president August Herrmann; former league president James Gilmore; former Chifeds chief Charles Weeghman; and former Newark Peppers chief Harry Sinclair.

The Baltimore club accused the defendants of conspiring to destroy its franchise by monopolizing the baseball business and restraining trade therein. The case was tried to a jury before the Honorable Wendell P. Stafford. Judge Stafford instructed the jury that organized baseball was engaged in interstate trade and commerce and that, by means of the National Agreement and the reserve system, it had created a monopoly in that business.⁵⁴ He left it to the jury to determine whether the Baltimore club had suffered damages as a result of that monopoly. The jury found that it had and returned a verdict in the plaintiff's favor. It fixed the club's damages at \$80,000. Pursuant to Section 4(a) of the Clayton Act, that amount was trebled, and the club received a judgment of \$240,000 plus its counsel fees.

Organized baseball appealed to the United States Court of Appeals for the District of Columbia Circuit, and the D.C. Circuit reversed. The court accepted that Sections 1 and 2 of the Sherman Act outlawed the monopoly or restraint of trade or commerce among the States.⁵⁵ It framed the issue on appeal as follows: "Did the giving of exhibitions of baseball, under the circumstances disclosed in the record, constitute trade or commerce within the meaning of the Sherman Act? If it did not, then the act does not apply, and the appellee has no right to invoke its provisions."⁵⁶

To answer that question, the court looked to the definitions of the terms "trade" or "commerce" in *Webster's Dictionary*. It also

considered how those terms had been defined in this Court's precedent, including Chief Justice Marshall's famous opinion in *Gibbons v. Ogden*⁵⁷ and Chief Justice Fuller's opinion in the *E.C. Knight* case mentioned earlier.⁵⁸ "Through these definitions," the D.C. Circuit reasoned, "runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another."⁵⁹ Applying that standard, the court concluded that the Baltimore club was engaged in the purely intrastate business of baseball exhibitions:

The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it.⁶⁰

The court thus distinguished between the baseball exhibitions and the interstate movement of players and equipment, which was merely incidental to the games themselves. Since the reserve system and ineligibility lists had at most an indirect effect on the movement of the players and their equipment across state lines, they did not offend the Sherman Act.⁶¹

Although the D.C. Circuit's analysis may seem pat and formalistic in light of modern doctrine, it was in line with this Court's analysis in the *E.C. Knight* case. It focused not on whether the defendant's conduct violated the substantive prohibition of the antitrust laws, but on whether the conduct sufficiently partook of interstate commerce to be prohibited by Congress at all. The parties focused on the latter issue when the case came before this Court on writ of error. The Court having not yet imposed page limits, the plaintiffs in error filed a 200-page brief, 40 pages of which were devoted to addressing the scope of the

"trade or commerce" reached by the Sherman Act. Fewer than twenty pages addressed the substantive antitrust question.

Moreover, the author of the D.C. Circuit's opinion was no antitrust slouch. The opinion was written by Chief Justice Constantine J. Smyth. Prior to joining the Court, Smyth had spent four years as Special Assistant to the Attorney General, overseeing the government's prosecution of antitrust cases.⁶²

Justice Holmes' unanimous opinion for the Court found Smyth's analysis persuasive. Like Smyth, Holmes focused his inquiry on whether the business of baseball was interstate "trade or commerce" within the meaning of the Sherman Act. He took the D.C. Circuit's starting point as his own because, in his words, "[t]he decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery."⁶³ After briefly reviewing the facts, he declared that "the Court of Appeals was right."⁶⁴

Holmes' opinion in the *Federal Baseball* case was tightly written. His analysis of the question presented—a question to which the parties had devoted about 400 pages of briefing—consumed all of two paragraphs. He agreed with the D.C. Circuit's characterization of the business in question as "giving exhibitions of base ball," a business that to his eye was a "purely state affair[]." ⁶⁵ The fact that players and their accoutrements had to cross state lines to play did not transform the essential intrastate nature of the games themselves. "It is true," Holmes wrote, "that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."⁶⁶

In support of this reasoning, Justice Holmes relied on the Court's analysis in *Hooper v. California*,⁶⁷ an 1895 decision in

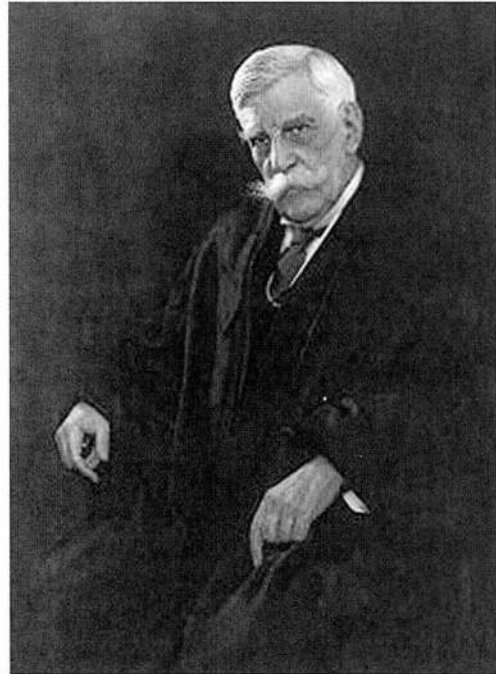
which the Court had held, over Justice Harlan's dissent, that the sale of maritime insurance in California on behalf of an out-of-state carrier was not interstate commerce. "The business of insurance," the Court had written in *Hooper*, "is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."⁶⁸ The *Hooper* case was the same precedent on which the D.C. Circuit had chiefly relied, and it was the only precedent that Holmes cited.

IV

So what should we think about Holmes' opinion in the *Federal Baseball* case? To many, the answer is "not much." It has been pilloried pretty consistently in the legal literature since at least the 1940s. Commentators have called it: "[b]aseball's most infamous opinion";⁶⁹ a "clearly wrong" decision based on a "curious and narrow misreading of the antitrust laws and/or [an] utter misunderstanding of the nature of the business of baseball";⁷⁰ a "remarkably myopic" decision, "almost willfully ignorant of the nature of [baseball]";⁷¹ and a "simple and simplistic" decision that forms "a source of embarrassment for scholars of Holmes."⁷² One commentator speculated that the Court simply "exempted baseball from the antitrust laws because it was the national pastime."⁷³

The decision has also been criticized from the bench. Judge Jerome Frank of the Second Circuit derided it as an "impotent zombi [sic]" void of vitality in light of the Court's more recent decisions.⁷⁴ Another jurist from that court, Judge Henry Friendly, declared that "*Federal Baseball* was not one of Mr. Justice Holmes' happiest days."⁷⁵

Members of this Court have not been much kinder. The Court has had at least two opportunities to overrule the *Federal Baseball* case, first in the 1953 case of *Toolson v. New York Yankees, Inc.*⁷⁶ and then again in the 1972



Justice Oliver Wendell Holmes, Jr.'s unanimous opinion giving major league baseball a monopoly in 1922 was tightly written but is not considered his finest effort.

case of *Flood v. Kuhn*.⁷⁷ Both times it let the case stand, both times over withering dissents. Justice Harold Burton, dissenting in *Toolson*, criticized the *Federal Baseball* case's understanding of professional baseball as a "purely state affair[]":

In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor

league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.⁷⁸

Justice William Douglas was even more unsparing with his criticism in *Flood*. He characterized the *Federal Baseball* case as a “derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.”⁷⁹ Justice Douglas added that although he had joined the Court’s opinion in *Toolson*, he had “lived to regret it.”⁸⁰

Even those who signed onto the Court’s opinions in *Toolson* and *Flood* regarded *Federal Baseball* as a relic. Justice Harry Blackmun, the author of the Court’s opinion in *Flood*, called the *Federal Baseball* case an “aberration,” albeit “an established one.”⁸¹ In one of the other sports antitrust cases that came before the Court, Justice Tom Clark dismissed Holmes’ decision as “unrealistic, inconsistent, . . . illogical,” and “of dubious validity.”⁸² In short, as one recent historian put it, “[t]he critiques of [the] decision are legion and its fans few.”⁸³

Only very recently have some scholars given Holmes’ opinion less caustic reviews. For example, Jerald Duquette’s 1999 work on baseball and antitrust finds Justice Holmes’ reasoning “consistent with Progressive Era jurisprudence regarding the treatment of ‘incidental’ interstate transportation.”⁸⁴ Perhaps the best defense of Holmes was published by this Society: in “Antitrust and Baseball: Stealing Holmes,” Kevin McDonald argued that the *Federal Baseball* case was “scorned princi-

pally for things that were not in the opinion, but later added by *Toolson* and *Flood*.⁸⁵

This assessment seems to me to be accurate. In 1922, the Court saw the Commerce Power as a limited power that did not extend to all “economic . . . activities that have a substantial effect on interstate commerce.”⁸⁶ This approach forced the Court to draw fine—some would say arbitrary—lines. Those who think poorly of this entire enterprise will obviously think poorly of the *Federal Baseball* case as well. But that decision is no less defensible than Holmes’ *Northern Securities*⁸⁷ dissent or the Court’s decisions in cases such as *E.C. Knight* and *Hooper*.

There is some irony in the outcome of the *Federal Baseball* case. In law, the view of baseball as a local affair prevailed. The argument that baseball was a big interstate business lost. But the real losers in the case were local people. The local interests were those connected with the Baltfeds, a ball club owned by some 600 citizens of Baltimore. The city felt slighted when the soon-to-be Yankees left town, and so the local political machinery stepped in and joined a renegade league to bring baseball back. For the people of Baltimore who backed the team, baseball, like politics, was local.

ENDNOTES

*Justice Alito delivered this speech as the Supreme Court Historical Society’s 2008 Annual Lecture. The Justice expresses his gratitude to James Hunter, one of his law clerks for the October 2007 Term, and Linda Corbelli, one of the Court’s librarians, for their invaluable assistance.

¹ 59 U.S. 200 (1922).

² See *infra* note and accompanying text.

³ See *infra* notes and accompanying text.

⁴ An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209 (1890).

⁵ 1 *The Legislative History of the Federal Antitrust Laws and Related Statutes* 25 n. 1.163 (Earl W. Kintner ed., 1978).

⁶ See generally Thomas D. Morgan, *Cases and Materials on Modern Antitrust Law and Its Origins* 25–29 (2d ed. 2001).

⁷ Sherman Act § 1, 26 Stat. at 209.

⁸*Id.* § 2, 26 Stat. at 209.

⁹See, e.g., Alan J. Meese, "Price Theory, Competition, and the Rule of Reason," 2003 *U. Ill. L. Rev.* 77, 83 & n. 28 (2003).

¹⁰An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes, ch. 323, 38 Stat. 730 (1914).

¹¹Jonathan Lurie, "Book review," 38 *Am. J. Legal Hist.* 378, 378 (1994).

¹²Louis R. Cohen, "A Biography of the Second Justice Harlan," 91 *Mich. L. Rev.* 1609, 1610 n. 4 (1993) (quoting Holmes' description of Harlan in Paul E. Freund et al., **Constitutional Law: Cases and Other Problems**, at xxxix–xl (1977)).

¹³*Id.*

¹⁴221 U.S. 1 (1911).

¹⁵*Id.* at 83 (Harlan, J., concurring in part and dissenting in part).

¹⁶*United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897).

¹⁷*Id.*

¹⁸G. Edward White, "Looking at Holmes in the Mirror," 4 *L. & Hist. Rev.* 439, 440 (1986), cited in Alfred S. Neely, "A Humbug Based on Economic Ignorance and Incompetence—Antitrust in the Eyes of Justice Holmes," 1993 *Utah L. Rev.* 1, 6 n. 20.

¹⁹Grant Gilmore, **The Ages of American Law** 48–49 (1977).

²⁰Albert W. Alschuler, **Law Without Values: The Life, Work, and Legacy of Justice Holmes** 58–59 (2000).

²¹Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 30, 1910), in 1 **Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock** 1874–1932, at 163, 163 (Mark DeWolfe Howe ed., 1944).

²²*N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

²³R. Blake Brown & Bruce A. Kimball, "When Holmes Borrowed from Langdell: The 'Ultra Legal' Formalism and Public Policy of *Northern Securities* (1904)," 45 *Am. J. Legal Hist.* 278, 287–88 (2001) (citing "The Hearing in the *Northern Securities* Case," 77 *The Nation* 499, 499 (1903)).

²⁴156 U.S. 1, 17–18 (1895).

²⁵193 U.S. at 402 (Holmes, J., dissenting).

²⁶*Id.* at 111.

²⁷C. D. Bowen, **Yankee from Olympus** 370 (1944), cited in Morgan, *supra* note, at 80 & n. 10.

²⁸Geoffrey C. Ward & Ken Burns, **Baseball: An Illustrated History** 3 (2007).

²⁹See *id.* at 3–4.

³⁰*Id.* at 4–5.

³¹*Id.* at 15.

³²*Id.* at 20.

³³See *id.* at 39–40.

³⁴*Id.* at 153.

³⁵Baseball Chronology.com, Major League Baseball Attendance for 1921, <http://www.baseballchronology.com/Baseball/Years/1921/Attendance.asp> (last visited April 5, 2009).

³⁶See Marc Okkonen, **The Federal League of 1914–1915: Baseball's Third Major League** 3 (1989).

³⁷See *id.* at 5.

³⁸*Id.*

³⁹See Br. for the Appellee at 3, 5, *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681 (D.C. Cir. 1921) (No. 3368); Br. on Behalf of Defendants in Error at 42, *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (No. 204).

⁴⁰Buffalo Federal League Baseball Company, Inc., "Share in the Profits of the Game You Patronize" (undated 1914 newspaper advertisement), reprinted in Okkonen, *supra* note, at 11.

⁴¹*Id.*

⁴²David S. Neft et al., **The Sports Encyclopedia: Baseball** 68 (5th ed. 1982).

⁴³Gary Hailey, "Anatomy of a Murder: The Federal League and the Courts," in **The National Pastime: A Review of Baseball History** 62, 63 (Merritt Clifton ed., 1985).

⁴⁴See *id.* at 66.

⁴⁵Br. on Behalf of Plaintiff in Error at 79, *Fed. Baseball Club of Balt.*, 259 U.S. 200 (citing Record at 325).

⁴⁶*Id.* (citing Record at 326).

⁴⁷*Id.* (quoting Record at 301).

⁴⁸*Id.*

⁴⁹App. to Br. on Behalf of Defendants in Error at 155, *Fed. Baseball Club of Balt.*, 259 U.S. 200.

⁵⁰See, e.g., J. Philip Calabrese, "The Racial Re-integration of Major League Baseball," 11 *Seton Hall J. Sport L.* 1, 24 (2001); Jason M. Pollack, Note, "Take My Arbitrator, Please: Commissioner 'Best Interests' Disciplinary Authority in Professional Sports," 67 *Fordham L. Rev.* 1645, 1650 (1999).

⁵¹See *United States v. Standard Oil Co. of Ind.*, 155 F. 305, 321 (1907).

⁵²See Shayna M. Sigman, "The Jurisprudence of Judge Kenesaw Mountain Landis," 15 *Marq. Sports L. Rev.* 277, 295 (2005).

⁵³Benjamin G. Rader, **Baseball: A History of America's Game** 109 (1992), quoted in Jerold J. Duquette, **Regulating the National Pastime: Baseball and Antitrust** 17 (1999).

⁵⁴See G. Edward White, **Creating the National Pastime: Baseball Transforms Itself, 1903–1953**, at 71–72 (1996).

⁵⁵*Fed. Baseball Club of Balt.*, 269 F. at 684.

⁵⁶*Id.*

⁵⁷9 Wheat. (22 U.S.) 1 (1824).

- ⁵⁸*United States v. E. C. Knight Co.*, 156 U.S. 1 (1895); *see also supra* text accompanying notes 24–25.
- ⁵⁹*Fed. Baseball Club of Balt.*, 269 F. at 684.
- ⁶⁰*Id.* at 684–85.
- ⁶¹*See id.* at 687–88.
- ⁶²Jeffrey Brandon Morris, **Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit** 71, 78 (2001).
- ⁶³*Fed. Baseball Club of Balt.*, 259 U.S. at 208.
- ⁶⁴*Id.*
- ⁶⁵*Id.*
- ⁶⁶*Id.* at 208–09.
- ⁶⁷155 U.S. 648 (1895).
- ⁶⁸*Id.* at 655.
- ⁶⁹Eldon L. Ham, “Aside the Aside: The True Precedent of Baseball in Law,” 13 *Marq. Sports L. Rev.* 213, 215 (2003).
- ⁷⁰Paul Finkelman, “Baseball and the Rule of Law Revisited,” 25 *T. Jefferson L. Rev.* 17, 30 (2002).
- ⁷¹White, *supra* note, at 70.
- ⁷²**Baseball and the American Legal Mind** 75–76 (Spencer Weber Waller et al. eds., 1995).
- ⁷³Roger I. Abrams, “Blackmun’s List,” 6 *Va. Sports & Ent. L. J.* 181, 183 (2006–2007); *see also* Roger I. Abrams, **Legal Bases: Baseball and the Law** 60 (1998).
- ⁷⁴*Gardella v. Chandler*, 172 F. 2d 402, 408–09 (2d Cir. 1949) (Frank, J., concurring).
- ⁷⁵*Salerno v. Am. League of Prof’l Baseball Clubs*, 429 F. 2d 1003, 1005 (2d Cir. 1970).
- ⁷⁶346 U.S. 356 (1953) (*per curiam*).
- ⁷⁷407 U.S. 258 (1972).
- ⁷⁸346 U.S. at 357–58 (1953) (Burton, J., dissenting) (citation omitted).
- ⁷⁹407 U.S. at 286 (Douglas, J., dissenting).
- ⁸⁰*Id.* at 286 n.1.
- ⁸¹*Id.* at 282 (Blackmun, J.).
- ⁸²*Radovich v. Nat’l Football League*, 352 U.S. 445, 450, 452 (1957).
- ⁸³**Baseball and the American Legal Mind**, *supra* note, at 78 n. 1.
- ⁸⁴Duquette, *supra* note, at 18.
- ⁸⁵Kevin McDonald, “Antitrust and Baseball: Stealing Holmes,” 1998 *J. Sup. Ct. Hist.* 89, 122 (1998).
- ⁸⁶*Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971) and *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (internal quotation marks omitted)).
- ⁸⁷*N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

The Original Justice Roberts

BURT SOLOMON

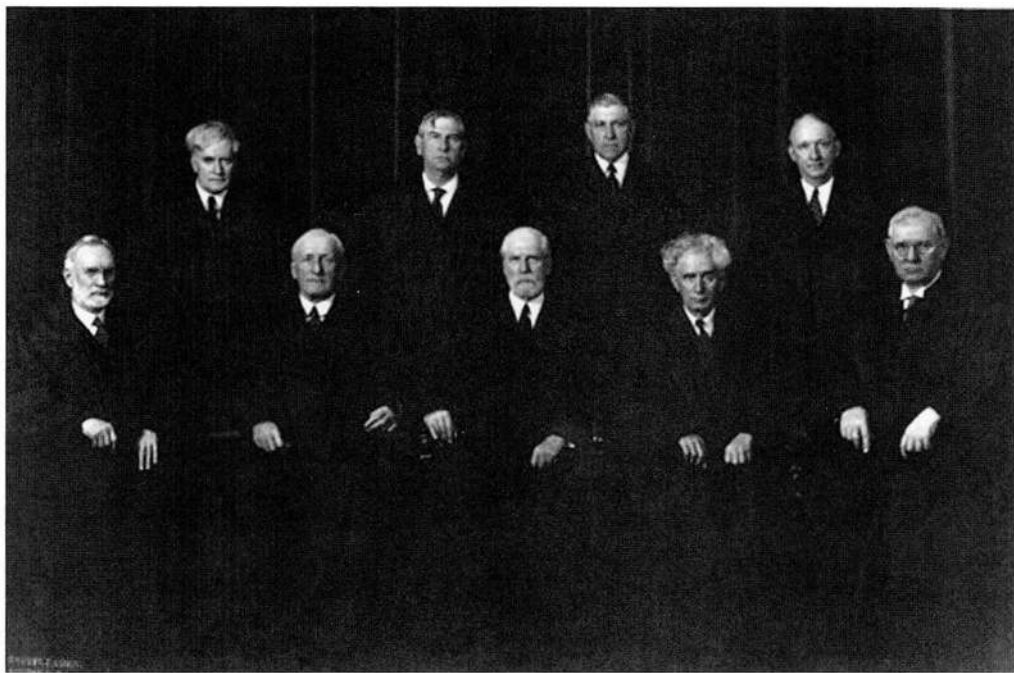
The Supreme Court had rarely, if ever, seen a fight quite like the one over the farewell letter to a departing Justice. It started routinely enough in the summer of 1955, when Chief Justice Harlan Fiske Stone drafted a letter of farewell to Justice Owen J. Roberts, who had suddenly resigned after fifteen eventful years on the Court. The six-sentence missive went first to the Senior Associate Justice, Hugo L. Black, to be signed and passed along to his Brethren.

But Black objected to two innocuous passages. He blue-penciled the regret “that our association with you in the daily work of the Court must now come to an end.” Even more telling was his objection to an idle compliment: “You have made fidelity to principle your guide to decision.”¹

What followed was the judicial equivalent of slapstick. Stone was amenable to the deletions. But when Justice Felix Frankfurter learned of Black’s “derogatory excisions,” he exploded.² Though Frankfurter was Roberts’ judicial executor and best friend on the Court, he was not prone to overestimate his colleague’s brainpower. To Stone, he acknowledged Roberts’ “serious intellectual limitations—above all, a lack of a more or less coherent juristic or social philosophy, except in a very few defined areas.”³ Still, he pointed out, Roberts was always faithful to whatever he considered the governing principles in a particular case. “If there’s one thing true about Roberts, that’s it!”⁴

When the Justices discussed the letter to Roberts at their first Saturday Conference in October, the discussion quickly grew heated. There was talk of sending two letters or of sending a single letter that not all of the Justices signed. Frankfurter announced that he would sign Stone’s original letter but not with Black’s deletions, with their implication of Roberts’ intellectual dishonesty.⁵ As Stone floundered for a solution, Black, his eyes blazing, declared that he would sign no letter at all.⁶ In the end, no letter was sent.

Both Black and Frankfurter, however, had missed the point about Justice Roberts. His indifference to principle was his strength. His place in Court history centers on his famous “switch in time that saved nine,” which did so much to defeat President Franklin D. Roosevelt’s 1937 proposal to “pack” the nation’s highest Bench by adding as many as six additional Justices. Roberts switched, in fact, on three separate constitutional interpretations over a span of eight weeks, willing to



Hugo Black (standing, right) refused to sign the retirement letter Chief Justice Harlan Fiske Stone drafted for his Brethren to say goodbye to Owen J. Roberts (standing, second from right). Black took issue with the compliment the letter directed to Roberts that “[y]ou have made fidelity to principle your guide to decision.”

abandon longstanding precedents and to invoke economic and social reality—and the highest needs of the American public—as the basis for the Court’s jurisprudence. As the swing vote on the narrowly divided Court, he touched off what legal scholars soon came to regard (in the title of a 1941 book) as a *Constitutional Revolution Ltd.*,⁷ one that led to the judicial activism of the Warren Court and far-reaching decisions such as *Roe v. Wade*.⁸ The original Justice Roberts served in one of the Court’s highest traditions: as a judicial pragmatist par excellence, the Sandra Day O’Connor of his day.

“A Heart and a Head”

Owen Roberts had seen different sides of life, and he had liked them all. Born in Philadelphia in 1875, the son of a wagon-maker who became the co-owner of a successful hardware business, he had the wherewithal to keep rising. He received the education of a

Philadelphia blueblood, first at the elite Germantown Academy and, starting at age sixteen, at the city’s—and state’s—preeminent educational institution, the University of Pennsylvania, as an undergraduate and then for law school. This completed his entry into “the University crowd” that could assure his worldly success in socially insular Philadelphia. In Roberts’ father’s life and then in his own, by dint of self-reliance, hard work, and the cultivation of connections, the American dream was nothing less than a fact of life.

A law school friend became Philadelphia’s district attorney and hired Roberts as the top assistant on his staff. Then Roberts co-founded a law firm, Roberts, Montgomery & McKeehan (continuing to this day as Montgomery, McCracken, Walker & Rhoads), that lured as a client the streetcar company he had defended on the public payroll, along with the bluest-chip corporations in the city and state: the Pennsylvania Railroad, Bell Telephone of Pennsylvania, the investment firm Drexel



Roberts served as an assistant district attorney in Philadelphia before striking out in private practice. He represented blue-chip companies in his state such as the Pennsylvania Railroad, Bell Telephone of Pennsylvania, the investment firm Drexel and Company, and Equitable Life Assurance.

and Company, Equitable Life Assurance, and Philadelphia's chamber of commerce. Soon he sat on several corporate boards and belonged to five of the city's most exclusive clubs. Near lofty Rittenhouse Square, he purchased an elegant four-story townhouse, the only one on the long block with a fancy bowed front. His reputation was as a stolid conservative in the city's conservative bar.

Yet Roberts was considerably more complicated than that. Beyond his city sophistication, he fulfilled a childhood dream by buying a 700-acre farm in nearby Chester County that he tried, though with limited success, to operate at a profit. He was a churchgoing man who talked little about his faith but, by all accounts, felt it deeply. His work on the municipal panel that managed the trust funds

that Philadelphians bequeathed to the city involved him with a school for orphaned boys as the chairman of its instruction committee. Lincoln University, a historically black college near Philadelphia, named him as a trustee. Appointed by President Calvin Coolidge as a special prosecutor in the Teapot Dome scandal, he often shared a table with reporters in Washington at a dingy basement lunchroom near the courthouse, chatting about politics, poetry, and baseball. They wound up believing he had progressive sympathies—"both a heart and a head," as one of them wrote.⁹ As a Republican in pursuit of Republican corruption, Roberts put Albert Fall, the former Interior Secretary, behind bars for bribery, making Fall the first Cabinet member ever imprisoned for his actions in office.

In the spring of 1930, President Herbert Hoover struggled to fill a vacancy on the Supreme Court after the Senate defeated his first nominee, John J. Parker, a federal appeals court judge from North Carolina. That partisans on all sides could see in Roberts whatever they liked made him a politically appealing second choice. The conservatives were heartened by his record as a corporate lawyer and his presumed devotion to *laissez-faire*, while a member of the National Association for the Advancement of Colored People wired a friend about Roberts, "Knowing him as I do am confident he is not only devoid of prejudices; but is a friend of Negro as he is of every minority group and every humanitarian cause."¹⁰ Even the American Federation of Labor's president, William Green, endorsed the nominee as someone able to understand the "profound social and economic problems" that ensued from the war between capital and labor.¹¹ The Senate confirmed him in less than a minute, without debate or even a vote.

"There is a good deal of talk about 'conservative' and 'liberal,'" Frankfurter, then a Harvard Law School professor, wrote in a congratulatory note to the Justice-to-be. "The characterizations don't describe anybody because we are all a compound of both. What divides men much more decisively is the extent to which they are free, free from a dogmatic outlook on life, free from fears. That is what cheers me most about your appointment, for you have, no doubt, no skeletons in the closet of your mind and are a servant neither of a blind traditionalism nor a blind indifference to historic wisdom."¹²

Before he left for Washington, Roberts told his friends in Philadelphia that he intended to be his own man on the Court and that he would decide each case on the merits, with complete independence, and would refrain from identifying himself with either ideological faction.¹³ Not long after he arrived, *The Christian Century* wondered in a headline: "Is Justice Roberts the Real Ruler of the United States?"¹⁴

The Swing Vote

The Court that Roberts joined was precariously balanced. It was controlled, more or less, by the unbending conservatives commonly known as the Four Horsemen—alluding less to the biblical apocalypse and its agents of destruction than to Notre Dame's starting backfield on the gridiron of 1924. All four had come to manhood amid the political and economic stability of the Gilded Age, and three of them had found their fortunes on the Western frontier, not as rugged individualists but as lawyers for the railroads or other corporations. At heart they had remained nineteenth-century men who regarded *laissez-faire*—the principle that the government ought to leave the marketplace alone—as enshrined in the Constitution.

Three reliable liberals stood against them, men of urban sensibility who recognized the distance that economic realities—the concentration of industry, the disparity in power between employer and employee, the economy's national scope—had moved since Adam Smith's day. Louis D. Brandeis, formerly known as the People's Lawyer, would be seen by New Dealers as an intellectual father. Stone, later a Chief Justice, had been dean of Columbia Law School and then attorney general for President Coolidge, a college chum. Oliver Wendell Holmes, Jr., and—after his retirement in 1932—his successor Benjamin Cardozo were admired for the elegance and eloquence of their legal reasoning, usually in dissents. The balance of power on the Court rested in the hands of Chief Justice Charles Evans Hughes, a progressive Republican, and Roberts, the youngest and least-formed of the nine Justices.

Roberts approached his earliest cases as a lawyer's lawyer, scrutinizing the language of the statute in question. The first opinion he wrote for the Court's majority hinged on the meaning of "of."¹⁵ He made little impact on the Court's direction until 1934, in the case of *Nebbia v. New York*, which involved a trivial incident but a major point of

law. Leo Nebbia was a grocer in Rochester, New York, who had sold a customer two quarts of milk for nine cents apiece but had thrown in a five-cent loaf of bread for free. This violated the state law that fixed the price of milk high enough for dairy farmers to turn a profit. Roberts, who owned a prize herd of Guernseys, could understand the dairy farmers' plight. His far-reaching, liberal opinion, adopted over the Four Horsemen's horrified dissent, decreed that the dairy farmers' despair trumped the Fourteenth Amendment's guarantee of due process that, by decades of judicial precedent, had protected a grocer's right to sell his wares as he wished. "[N]either property rights nor contract rights are absolute," Roberts wrote, "for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."¹⁶

His precedent-shattering liberalism, however, was not to last. In the spring of 1935, Roberts began siding with the Court's conservatives in a series of increasingly controversial rulings that toppled pillar after pillar of the New Deal. He authored the opinions that overturned a railroad employees' pension law in 1935 and then the Agricultural Adjustment Act, which paid farmers to produce less, in 1936. The Depression had made people "soft," he told a gathering of Boy Scout leaders near his Pennsylvania farm, for it had given many Americans the idea that if they leaned hard enough on the government, it would support them.¹⁷ Roberts privately believed, or so a Court insider later divulged to a reporter, that the Roosevelt administration was grabbing the country's resources "and plunging them down the sewer."¹⁸

As a narrow but rigidly conservative majority kept striking down governmental attempts to salve the widespread suffering of the Great Depression, the political furor grew. It peaked in the spring of 1936, when Roberts again joined the Four Horsemen in overturn-

ing a New York state law that set a minimum wage for women.¹⁹ This created a "no-man's land," as President Roosevelt famously told reporters, where neither the federal nor state government was permitted to act on the citizenry's behalf.

The political backlash contributed to FDR's landslide reelection in November 1936 and to his Court-packing proposal the following February, meant to assure a Court favorable to the New Deal. It was seven-and-a-half weeks later, on March 29, 1937, that Roberts began to make his mark on judicial history. *West Coast Hotel Co. v. Parrish*²⁰ involved a minimum-wage law for women in the state of Washington that was virtually identical to the overturned law in New York. But only ten months after its decision in the New York case, the Court changed its mind, turning a 5–4 decision against the power of government to regulate wages into a 5–4 decision in favor. Roberts, without explanation, had switched sides. Two weeks later, he joined with the liberals again in upholding the Wagner Act, which assured employees the right to join labor unions and bargain collectively. Six weeks later, he did so yet again, in allowing the Social Security Act to pass constitutional muster. These decisions undermined the already-lukewarm public support for FDR's Court-packing plan, which soon fizzled. Roberts' judicial conversion also instigated a rare bit of Washington humor. Legal scholars from Harvard, Yale, and Princeton all claimed credit for transforming Benjamin Franklin's maxim of thrift—a *stitch in time saves nine*—into a tribute to political cunning: *A stitch in time saved nine*.

Clearly, this was more than a coincidence. Roberts had switched sides in interpreting three distinct constitutional provisions—respectively, the guarantee of due process, the interstate Commerce Clause, and the General Welfare Clause—without ever saying why. His about-face, and therefore the Court's, signified not merely a change in interpretation, but rather a reversal of attitude about the

Constitution—about its purpose in American life, about the duty of the law in achieving social and economic justice. Indeed, the Supreme Court's acceptance of a wider role for government in the nation's life marked the beginning of the modern era of government—and of justice.

A Good Man's Mind

Not until eighteen years later, after his own death, did Owen Roberts ever try to furnish a clear explanation of why he had switched sides on the Court. He was a private man, and before he died he burned all of his personal and judicial papers—"because he did not want them subject to interpretation which he would not approve or correct," a friend explained.²¹ But after he stepped down from the Bench, in 1945, he drafted a memorandum

of explanation at Frankfurter's behest, which Frankfurter published after Roberts' death in 1955.²² Roberts attributed his change of heart in the two cases involving the minimum wage to a technicality—the failure ("born of timidity") by New York state's lawyers to request the Court to overturn its prevailing 1923 precedent.²³ There was a problem, however, with Roberts' after-the-fact explanation: It was inaccurate. The New Yorkers' writ of certiorari, which still can be found in the National Archives, explicitly asked the Court to rethink its precedent.

This has left an enduring mystery about Justice Roberts: Why, in fact, did he switch sides? It was believed by many, including FDR and his advisers, that the Court bill itself had been "the major cause in reversing an unfortunate trend of decisions," as Attorney General Homer S. Cummings said in his diary.²⁴ Yet it was indisputable, as a simple matter of timing,

INTO THE FOLD



The question of why Roberts switched his vote on a second case concerning the constitutionality of minimum-wage acts is perennially debated by scholars. Pictured is a cartoon showing the first Supreme Court decisions holding New Deal-era initiatives to be constitutional, including the minimum-wage law Roberts gave the crucial fifth vote to uphold.

that the Court-packing plan had made no impact at all on Roberts' reversal, at least in the minimum-wage cases. His conversion, though announced in March 1937, had already occurred by December 1936, when the Justices initially voted on the Washington case. A 4–4 tie prompted them to wait until Justice Stone recovered from dysentery and could cast a fifth vote to reverse a precedent.

Nor was it clear that Roberts had simply "follow[ed] th' illiction returns," as humorist Finley Peter Dunne had noticed about the Court a few decades earlier. In November 1936, every state except Maine and Vermont endorsed a second term for FDR. But Roberts had evidently at least contemplated a change of heart as early as October 1936, when he cast his vote—or so he told Frankfurter—to hear the appeal of the Washington case.

Another explanation for Roberts' switch that bounced around the power centers and salons of Washington bore three names: Charles Evans Hughes. The Chief Justice, a former New York governor who had come within a few thousand Californians' votes of wresting the presidency from Woodrow Wilson in 1916, was a shrewd judicial politician. He and Roberts had cultivated a friendship on and off the Bench; they socialized on occasion, and Hughes and his wife once motored to the Robertses' farm in Pennsylvania. "In most ways, he was the greatest man I have ever known," Roberts later said of Hughes.²⁵ Still, it seemed unlikely that Hughes had openly coerced his younger brother on the Bench. For one thing, as Roberts said, "Chief Justice Hughes was a stickler for proprieties."²⁶ And since joining the Court, Roberts had been his own man, as he had promised his friends in Philadelphia; he had never hesitated to go his own way. There was every reason to think that Roberts had changed his mind on his own.

His reasons he kept to himself—away from the public, at least—except once. The occasion was near the end of the second of three ponderous lectures that he delivered at Harvard Law School in 1951. He was discussing

the declining autonomy of state governments when he noted the obvious: "The continual expansion of federal power with consequent contraction of state powers probably has been inevitable. The founders of the Republic envisaged no such economic and other expansion as the nation has experienced. Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."²⁷

That last, passively constructed sentence revealed why Roberts had switched. Two factors had moved him in 1937. One was reality—*what in effect was a unified economy*. The other was democracy—the *popular urge*, the people's will. He said not a word about the law.

Roberts' explanation for his actions did not end there. He went on to acknowledge that relying on the Commerce Clause, say, or the General Welfare Clause "to reach a result never contemplated when the Constitution was adopted, was a subterfuge." But he had accepted such a sophistry in order to avert a deeper danger to the American system of government. "An insistence by the Court on holding federal power to what seemed its appropriate orbit when the Constitution was adopted," he said, "might have resulted in even more radical changes in our dual structure than those which have been gradually accomplished through the extension of the limited jurisdiction conferred on the federal government." He had switched sides, that is, to save the American system of federalism—to prevent the central government from assuming a dictatorial power, as it already had done so disastrously in Germany, Italy, and the Soviet Union. Roberts had intended to assure a working democracy, safe from the desperation of its people and the ambitions of its leaders. And, in fact, he had succeeded. Perhaps the truly conservative position was to bend with the times.

Roberts had come to believe, in effect, that the job of a Supreme Court Justice was to administer justice, not the law. His evolving approach to the purpose of the law was more

a matter of character than of jurisprudence. “He was, if not a great judge, a good man,” Charles Wyzanski, later an eminence himself on the federal bench, wrote to Frankfurter after Roberts died.²⁸ “That is how he would choose to be remembered, as would we all.”

ENDNOTES

¹Box 82, Harlan Fiske Stone Papers, Library of Congress, Washington, D.C. The proposed letter in its entirety, with Black’s proposed excisions:

Dear Justice Roberts:

The announcement of your resignation as a Justice of this Court brings to us a profound sense of regret, [that our association with you in the daily work of the Court must now come to an end].

During the more than fifteen years since you took office you have given to the work of the Court the benefit of your skill and wide knowledge of the law, gained through years of assiduous study and practice of your profession. You have faithfully discharged the heavy responsibility which rests on a Justice of this Court with promptness and dispatch, and with untiring energy. [You have made fidelity to principle your guide to decision.]

At parting we who have shared that responsibility with you, and who have shared in the common endeavor to make the law realize its ideal of justice, give you the assurance of our continued good will and friendly regard. In the years to come we wish for you good health, abiding strength and, with them, the full enjoyment of those durable satisfactions which will come from the continued devotion of your knowledge and skill to worthy achievement.

Yours faithfully, . . .

²Letter from Frankfurter to Stone, Sept. 7, 1945, Box 82, Stone Papers.

³Letter from Frankfurter to Stone, Aug. 20, 1945, Box 119, Robert Jackson Papers, Library of Congress, Washington, D.C.

⁴*Id.*

⁵Frankfurter’s retelling to Jackson in diary form, Oct. 2, 1945, Box 119, Jackson Papers. Jackson was serving as the chief American prosecutor at the Nuremberg trials in Germany, and Frankfurter kept him informed.

⁶*Id.*

⁷Edward S. Corwin, **Constitutional Revolution, Ltd.** (Claremont, CA: Claremont Colleges, 1941).

⁸410 U.S. 113 (1973).

⁹A.F.C., “Backstage in Washington,” *Outlook and Independent*, May 21, 1930, p. 100.

¹⁰Letter from Jacob Bellikoff of Elkins Park, PA, an NAACP supporter, to Roberts, May 10, 1930, in **Owen J. Roberts on His Appointment to the Supreme Court of the United States, May 20, 1930**, vol. 1, courtesy of Owen R. Hamilton, Roberts’ grandson.

¹¹*Pennsylvania Gazette*, June 2, 1930.

¹²Letter from Frankfurter to Roberts, May 10, 1930, in **Owen J. Roberts on His Appointment to the Supreme Court of the United States**.

¹³William Oscar Trapp, “The Constitutional Doctrines of Owen J. Roberts,” Ph.D. dissertation, Cornell University, May 1943, p. 341.

¹⁴*The Christian Century*, June 10, 1931, p. 765.

¹⁵*Poe, Collector of Internal Revenue, v. Seaborn*, 282 U.S. 101, 112 (1930).

¹⁶*Nebbia v. New York*, 291 U.S. 502, 523 (1934).

¹⁷“Scout Council Raises Budget After Month’s Finance Drive,” *West Chester (Pa.) Daily Local News*, June 19, 1936. This was an account of a speech that Roberts delivered to the Chester County Council of Boy Scouts.

¹⁸Joseph Alsop’s interview, apparently with Chief Justice Hughes, Box 53, Joseph and Stewart Alsop Papers, Library of Congress, Washington, D.C.

¹⁹*Morehead, Warden v. New York ex rel. Tivaldo*, 298 U.S. 587 (1936).

²⁰*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²¹Letter from Paul Bruton, a retired law professor at the University of Pennsylvania, Feb. 26, 1976, Box 2257, University of Pennsylvania Archives, Philadelphia, PA.

²²Felix Frankfurter, “Mr. Justice Roberts,” *University of Pennsylvania Law Review*, vol. 104, no. 3, December 1955, pp. 311–17.

²³The precedent was *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

²⁴Homer Cummings’ 1937 diary, p. 59, May 4 entry, Box 234, Papers of Homer S. Cummings, Albert and Shirley Small Special Collections Library, University of Virginia, Charlottesville, VA.

²⁵Letter from Roberts to Felix Frankfurter, Sept. 4, 1948, Box 59, Felix Frankfurter Papers, Library of Congress, Washington, D.C.

²⁶Owen Roberts, “Charles Evans Hughes: The Administrative Master,” memorial address before the Association of the Bar of the City of New York, December 12, 1948, cited in Charles A. Leonard, **A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937** (Port Washington, NY: Kennikat Press, 1971), p. 21.

²⁷Owen J. Roberts, **The Court and the Constitution** (Cambridge, MA: Harvard University Press, 1951), pp. 61–62.

²⁸Handwritten letter to Frankfurter from Charles Edward Wyzanski, Jr., in Cambridge, MA, dated Feb. 13, 1956, Box 181, Frankfurter Papers.

Edward Bennett Williams for the Petitioner: Profile of a Supreme Court Advocate

CONNOR MULLIN

Introduction

It is not often that the same lawyer can be tough and quick and a tremendous adversary in the courtroom and also write law review articles and appellate briefs and make oral appellate arguments of excellent quality. Well, Ed Williams could do it all.

Associate Justice William Brennan, 1989¹

As a law student at Georgetown University, Edward Bennett Williams would often walk down to the Supreme Court on Sunday afternoons.² “I never failed to be thrilled when I looked up at the magnificent portico on that building and saw the words chiseled into stone: Equal Justice Under Law.”³ Williams’ career before the High Court breathed life into these words, yet little has been written about his Supreme Court advocacy.

In 1975, Arthur Schlesinger, Jr. wrote a column in *The New York Times* cataloging occupations that best prepare a candidate to be President of the United States.⁴ Among others,

he considered college president, general, business manager, labor leader, and Supreme Court Justice.⁵ Afterwards, Schlesinger received a letter from a reader pointing out that the list was incomplete because it left off Supreme Court advocate.⁶ The reader had a specific advocate in mind for the 1976 Democratic nomination:

A great and skilled lawyer like [Edward Bennett] Williams must know human nature very well. He must be able to think on his own two feet. On appearing before the Supreme Court,

Williams said, “If Justice Douglas asks you a question, you have to be careful not to alienate Justice Potter Stewart with your answer. You need five judges on your side.”⁷

The reader believed an effective Supreme Court advocate could take on any challenge, including the presidency. Five years before Schlesinger’s article, Williams argued *Monitor Patriot Co. v. Roy*.⁸ Defending the *Monitor Patriot* newspaper against a defamation suit, Williams took the measure of a down side of running for office:

I believe that when a candidate announces for office, he lays his life before the press for scrutiny. And I believe that anything in his life is relevant to his fitness for office, his private life or his public life, his character, his mental and physical health, his record, whether it be academic, professional, commercial, social, marital, or criminal. I believe that all of that is appropriate for public discourse.⁹

One can glean many of these insights by studying the Supreme Court advocacy of Williams. Yet the Edward Bennett Williams canon focuses almost exclusively on his career as a trial lawyer. The most recent biography of Williams devotes just six of its more than 500 pages exclusively to Williams’ career before the Supreme Court.¹⁰ History has run with *Life Magazine*’s account of Williams as “the man who [could] get you out of bad trouble.”¹¹ Williams is usually tied to the notorious characters he defended, rather than to the constitutional rights he shaped.¹² His twelve cases before the Supreme Court do not fit neatly within the legendary-trial-lawyer schema.

To be fair, there is more at work here than history’s tendency to categorize. First, Williams did not partake in the arms race for Supreme Court arguments. Today, Supreme Court arguments are a talismanic number on a résumé—not just a badge of honor, but a

meal ticket. It is shocking to discover an advocate not opportunistically clawing his way through the sixteen marble columns. In 1971, the executive editor of the *Washington Post*, Ben Bradlee, asked his dear friend Williams to argue *New York Times Co. v. United States*,¹³ commonly known as the *Pentagon Papers* case.¹⁴ An elated Williams called his law partner Joseph Califano and said, “The *Post* wants me to argue the *Pentagon Papers* case in the Supreme Court!”¹⁵ However, Williams was then in Chicago, tied up in a private securities matter arising out of divorce proceedings, a case his client refused to settle.¹⁶ Williams told Califano, “I don’t see how I could do it with this trial in Chicago. I just can’t do it. My guy wants to try this case and I’ve got to stay with him if he’s going to have any chance.”¹⁷ While the *Pentagon Papers* case became a landmark Supreme Court decision, Williams quietly won a hung jury for his client in Chicago.¹⁸

Biographers also focus on Williams as a trial lawyer because he himself preferred trial practice. Trial and appellate practice are markedly different beasts:

Procedures on appeal are quite different than those in the trial court. Essentially, the appellate process is more “reflective” than trial court proceedings and requires a rigorous and refined adherence to procedural and legal doctrines. Notably, the “drama” of trial is absent on appeal . . . There is no witness testimony; nor is there any jury to instruct or persuade.¹⁹

At a glance, appellate practice seems to gut the very drama Williams loved about trial: “Running a trial is a lot like making a movie—but infinitely harder. It requires direction, production, and writing.”²⁰ It is easy to see why Williams told a reporter from *Life Magazine* in 1957, “Trial law is what I like—anything else bores me.”²¹

Nevertheless, the career of Edward Bennett Williams is not fully painted with a trial lawyer brush. According to Associate Justice



Edward Bennett Williams was asked by his friend Ben Bradlee of the *Washington Post* to argue the *Pentagon Papers* case before the Supreme Court in 1971. Williams had to decline because he was conducting a trial in Chicago.

William Douglas, “Edward Bennett Williams, best known perhaps as a criminal lawyer, would certainly be in any list of the top appellate advocates who appeared in my time.”²² Before the Supreme Court, Williams represented a United States Congressman, multiple indigents, a corporation, a mob boss, a Jesuit college, and a union, among others. To overlook a dozen Supreme Court cases, many of historic importance, would do a disservice to a uniquely versatile advocate.

This piece examines the Supreme Court advocacy of Edward Bennett Williams in four parts. Part I explores the trial skills Williams brought to bear in the Supreme Court. Part II highlights the critical role his advocacy played in expanding the safeguards of the Fourth Amendment. Part III examines his two Establishment Clause cases in the context of lifelong commitment to Jesuit and Catholic education. Finally, Part IV takes a fresh look at Williams’ “contest-living” through the lens of his representation of Frank Costello before the High Court.

I. The Trial Lawyer Goes to the Supreme Court

Edward Bennett Williams’ transition from the trial courts to the Supreme Court had an inauspicious beginning. On February 7, 1955, 34-year-old Williams argued his first case before the Court: *United States v. Bramblett*.²³ The following day, the *Washington Post* ran the headline: “High Court Meets in Bramblett Case, Finds Defendant and Counsel Absent.”²⁴ The article only got worse for Williams in the opening paragraph: “The Supreme Court’s black-robed decorum and clock-like punctuality were interrupted yesterday when one of the leading attorneys, Edward Bennett Williams, failed to appear.”²⁵

Williams’ client, former United States Congressman Ernest K. Bramblett, had been found guilty by a jury of padding his office payroll and taking kickbacks.²⁶ The government’s attorney, Charles Barber, began his oral argument promptly at the scheduled 1:30 p.m.²⁷ As the Justices are wont to do, they began whispering to each other during the

government's argument.²⁸ Only they were not discussing the merits of the case. Justice Sherman Minton could be overhead repeatedly whispering to Justice Felix Frankfurter, "Where's the other attorney? Where's the other attorney?"²⁹

After Barber concluded the government's argument, "[t]he justices retired behind their red velvet curtains for a five-minute recess."³⁰ Upon returning, a Justice announced that there had been a "misunderstanding."³¹ Edward Bennett Williams was eating lunch at the Metropolitan Club on the other end of Washington, D.C., thinking the case was scheduled for the next day.³² Williams "rushed up to the Court, apologized profusely and judicial decorum was resumed."³³

It may seem impossible to reconcile this ill-fated beginning with any definition of victory, especially in light of the Court's 6-0³⁴ decision against Williams' client. However, after the decision was handed down, Justice Frankfurter told Williams, "You made a brilliant argument."³⁵ Williams responded, "I wish you'd write a letter to my client and tell him that, because we lost."³⁶ The 1955 *Washington Post* article did not tell the whole story. Williams was under the impression that the argument was on the following day because he was given the wrong date by the scheduling clerk at the Supreme Court.³⁷ Apologizing to the Justices for arriving an hour late, Williams took the blame.³⁸ Apparently, the scheduling clerk had been known to bungle the oral argument schedule in the past.³⁹ When Chief Justice Earl Warren looked into the mix-up, he was impressed that Williams shouldered the responsibility.⁴⁰ The incident earned Williams a great deal of respect from Warren, who would serve as Chief Justice for much of Williams' career before the Court.⁴¹ Warren and Williams became fast friends, watching the Washington Redskins from Williams' owner's box every Sunday for eight years.⁴² Williams even gave Warren's eulogy at the Supreme Court in 1974: "Earl Warren was the

greatest man I ever knew. His friendship was a rich and lasting treasure which I shall hold as one of my dearest possessions during life."⁴³

The law reports mark *United States v. Bramblett* as a loss for Edward Bennett Williams. He was an hour late for the argument, and the Justices unanimously decided against his client. Still, Williams' debut in the Supreme Court won him the respect of the Justices, a career's worth of goodwill, and the lifelong friendship of Chief Justice Warren. Michael Tigar, a Williams protégé, revealed that Williams would often remind his children, "Life is not a plateau. You either move up or you fall back."⁴⁴ Williams' loss in *Bramblett* certainly allowed him to move up, laying the foundation for a remarkable career before the Court.⁴⁵

A. Use of Trial Skills in the Supreme Court

Williams did not check his trial skills at the door of the Supreme Court, employing his uncanny power of persuasion in front of juries and Justices alike. While trial and appellate practice are quite different arts, certain talents serve an advocate in both arenas. Williams once said, "The whole world is divided into engineers and salesmen. When I was at school I was miserable in science and had no feeling for math and couldn't drive a damn nail. I guess law was my outlet for salesmanship."⁴⁶ Fittingly, in *The Art of Appellate Advocacy*, Jason Honigman called "the job of an appellate lawyer, like that of a trial lawyer . . . essentially one of salesmanship."⁴⁷ Honigman continues, "If a trial could be analogized to a living body, a record in an appeal would correspond to a corpse. Skill in appellate advocacy is largely the ability to breathe life into that corpse."⁴⁸ Williams infused his Supreme Court arguments with the drama of the courtroom. Faded transcripts and muffled audio recordings of Williams' oral arguments still bear the strong marks of a trial lawyer.

Against conventional wisdom, Williams often began his oral arguments with a similar strategy: "I think it would be useful and helpful to the Court if I reset the factual backdrop against which the legal issues are framed at the very outset."⁴⁹ Even in the Supreme Court, Williams begrudgingly gave up his ability to steer the facts to embrace his theory of the case. He became a criminal expert of sorts for the Court, even clarifying trial practice phenomena for the Justices. In 1977, Williams took on *Nixon v. Warner Communications, Inc.*, arguing that the audio recordings that resulted from the Watergate investigations should be released to the public.⁵⁰ During oral argument, Chief Justice Warren Burger tried to grapple with a criminal-procedure hypothetical:

Mr. Williams, suppose you have a celebrated criminal case, kidnapping, rape, murder . . . and one of the elements of evidence introduced at the trial are statements made which in the aggregate amount to a confession by the defendant . . . and these statements are all on the record now in trial, not subpoenaed in the ordinary sense but produced by the prosecution.⁵¹

Williams immediately threw Burger a life preserver: "Extrajudicial statements, Mr. Chief Justice?"⁵²

Even when the cases were not criminal in nature, Williams made the Supreme Court his comfort zone by analogizing the issues to ones with which he was familiar. In *Viking Theatre Corp. v. Paramount*, Williams analogized antitrust violations to "economic murder."⁵³ Similarly, when the government was trying to revoke the citizenship of his client, Frank Costello, in *Costello v. United States*, Williams noted, "The government has the burden [of proof,] which is very close to the burden in a criminal case."⁵⁴ In the same case, he made an analogy to perjury, another trial-court comfort zone: "If this case were here not as a denaturalization case but as a perjury case,

I think that it is fair to say that, qualitatively, the evidence here would not support a perjury conviction."⁵⁵ *Costello v. United States* was not a criminal matter and perjury was not at issue, but Williams thought like a trial lawyer, even in the Supreme Court.

B. Use of Physical Evidence: The Spike Microphone

The only inscription inside the entire courtroom of the Supreme Court is a metal plate located on top of the podium for the advocates. The inscription reads, "Do Not Adjust Microphone," although there are now two skinny black microphones on top of the podium. In 1960, while arguing *Silverman v. United States*,⁵⁶ Edward Bennett Williams made use of a third microphone. At issue in the case was the government's installation of a spike microphone ("spike mic") into the heating duct of the petitioner's home. The tiny device gets its name from the metal spike that is used to lodge the microphone into a wall.⁵⁷ Through the use of this spike mic, the government could overhear conversations within the home.

Less than a minute into his oral argument, Williams revealed that he had a prop sitting on top of the podium: "Precisely stated, the question is whether evidence which is obtained by the federal government by the use of *this* electronic eavesdropping device which is known as a spike microphone . . . may be offered against petitioners in a criminal proceeding."⁵⁸ Listening to the audio of the oral argument, one can hear Williams pick up and drop the actual spike mic on the podium every time he referred to it. Not surprisingly, the Justices were at once infatuated and mystified by the use of physical evidence in the Supreme Court. Almost in disbelief, a Justice immediately interrupted the argument and asked, "This is the device?"⁵⁹ Williams held up the spike mic and said, "This is precisely the device, Your Honor."⁶⁰ Justice William Brennan, also transfixed by the exhibit, asked, "Mr. Williams, is that a custom-made or an assembly line device?"⁶¹ Williams, thinking on his feet, further demonized the

spike mic by answering, "I hope it's not an assembly line article, Mr. Justice Brennan, but it is an article which has some widespread use at the present time by federal law enforcement agents."⁶²

Williams demonstrated with great force the power of the tiny spike mic to the Justices:

Directly behind where the officers were inserting this microphone was the heating register for the petitioner's premises. They laid the tip of this needle against the heating duct and they converted the heating system into a giant conductor of sound. They made every register in the premises . . . a microphone so that . . . they were able to hear conversations in every part of the dwelling house.⁶³

Williams repeatedly referenced the spike mic, holding it up like a trial lawyer might hold up a murder weapon. This use of physical evidence helped Williams overcome the current law of searches and seizures. As Williams correctly conceded during his oral argument in *Silverman*, "the penumbra of the Fourth Amendment did not cover [seizing] conversations"⁶⁴ according to Supreme Court jurisprudence in 1960. Williams had to show that the government was engaged in more than just listening. Brandishing the spike mic gave the Justices the impression that this eavesdropping device was like a putrid insect. A Justice acknowledged that consent may have been given to the government to enter the premises, but no consent was given for "sticking *this thing* in!"⁶⁵ The presentation of physical evidence transformed permissible eavesdropping into a concrete trespass in the eyes of the Justices, resulting in Williams' first victory in the Supreme Court.

C. *Wong Sun*: Witness Testimony in the Supreme Court

In 1962, Williams argued *Wong Sun v. United States*,⁶⁶ another Supreme Court case with the

trappings of a trial lawyer. By 1962, Williams was a perennial player at the High Court, arguing his fourth case over all and his third in as many years. At issue in *Wong Sun* was whether the government agents had probable cause to enter the Laundromat of Williams' clients, James Wah Toy and Wong Sun. The Laundromat was located in San Francisco on Leavenworth Street, a 30-block main drag slashing through the city into the mouth of the San Francisco Bay.⁶⁷ The great length of Leavenworth Street embraced Williams' theory of the case, mainly that the federal agents lacked probable cause and were fishing the entire street in the hopes of finding the Laundromat in question. At oral argument, Williams noted:

At the time that the agents went to Leavenworth Street, they had no reason to believe that the laundry . . . was the [correct] laundry . . . It was a different name, [the agents] had not [been] given the address. Leavenworth is one of the longest streets in San Francisco, presumably, in so far as this record is concerned, those agents were engaged in a systematic investigation of Chinese laundries on Leavenworth Street.⁶⁸

Williams could strengthen his argument by demonstrating that the Laundromat was one of many on the street. The problem was that the number of laundries on Leavenworth was not included in the lower court record.⁶⁹ But Williams pushed the limits of the record, mixing in such exclamations as, "[The agents] didn't even know if they were at the right laundry!"⁷⁰ After enough innuendo, Justice Clark sought clarification: "The record shows there weren't any other laundries?"⁷¹ Williams replied, "The record is silent on that."⁷² The point was too crucial for an advocate like Williams to stop there. Even in the Supreme Court, he thought like a trial lawyer and found a witness. The night before his oral argument in *Wong Sun*, Williams telephoned a close friend who lived near Leavenworth Street: Joe DiMaggio. Evan Thomas puts it best:

Williams had to move quickly to find someone living in San Francisco who could drive down Leavenworth Street and check for other laundries. It is not often that Hall of Fame baseball players are used as private investigators, but that night Joe DiMaggio drove up and down Leavenworth Street counting Chinese laundries for his friend Ed Williams. . . . Williams was able to say that, though the record did not disclose the number, he could assure the Court that there were many Chinese laundries on the street.⁷³

Williams hammered home his theory of the case. In response to a question from Justice White, Williams said, "What I think, Mr. Justice White, is that [the agents] did what any good investigators would do. They investigated every Chinese laundry on Leavenworth Street and there are many."⁷⁴

Except in extremely rare situations, witness testimony and new evidence are, of course, off limits in the Supreme Court. It is fitting that the greatest trial lawyer of his generation stretched the bounds of an appellate record. Evan Thomas notes: "Officially, the Court could not be bound by [Williams'] off-the-record observation . . . [b]ut [his] thoroughness may have been a factor in the Court's five-to-four decision holding that the police had violated the defendant's Fourth Amendment rights."⁷⁵ Whether appellate practice purists see it as "thoroughness" or overzealousness, it is worth noting that Williams came into the case strictly for the Supreme Court argument. Surely, the scorched-earth preparation made famous by Williams would have inserted the number of laundries into the lower court record. Undoubtedly, the phantom testimony of DiMaggio helped persuade the Court to embrace Williams' theory of the case. Delivering the opinion of the Court, Justice Brennan held that the agents were "roam[ing] the length of [the] street (some 30 blocks) in search of . . . one laundry . . . somewhere on Leavenworth Street."⁷⁶

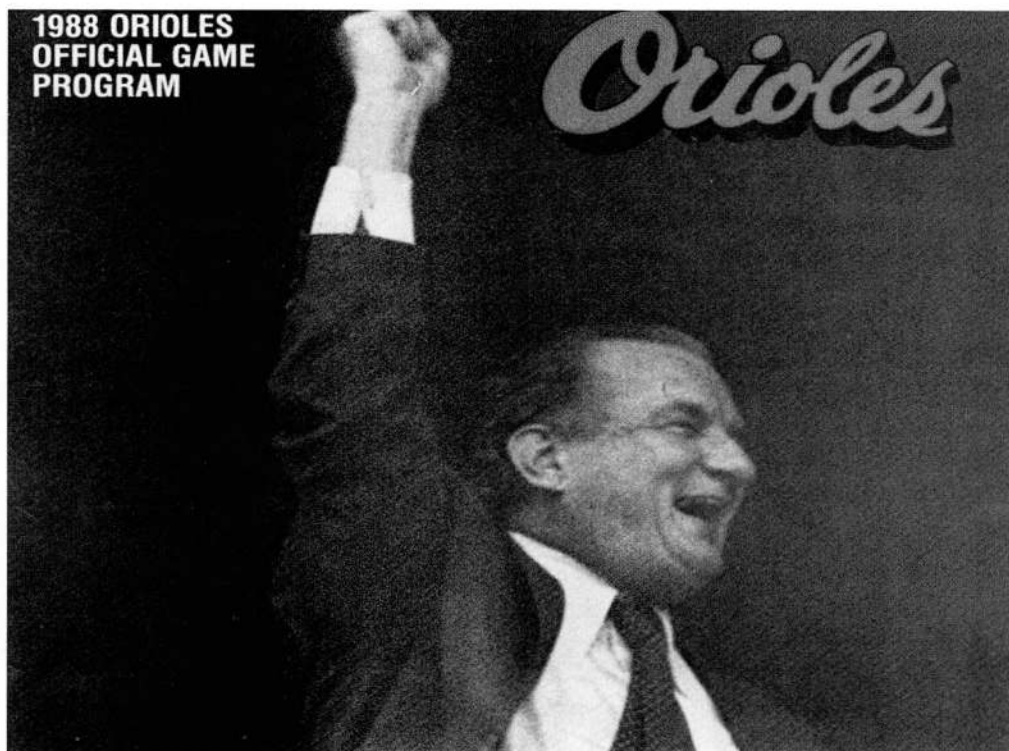
D. *Wong Sun*: Supreme Court-Appointed Counsel

The use of witness testimony is just one way in which *Wong Sun* bears the imprint of a trial lawyer. The presence of Edward Bennett Williams was felt in the Supreme Court even in his absence. In 1983, the same year both of Williams' professional sport teams won championships,⁷⁷ the Supreme Court heard *Flanagan v. United States*,⁷⁸ a case not argued by Williams. One of the issues in the case was whether the Sixth Amendment guaranteed not only the right to counsel, but also the right to choose one's counsel. A Justice berated petitioner's counsel Edward Rubenstone for implying that an indigent defendant has the right to choose any counsel he wishes.⁷⁹ Rubenstone held strong by making an interesting and nuanced argument that there is in fact a right to choose one's counsel:

It is a right to choose. It is a right to choose whom you want whether you are a millionaire or an indigent. . . . If an indigent goes up to Edward Bennett Williams, who charges I have no idea for his services . . . if he can convince Edward Bennett Williams that his case is interesting enough and important enough Mr. Williams may take the case. . . . The question is will his choice be accepted by the lawyer.⁸⁰

Counsel's hypothetical was more than a flight of fancy. Twenty years earlier, Edward Bennett Williams had taken on, free of charge, the case of two indigents: James Wah Toy and Wong Sun. As it turns out, Rubenstone was correct; the facts in *Wong Sun* were "interesting enough and important enough" to pique Williams' interest. In this raid on a Chinese Laundromat on Leavenworth Street, Williams saw an opportunity to expand the safeguards of the Fourth Amendment.

Trial courts have procedures in place to appoint counsel for indigents, often employing a mixture of private lawyers and public defenders. As a criminal defense attorney,



Williams (pictured) owned the Baltimore Orioles and the Washington Redskins.

Williams was accustomed to court-appointing procedures, often taking on cases *pro bono*. However, it was the Supreme Court of the United States that asked Williams to take on *Wong Sun v. United States*. According to Supreme Court Rule 39 entitled "Proceedings *In Forma Pauperis*," the Supreme Court may appoint an attorney for someone unable to afford counsel "in a case in which *certiorari* has been granted."⁸¹ In light of the competition for Supreme Court arguments among lawyers, such orphan arguments are rare.⁸² Because of the rarity of court-appointed counsel at the appellate level, appointment is often considered a creature of trial courts. It seems fitting that Edward Bennett Williams would experience this rare blend of trial and appellate practice.

At the close of Williams' oral argument in *Wong Sun*, Chief Justice Warren said:

Mr. Williams, before you sit down, I want to express appreciation of the Court to you for having accepted this assignment and particularly for the double duty you've been compelled

to make. The Court is always appreciative of the efforts of counsel and it gives us great confidence to know that members of the bar are willing to take these assignments without compensation to themselves and with great effort on their part.⁸³

It is quite interesting that Warren referred to Williams' obligations as "double duty." Warren acknowledged not only the need to represent two clients, but also the need to investigate the many holes of an inadequate lower court record. If "double duty" is this opportunity to be a trial and appellate lawyer at once, Edward Bennett Williams was uniquely qualified to serve.

II. Contributions to the Fourth Amendment

In 1947, acting in his capacity as a professor at Georgetown Law School, a young Edward Bennett Williams posed the following hypothetical on his Evidence final examination:

A, B, and C are indicted by a Federal Grand Jury for using the mails to defraud. The telephone wires of all of these men had been tapped by F.B.I. agents and conversations which they had among themselves had been recorded. . . . A and B immediately decided to plead guilty . . . and agreed to testify for the Government against C. At the trial, A and B are offered by the Government as witnesses. Counsel for C objects to the admission of their testimony.⁸⁴

At the end of his exam hypothetical, Williams tendentiously asked his students, "Is there any way in which counsel for C can block this evidence?"⁸⁵ For Williams, the safeguards of the Fourth Amendment were critical. In addition to teaching the Fourth Amendment at Georgetown and Yale law schools, Williams made a career out of protecting people from wrongful methods of law enforcement. Much of the only book he ever wrote, *One Man's Freedom*, was a treatment of the Fourth Amendment.⁸⁶ After Williams railed against the government's use of wiretapping during his Supreme Court oral argument in *Costello*, Justice Frankfurter said, "If I may, I'd like to encourage you to make that speech to the Senate Committee on the Judiciary."⁸⁷ Williams responded, "I don't know that I'll ever be given that opportunity, Mr. Justice Frankfurter."⁸⁸ Frankfurter quipped, "You don't wait always to be given an opportunity."⁸⁹ Williams would indeed testify before Congress, sounding the alarm about the dangers of wiretapping and eavesdropping. The materials he used to prepare for his testimony before Congress now fill several boxes at the Library of Congress.

Most importantly, Williams took the fight to the Supreme Court. He argued four Supreme Court cases dealing specifically with the Fourth Amendment.⁹⁰ Factually, these cases covered denaturalization, gambling rings, espionage, and narcotics, but they all turned on the Fourth Amendment. William was a young

lawyer three years out of law school when he posed that Fourth Amendment hypothetical to his students. He would not argue his first Supreme Court case for another eight years. Today, if a student were faced with that hypothetical on a law school examination, she would undoubtedly need to cite multiple Supreme Court cases argued by Edward Bennett Williams.

A. The *Olmstead* Chimera

The phrase "reasonable expectation of privacy" has become idiomatic in Fourth Amendment jurisprudence. The phrase is attributable to the landmark Supreme Court decision *Katz v. United States*,⁹¹ in which the Court grappled with the Fourth Amendment rights of a man overheard making wagers in a public telephone booth. It was actually Justice Harlan's concurrence in *Katz* that used the phrase:

An enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy. . . . My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation of privacy be one society is prepared to recognize as "reasonable."⁹²

Interestingly, Justice Harlan failed to cite a single case to support this "rule that has emerged from prior decisions." Harlan peppered his concurrence with citations to Fourth Amendment cases⁹³ that did not employ a reasonable-expectation standard. Before *Katz*, *Olmstead v. United States* had long been the law.⁹⁴ *Olmstead* held that wiretapping did not amount to a Fourth Amendment violation because there was no tangible seizure and no actual physical invasion.⁹⁵

In his dissent, Justice Black expressed confusion over *Katz*'s new Fourth Amendment standard:

To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* . . . have been . . . eroded by our subsequent decisions." But the only cases cited as accomplishing this "eroding" are *Silverman v. United States* and *Warden v. Hayden*.⁹⁶

Black's dissent revealed the silent advocate in *Katz*: Edward Bennett Williams. In *Silverman*, Williams won an arguably narrow victory,⁹⁷ specifically that the Fourth Amendment governs not only seizure of tangible items, but conversations as well.⁹⁸ Yet, four years later in *Katz*, the Court seemed to be relying on *Silverman* to introduce this new "reasonable expectation of privacy" standard. Questioning the cases cited by the majority, Justice Black identified the role of Williams: "*Silverman* is an interesting choice since there the Court expressly refused to re-examine the rationale of *Olmstead* . . . although such a reexamination was strenuously urged by the petitioner's counsel."⁹⁹ At oral argument in *Silverman*, Justice Frankfurter interrupted Williams' argument: "One aspect of your argument is to overrule *Goldman* . . . in your broad approach that is a consequence . . . and [it is] necessary to overrule *Olmstead*."¹⁰⁰ Williams wanted the Court to abandon *Olmstead*'s requirement of a physical trespass for a Fourth Amendment violation, but he also had a duty to his client: "Mr. Justice Frankfurter, it is not necessary to overrule *Olmstead* to reverse this case. I would hope that in reversing this case, it would overrule *Olmstead*. But this [case] is distinguishable because here there was a trespass."¹⁰¹ Looking back, the spike mic that Williams waved around in *Silverman* gave the Court an easy opportunity to punt and keep the *Olmstead* physical-trespass frame-

work intact. After railing against the practice of wiretapping in *Silverman*, *Costello*, and *Wong Sun*, Williams finally slew the *Olmstead* beast. In *Katz*, the Court was finally ready to embrace Williams' argument that no physical trespass was necessary to violate the Fourth Amendment.

B. The *Katz* Hypothetical

Edward Bennett Williams did not put forth the "reasonable expectation" standard in a carefully crafted brief or thoroughly researched law-review article. His thoughts were elicited during an impromptu hypothetical thrust upon him during oral arguments in *Silverman*. Much of Supreme Court advocacy is fielding hypothetical questions in order to establish the outer limits of a position.¹⁰² In *The Art of Oral Advocacy*, David Frederick notes, "In Supreme Court and court of appeals cases, the court will ask questions geared toward an understanding of what the next case in the doctrinal line will look like and how the court should rule in that case."¹⁰³ Perhaps sensing the changing times of the 1960s, the Court sought Williams' thoughts on a case that would come four years down the doctrinal line. That case was *Katz v. United States*, where the Court would lay down the "reasonable expectation of privacy" standard.

In *Silverman*, a Justice asked Williams, "What about visual ascertainment? With a telescope, you can see things that you can't see with a naked eye. What about using a telescope to look into a room across the street?"¹⁰⁴ Williams had to carve out a line to assure the Justices that looking into windows would not become an unlawful search and seizure. Williams replied, "If it was simply a telescope by which one looked across a street and [looked] into a window, which the occupant could reasonably foresee might be used in this way because he didn't pull the shade, then I would have [no] trouble with that."¹⁰⁵ Williams explained his standard as protecting people from the "lifting of sound

from the room and transmitting it to places where the persons engaged in the conversation have no reason to believe that it is being transmitted."¹⁰⁶

Four years later, the hypothetical window imagined by Williams and the Justices in *Silverman* would become the glass walls of the public telephone booth in *Katz*. Looking back on settled law, it is easy to view a standard as the only viable option. The language of the Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹⁰⁷ Turning the standard on the citizen's expectation of privacy does not necessarily flow from the language of the Fourth Amendment or the case law before *Katz*. A standard based on the occupant's expectation was a way for Williams to draw a line for the Justices of the Supreme Court. Fielding an impromptu hypothetical, Edward Bennett Williams put forth a way to think about the Fourth Amendment that has endured for decades.

III. Establishment Clause Cases

A graduate of the College of the Holy Cross and Georgetown Law,¹⁰⁸ Edward Bennett Williams believed in Jesuit education. His well-documented philanthropy¹⁰⁹ to Catholic institutions ranged from the restoration of Saint Matthew's Cathedral in Washington, D.C. to the construction of the Edward Bennett Williams Law Library at Georgetown University Law Center, still the fourth-largest law library in the United States.

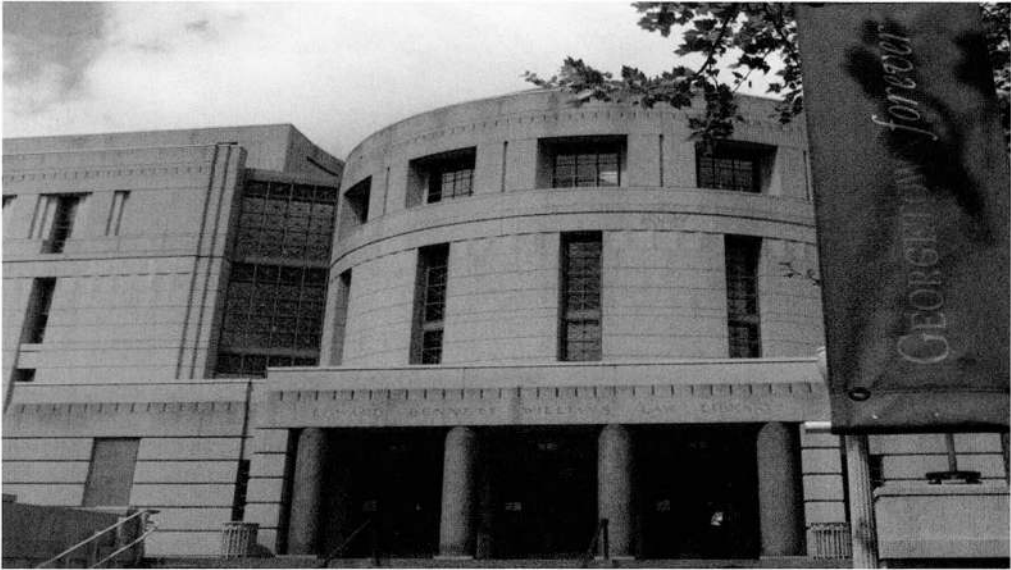
In addition to financial support, Williams was an advocate in the courtroom for Jesuit and Catholic education. Williams argued *Lemon v. Kurtzman* in the Supreme Court on March 3, 1971.¹¹⁰ The seminal case established what is now known as the "*Lemon test*," a three-pronged test to determine whether legislation concerning religion violates the Establishment Clause of the First Amendment.¹¹¹

Remarkably, *Lemon* was not the only Establishment Clause case Williams argued before the Supreme Court on March 3, 1971. That day, he also argued *Tilton v. Richardson*, a separate case interpreting the religion clauses of the First Amendment.¹¹²

Lemon and *Tilton* both centered around state aid given to church-related educational institutions. In *Lemon*, the Supreme Court considered the constitutionality of the Rhode Island Salary Supplement Act of 1969.¹¹³ The Act authorized the state of Rhode Island to supplement the salaries of teachers of secular subjects in nonpublic elementary schools, mainly Catholic parochial schools. Williams represented the petitioner state education officials of Rhode Island charged with the administration of the Act. Leo Pfeffer and Milton Stanzler represented the respondent citizen group challenging the statute as a violation of the First Amendment. Opposing counsel painted a poignant picture of the apparent entanglement between government and religion. Even though the Act supplemented the salaries of only the teachers of secular subjects, Stanzler noted "each class day starts with a prayer for each of the students."¹¹⁴ Stanzler also cited the following testimony of a nun: "As teachers, we by our example, particularly in our handling of the children, try to inculcate in them the same Christian attitude."

Williams could not employ the lofty constitutional rhetoric he used in the context of the Fourth Amendment. His task was to convince the Court that the Act was a practical and circumscribed method to retain qualified elementary school teachers in parochial schools. Williams countered the testimony of the nun by telling the Justices that nuns had been excluded under the "carefully circumscribed procedures"¹¹⁵ of the Act:

How many [teachers] have been declared eligible and have qualified under this Act? Only 161. Why? Because the Act is so tailored as to exclude those independent schools



Williams supported a range of Catholic institutions in Washington, D.C., including the Edward Bennett Williams Law Library at Georgetown University Law Center, which is still the fourth-largest law library in the United States.

whose per pupil expenditure exceeds that of the public schools of the state of Rhode Island because indeed they don't need that kind of aid. Now how many of the parochial school teachers are qualified for this kind of aid? [Only] 342 the record shows. Why? Because the balance of them are nuns and nuns don't qualify.¹¹⁶

Williams showed his well-known sense of humor in response to a question about the nuns who taught in the Rhode Island parochial schools. A Justice asked, "I was wondering what these teaching sisters did with [their] \$1800 [salary]?"¹¹⁷ Williams replied, "I guess \$1800 probably is just walking around money these days, Mr. Justice."¹¹⁸ The Justice wondered, "Even in a convent?"¹¹⁹ Williams responded, "Well, I think they are allowed to leave the convent, but I don't think they could go very far on \$1800."¹²⁰ The dialogue elicited rare laughter from the courtroom.

Williams argued that the Act should pass constitutional muster under the "purpose and primary effect test."¹²¹ Williams noted at oral

argument: "This Court since it began the evolution of the purpose and primary test has found in four instances that the mere fact that an effect of a statute may be of aid or benefit to religion does not constitute a barrier to its passing constitutional muster."¹²²

The problem for Williams was that the Court used *Lemon* to lay down a new Establishment Clause standard. In addition to the traditional requirements that the statute have a secular purpose and not have the primary effect of aiding or inhibiting religion, the Court added a third prong. According to the *Lemon* test, the statute must also not result in an excessive entanglement between government and religion.¹²³ Using the *Lemon* test, an 8–0 majority held that the Salary Supplement Act violated the Establishment Clause of the First Amendment.¹²⁴

Williams had more success with the *Lemon* test in the other First Amendment case he argued that day. In *Tilton*, Williams represented four colleges, including the Jesuit institution Fairfield University.¹²⁵ At issue in the case was the Higher Education Facilities Act of 1963, which provided federal funding to

construct academic facilities at these church-related colleges. At oral argument in *Tilton*, a Justice stated, "Under your argument, a clergyman could be put on the federal payroll provided he was teaching physics or math. I'm just wondering how far this theory of yours goes."¹²⁶ Williams was prepared for this question. He relied on another well-known Georgetown Law alumnus: "Well, we have clergymen on the payroll across the road here in Congress."¹²⁷ Williams, of course, was referring to the late Father Robert Drinan, who ultimately stepped down from the U.S. Congress in 1980 at the direction of the Pope.¹²⁸ A divided 5-4 Court ultimately upheld the High Education Facilities Act,¹²⁹ finding that it passed the *Lemon* test.

The two cases Williams argued on March 3, 1971, *Lemon* and *Tilton*, started a Supreme Court conversation about religion. The decisions were published on the same day, each with citations to the other. Supplementing salaries in parochial schools was unconstitutional, but providing funds for Catholic university facilities passed constitutional muster. In his commencement address at Georgetown University Law Center in 2006, Chief Justice John Roberts compared the Supreme Court judicial process to the old tradition of weighing a hog in an English village: "They would get a log and balance it on a rock. They would put the hog at one end. Then they would pile stones on the other end until the log was perfectly balanced. Then they would try to guess the weight of the stones."¹³⁰ Here, it was almost as if the Court weighed *Tilton* against *Lemon*, only to realize that the distinction did not settle the constitutionality of either case. The Court's establishment of the excessive-entanglement prong of the *Lemon* test was a way to more accurately guess the weight of the stones.¹³¹

Edward Bennett Williams' advocacy in *Lemon* and *Tilton* highlights his commitment to Jesuit and Catholic education. His victory in *Tilton* allowed Jesuit and Catholic universities to flourish. According to Evan Thomas, "The

one institution Williams always stood ready to help was the Catholic Church."¹³² Williams represented the Catholic Church on the most important constitutional issues of the day on the highest stage.

IV. Contest-Living

The hell with all that book law. You can hire any lawyer to read law books, but Ed Bennett Williams has enough imagination and interest to win even when everything indicates that you won't. Ed takes a case to win.

Teamsters President Jimmy Hoffa, 1959¹³³

No profile of any aspect of Edward Bennett Williams' advocacy would be complete without taking measure of the driving force of his life: winning. Edward Bennett Williams once said, "I love contest-living . . . [M]y life in the law has been contest-living. It's a life in which every effort ends up a victory or a defeat. It's a difficult way to live, but it is a very exciting way."¹³⁴ Williams described contest-living as striving with all one's physical and spiritual strength for a worthwhile objective.¹³⁵ At the dedication of the Edward Bennett Williams Law Library in 1989, Justice Brennan noted that Williams lived by a code in which success depended only on winning.¹³⁶ Brennan was uniquely situated to gauge the success of Williams' Supreme Court career:

I can speak, I think, from some personal knowledge of his performance in the Supreme Court. In the Supreme Court, in my day, he argued twelve cases, many of great importance. I sat in all of those cases and he gave us a superb argument in every one of them and won most of them. Several broke new ground or clarified important constitutional principles.¹³⁷

Charitably, Brennan noted that Williams won "most" of his cases before the High Court.

Case	Year of Argument	Result	Party	Against Solicitor General?
<i>Bramblett</i>	1955	Lost, 6–0	Respondent	Yes
<i>Silverman</i>	1960	Won, 9–0	Petitioner	Yes
<i>Costello I</i>	1960	Lost, 6–2	Petitioner	Yes
<i>Wong Sun</i>	1962	Won, 5–4	Petitioner	Yes
<i>Costello II</i>	1963	Won, 6–2	Petitioner	Yes
<i>Viking Theatre</i>	1964	Lost, ¹³⁸ 4–4	Petitioner	No
<i>Alderman</i>	1968	Won, 5–3	Petitioner	Yes
<i>Ramsey</i>	1970	Lost, 5–4	Respondent	No
<i>Monitor Patriot</i>	1970	Won, 7–2	Petitioner	No
<i>Tilton</i>	1971	Won, 5–4	Respondent	No
<i>Lemon</i>	1971	Lost, 8–0	Petitioner	No
<i>Nixon</i>	1977	Lost, 5–4	Respondent	No

Williams actually went 6–6 before the Court, perhaps a lackluster record for the man famous for winning the impossible cases.

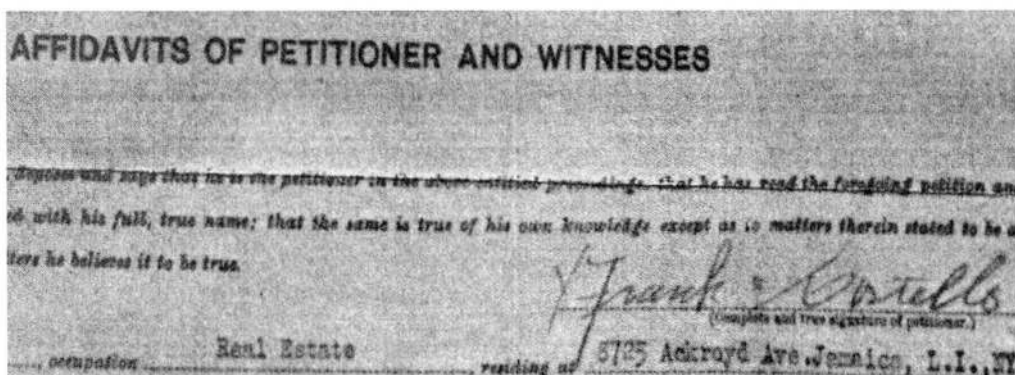
Williams actually presented thirteen oral arguments before the Court, making two oral arguments in consolidated cases in *Alderman v. United States*. This would bring his record to 7–6 and might explain Brennan's depiction. A win-loss record never tells the whole story in light of certain forces unique to Supreme Court advocacy. Williams suffered three losses arguing for the respondent. He also suffered three losses at the hands a sharply divided Court. The following section examines Williams' famous "contest-living," using his representation of Frank Costello as a case study. Beyond the numbers, it is clear Williams' contest-living was alive and well in the Supreme Court.

A. You Can't Lose If You Never Give Up

In 1925, mob boss Frank Costello, the original "Godfather,"¹³⁹ applied for United States citizenship.¹⁴⁰ Although his naturalization

forms have faded with time, it is evident that Costello characterized his occupation as "real estate." Costello's occupation would be the subject of a host of legal battles, including multiple trips to the Supreme Court. According to the Immigration and Nationality Act of 1952 (INA), citizenship could be revoked if "procured by concealment of a material fact or by willful misrepresentation."¹⁴¹ With Costello's 1925 citizenship forms in hand, it appeared the government had a slam-dunk case against the notorious bootlegger. Even Costello's personal attorney "concluded that his client had lied on his citizenship papers."¹⁴² Faced with this seemingly impossible case, Costello turned to Edward Bennett Williams.

When the United States sought to cancel Costello's citizenship in 1956,¹⁴³ Williams brought a familiar defense: wiretapping. Finding that the government had indeed made illegal use of wiretaps, the district court dismissed the case.¹⁴⁴ On appeal, the Second Circuit reversed, affording the government an opportunity to re-file the case.¹⁴⁵ The Supreme Court granted *certiorari* and reversed the decision



Williams represented mob boss Frank Costello against charges that Costello mischaracterized his profession as “real estate” on his application for United States citizenship in 1925.

of the Second Circuit, finding that the government failed to file the required affidavit of good cause with the complaint.¹⁴⁶ On remand, the district court once again dismissed the case, but failed to characterize the dismissal as with or without prejudice.¹⁴⁷ Williams had bought some time, but the war over Costello’s citizenship was just beginning.

In 1958, the government brought a new case to denaturalize Costello under the INA, claiming Costello had willfully misrepresented his occupation to obtain citizenship.¹⁴⁸ The government highlighted Costello’s prior testimony before a grand jury in the Appellate Division of the New York supreme court:

Q: You were in the bootlegging business, weren’t you?

A: I was.

Q: You smuggled whiskey into the country?

A: Yes.

Q: Your income was pretty heavy in those years, wasn’t it?

A: Well, it was profitable.¹⁴⁹

Williams threw the kitchen sink at the government, raising defenses of *res judicata*, laches, estoppel, and illegal wiretapping. The judge dismissed each defense seriatim.¹⁵⁰ The district court judge mused, “Not even Costello’s ingeniously alert counsel went so far as to contend that the fact that Costello’s wires

had been tapped gave him immunity from past illegal activities.”¹⁵¹ The government presented overwhelming evidence, and the district court ordered the revocation of Costello’s citizenship.¹⁵²

On December 12, 1960, Edward Bennett Williams returned to argue Costello’s case in the High Court, just seven days after he argued *Silverman*. Williams summarized the issue at oral argument:

There were a number of grounds alleged for the revocation and cancellation of citizenship; the one that is germane on this petition is that [Frank Costello] is alleged to have willfully misrepresented his occupation in his . . . application for citizenship in that he stated that his occupation was real estate when in fact the government contends he was a bootlegger.¹⁵³

Williams marshaled several arguments in Costello’s defense, but met an eerily cold Bench. The tea leaves of the oral argument did not read well for Williams. He attempted to argue that Costello was “in truth and fact in the real estate business,” because he was the president of Koslo Realty, a company with extensive real estate holdings.¹⁵⁴ However, Justice Stewart, who would eventually side with the 6–2 majority against Costello, interrupted Williams: “[Costello] is alleged to have made

these material misrepresentations on three different occasions. When were they?"¹⁵⁵ The question sidetracked Williams' argument. It showed that the Justices did not think it passed the straight-face test to characterize Costello's occupation as real estate. Justice Brennan held in the opinion of the Court: "However occupation is defined, whether in terms of primary source income, expenditure of time and effort, or how the petitioner himself viewed his occupation, we reach the conclusion that real estate was not his occupation and that he was in fact a large-scale bootlegger."¹⁵⁶

As a last-ditch effort, Williams mounted a familiar defense: "Wiretaps were extensively used. There were innumerable wiretaps. These wiretaps clearly vitiated the alleged admissions . . . by the defendant. [The] evidence was infected fatally with wiretaps."¹⁵⁷ But Williams was reduced to a voice crying out in the wilderness. The Court found that "any connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence."¹⁵⁸

In 1961, the Supreme Court delivered its opinion upholding the revocation of Costello's citizenship. It was not long before the Immigration and Naturalization Service provided notice of Costello's deportation to Italy. After years of litigation, it looked as though Williams had lost the Costello war. But in 1963, the man who lived for the contest made one last stand, appealing Costello's deportation all the way back to the Supreme Court.¹⁵⁹

Costello v. Immigration and Naturalization Service came down to a matter of statutory interpretation. The INA provided that "any alien in the United States shall upon the order of the Attorney General, be deported who at any time after entry is convicted of two crimes involving moral turpitude."¹⁶⁰ It was undisputed that Costello had been found guilty of two separate offenses of income tax evasion in 1954.¹⁶¹ At oral argument, Williams argued:

It is our contention that an alien under the statute is not deportable for a

conviction or convictions during the time he enjoyed the status of citizenship. It is our position that there must be chronological coincidence between alienage and conviction under the language of the statute.¹⁶²

One of the Justices quickly reminded Williams of their holding three years earlier in *Costello v. United States*, namely that Costello had obtained citizenship fraudulently.¹⁶³ Justice Goldberg interrupted Williams' oral argument to point out that Costello was simply trying to profit from his fraud. Similarly, Assistant Solicitor General Wayne Barnett emphasized, "The only question, as Justice Goldberg noted, is whether the statute should be less harshly applied to the petitioner because he not only committed two crimes, but also committed a fraud to obtain a naturalization certificate which has been revoked for that reason."¹⁶⁴ In response to this damning characterization, Williams emphasized:

We don't argue that he should profit from his own fraud . . . but we do argue that no penalty may be constitutionally imposed on him, the penalty of banishment or exile, without notice . . . and the construction that the government contends for brings about that precise result. . . . If he had known that he faced banishment or exile, he could have pled guilty to one count [in 1954] and avoided the consequences of a dual conviction.¹⁶⁵

Williams also noted what the meaning of "is" is. Williams focused on the plain language of the statute: "any alien . . . shall be deported . . . who *is* convicted of two crimes."¹⁶⁶ The present tense of the verb, Williams argued, suggested that the convictions had to coincide with alien status.

The Court sided with Williams in a 6–2 majority, reversing Costello's deportation order.¹⁶⁷ The Court concluded that Costello's convictions occurred while he was a naturalized citizen and the deportation statute applied

to aliens only.¹⁶⁸ After almost a decade of litigation and multiple trips to the Supreme Court, Edward Bennett Williams won the Costello war. Looking at the numbers alone, Williams was 1–1 before the Court in his representation of Frank Costello. Beyond the numbers, as Robert Pack notes, “Williams and Costello won the only decision that counted—the last one.”¹⁶⁹ Costello would spend the remaining decade of his life in New York City.¹⁷⁰ Even in the Supreme Court, Edward Bennett Williams won the impossible cases.

Conclusion

Edward Bennett Williams often quoted the story of Susanna from Chapter 13 of the Book of Daniel.¹⁷¹ As the story goes, two elders accosted the virtuous Susanna, threatening to tell the town that she was promiscuous if she did not submit to their desires.¹⁷² Daniel exonerated Susanna by questioning her accusers separately, exposing holes in their stories. Williams referred to the story of Susanna as the “first transcript made of a cross-

examination in all history.”¹⁷³ Reviewing the most recent biography of Williams, Alan Der-showitz wrote: “Writing critically of a man who so recently died is, in effect, a denial of literary due process and of the right to confront one’s accuser.”¹⁷⁴ Unearthing a remarkable Supreme Court advocacy record is perhaps a small piece of Williams’ literary due process.

Archibald Cox’s biographer, Ken Gormley, once ruminated over the consequences of learning too much about great men:

Many biographers face the harsh realization that they have learned so much about their subjects that they have grown to disrespect them or even to hold them in disdain because they discover that much of the public persona is a façade. I had the unusual privilege of discovering the opposite.¹⁷⁵

Similarly, the deeper I researched the man known as the greatest lawyer of his generation, the more I found inspiration in his career. Williams had the unique ability to transition



Williams presented thirteen oral arguments before the Supreme Court between 1955 and 1977.

between trial and appellate practice. His trial skills infused his Supreme Court arguments with a unique energy, and his success as a Supreme Court advocate lent substantial credibility to the criminal defense bar. The safeguards guaranteed by the Fourth Amendment attest to a remarkable career before the Court. The Edward Bennett Williams Law Library at Georgetown University memorializes not just his philanthropy, but also his willingness to defend Catholic education on the highest stage.

Williams shared countless insights about Supreme Court advocacy in the classroom, inspiring scores of Georgetown and Yale law students. In 1971, as a student in Edward Bennett Williams' Constitutional Litigation Seminar at Yale Law School, a young Hillary Rodham attached a hand-written note to her final paper:

After our first meeting, I thought that you possibly accepted Dean Goldstein's offer to teach again both to discover what if any changes had occurred in law schools and students and to share your convictions about the profession with those who perhaps could not decide if the life's commitment was a valid one. If the latter hypothesis were a factor in your decision at all, then I especially want to thank you.¹⁷⁶

One man's contributions in twelve cases before the Supreme Court give testimony to the promise that a life in the law is a commitment worth making.

ENDNOTES

¹ Audio tape: Dedication of Edward Bennett Williams Law Library (1989) (on file with the Georgetown University Law Center archives) [hereinafter "Library Dedication"].

² Audio tape: Edward Bennett Williams' second Ryan Lecture at Georgetown University Law Center (1981) (on file with the Georgetown University Law Center archives).

³ *Id.*

⁴ Arthur Schlesinger, Jr., "J.F.K. F.D.R. Y.O.U.?", *N.Y. Times*, Apr. 5, 1975.

⁵ *Id.*

⁶ Letter from John Kennedy to Arthur Schlesinger, Jr. (Apr. 5, 1975) (on file with the Library of Congress).

⁷ *Id.*

⁸ 401 U.S. 265 (1971).

⁹ Audio tape: Oral Argument, *Monitor Patriot*, 401 U.S. 265 (1971) (No. 62) (on file with the National Archives).

¹⁰ Evan W. Thomas, *The Man to See 171-77* (Simon & Schuster 1992).

¹¹ Paul O'Neil, "Star Attorney for the Defense: Edward Bennett Williams, a Mouthpiece in the Great Tradition, Guards Hoffa and Others from the Law's Clutches," *Life Magazine*, June 22, 1959, at 110.

¹² O'Neil, *supra* note 11.

¹³ 403 U.S. 713 (1971).

¹⁴ "Library Dedication," *supra* note 1 (address of Joseph A. Califano, Jr.).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Christopher A. Goelz & Meredith J. Watts, *California Practice Guide: Federal Ninth Circuit Civil Appellate Practice 4* (2008).

²⁰ "Defender for the Unpopular, Lawyer Edward Bennett Williams," *Life Magazine*, Oct. 21, 1957 [hereinafter "Defender for the Unpopular"].

²¹ *Id.*

²² William O. Douglas, *The Court Years 1939-1975: The Autobiography of William O. Douglas* 186 (Random House 1980).

²³ 348 U.S. 503 (1955).

²⁴ "High Court Meets in Bramblett Case, Finds Defendant and Counsel Absent," *Wash. Post*, Feb. 8, 1955 [hereinafter "Counsel Absent"].

²⁵ *Id.*

²⁶ *Bramblett*, 348 U.S. at 504.

²⁷ "Counsel Absent," *supra* note 24.

²⁸ Robert Pack, *Edward Bennett Williams for the Defense* 368 (Harper & Row 1983).

²⁹ "Counsel Absent," *supra* note 24.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Bramblett*, 348 U.S. at 510 (Warren, C.J., Burton, J., and Harlan, J., abstaining).

³⁵ Pack, *supra* note 28, at 368.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Earl Warren served as Chief Justice from 1953 to 1969, presiding over six of Williams' arguments before the Court.

- ⁴²Edward Bennett Williams, "Address," 62 *Cal. L. Rev.* 5, 8-9 (1976).
- ⁴³*Id.* at 9.
- ⁴⁴Thomas, *supra* note 10, at 22.
- ⁴⁵Seven years after his death, Williams finally got his victory in *Bramblett*. In 1995, the Supreme Court reversed *Bramblett*, embracing the argument Williams had made forty years before. *Hubbard v. United States*, 514 U.S. 695 (1995).
- ⁴⁶"Defender for the Unpopular," *supra* note 20.
- ⁴⁷Jason L. Honigman, "The Art of Appellate Advocacy," 64 *Mich. L. Rev.* 1055, 1055 (1966).
- ⁴⁸*Id.*
- ⁴⁹Audio tape: Oral Argument, *Wong Sun v. United States*, 371 U.S. 471 (1963) (No. 36) (on file with the National Archives).
- ⁵⁰435 U.S. 589, 589 (1978).
- ⁵¹Audio tape: Oral Argument, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (No. 76-944) (on file with the National Archives).
- ⁵²*Id.*
- ⁵³Thomas, *supra* note 10, at 175.
- ⁵⁴Audio tape: Oral Argument, *Costello v. United States*, 365 U.S. 265 (1961) (No. 59).
- ⁵⁵*Id.*
- ⁵⁶365 U.S. 505 (1961).
- ⁵⁷*Id.* at 506.
- ⁵⁸Audio tape: Oral Argument, *Silverman v. United States*, 365 U.S. 505 (1961) (No. 59) (on file with the National Archives).
- ⁵⁹*Id.*
- ⁶⁰*Id.*
- ⁶¹*Id.*
- ⁶²*Id.*
- ⁶³*Id.*
- ⁶⁴*Id.*
- ⁶⁵*Id.*
- ⁶⁶371 U.S. 471 (1963).
- ⁶⁷*Id.* at 480.
- ⁶⁸*Wong Sun* Oral Argument, *supra* note 49.
- ⁶⁹Williams did not represent *Wong Sun* and James Wah Toy at the trial level. He parachuted in for the Supreme Court argument.
- ⁷⁰*Wong Sun* Oral Argument, *supra* note 49.
- ⁷¹*Id.*
- ⁷²*Id.*
- ⁷³Thomas, *supra* note 10, at 175.
- ⁷⁴*Wong Sun* Oral Argument, *supra* note 49.
- ⁷⁵Thomas, *supra* note 10, at 175.
- ⁷⁶*Wong Sun*, 371 U.S. at 480-81.
- ⁷⁷In 1983, the Washington Redskins won the Super Bowl and the Baltimore Orioles won the World Series.
- ⁷⁸465 U.S. 259 (1984).
- ⁷⁹Transcript of Oral Argument, *Flanagan*, 465 U.S. 259 (No. 82-374). Available at http://www.oyez.org/cases/1980-1989/1983/1983_82_374/argument.
- ⁸⁰*Id.*
- ⁸¹*Sup. Ct. R.* 39.
- ⁸²Tony Mauro, "Supreme Court Justices Turn to Ex-Clerks for Unusual Role," *Legal Times*, Apr. 14, 2008. Before this Term, the Supreme Court had not appointed counsel for five consecutive Terms. However, it appointed counsel for two cases this year. Interestingly, in 1989, Chief Justice John Roberts' first Supreme Court argument came as appointed counsel. *Id.*
- ⁸³*Wong Sun* Oral Argument, *supra* note 49.
- ⁸⁴Edward Bennett Williams' Evidence Final Examination at Georgetown University Law Center, Second Session Summer School, Aug. 28, 1947 (on file with the Library of Congress).
- ⁸⁵*Id.*
- ⁸⁶Edward Bennett Williams, *One Man's Freedom* 72-121 (Atheneum 1962).
- ⁸⁷*Costello* Oral Argument, *supra* note 54.
- ⁸⁸*Id.*
- ⁸⁹*Id.*
- ⁹⁰*Costello v. United States*, 365 U.S. 265 (1961); *Silverman v. United States*, 365 U.S. 505 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Alderman v. United States*, 394 U.S. 165 (1969).
- ⁹¹*Katz v. United States*, 389 U.S. 347 (1967).
- ⁹²*Id.* at 360 (Harlan, J., concurring).
- ⁹³*Weeks v. United States*, 232 U.S. 383 (1914); *Hester v. United States*, 265 U.S. 57 (1924).
- ⁹⁴277 U.S. 438 (1928).
- ⁹⁵*Olmstead*, 277 U.S. at 466.
- ⁹⁶*Katz*, 389 U.S. at 370 (Black, J., dissenting).
- ⁹⁷With Williams on the briefs was Agnes Neill. The two married in 1960.
- ⁹⁸*Silverman*, 365 U.S. at 512.
- ⁹⁹*Katz*, 389 U.S. at 370 (Black, J., dissenting).
- ¹⁰⁰*Silverman* Oral Argument, *supra* note 58.
- ¹⁰¹*Id.*
- ¹⁰²David Frederick, *The Art of Oral Advocacy* 59 (West Group 2003).
- ¹⁰³*Id.*
- ¹⁰⁴*Silverman* Oral Argument, *supra* note 58.
- ¹⁰⁵*Id.*
- ¹⁰⁶*Id.*
- ¹⁰⁷U.S. Const. Amend. IV.
- ¹⁰⁸Pack, *supra* note 28, at 116-17.
- ¹⁰⁹Thomas, *supra* note 10, at 388 ("Williams was truly generous to Catholic charities. He gave away about ten percent of his salary . . . and he often gave anonymously.")
- ¹¹⁰403 U.S. 602 (1971).
- ¹¹¹403 U.S. 602.
- ¹¹²394 U.S. 165 (1968). This was not the first time the Court heard two oral arguments from Edward Bennett Williams in one day. He presented two oral arguments in one day in cases consolidated into *Alderman v. United States*, 394 U.S. 165 (1969).

- ¹¹³ *Lemon*, 403 U.S. at 607.
- ¹¹⁴ Audio tape: Oral Argument, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (No. 89) (on file with the National Archives).
- ¹¹⁵ *Id.*
- ¹¹⁶ *Id.*
- ¹¹⁷ *Id.*
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.*
- ¹²¹ *Id.*
- ¹²² *Id.*
- ¹²³ *Lemon*, 403 U.S. at 614.
- ¹²⁴ *Lemon*, 403 U.S. at 614.
- ¹²⁵ *Tilton v. Richardson*, 403 U.S. 672 (1971).
- ¹²⁶ Audio tape: Oral Argument, *Tilton v. Richardson*, 403 U.S. 672 (1971) (No. 153) (on file with the National Archives).
- ¹²⁷ *Id.*
- ¹²⁸ Tony Mauro, "In Fond Remembrance of Father Drinnan," *Legal Times*, Feb. 5, 2007.
- ¹²⁹ The Court struck down a clause of the Act requiring that the facilities be used for secular purposes for only twenty years.
- ¹³⁰ John Roberts, Chief Justice of the United States, Commencement Address at the Georgetown University Law Center (May 21, 2006).
- ¹³¹ Though the *Lemon* test remains the standard, Justice Scalia once wrote: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being killed and buried, *Lemon* stalks our Establishment Clause once again frightening the little children." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).
- ¹³² Thomas, *supra* note 10, at 258–59.
- ¹³³ O'Neil, *supra* note 11. Williams represented the Teamsters and Jimmy Hoffa in just shy of twenty lawsuits, never losing a single case. Joseph Califano, "In Memoriam: Edward Bennett Williams," 77 *Geo. L. J.* 1, 2 (1988).
- ¹³⁴ Marc Fisher, "Obituaries: Edward B. Williams, Famous and Powerful Lawyer, Sports Figure," *L.A. Times*, Aug. 14, 1988, at 39.
- ¹³⁵ "Library Dedication," *supra* note 1 (address of Vince Fuller).
- ¹³⁶ *Id.* (address of Justice Brennan).
- ¹³⁷ *Id.*
- ¹³⁸ Without writing an opinion, the Supreme Court affirmed the judgment of the Third Circuit by an equally divided Court.
- ¹³⁹ Pack, *supra* note 28, at 275.
- ¹⁴⁰ *Costello*, 365 U.S. at 267.
- ¹⁴¹ *Costello*, 365 U.S. at 267.
- ¹⁴² Pack, *supra* note 28, at 263.
- ¹⁴³ *United States v. Costello*, 145 F. Supp. 892 (D.N.Y. 1956).
- ¹⁴⁴ *Costello*, 145 F. Supp. at 895.
- ¹⁴⁵ *Matles v. United States*, 356 U.S. 256, 256 (1958).
- ¹⁴⁶ *Matles*, 356 U.S. 256.
- ¹⁴⁷ Pack, *supra* note 28, at 272.
- ¹⁴⁸ *United States v. Costello*, 171 F. Supp. 10 (1959).
- ¹⁴⁹ *Costello*, 171 F. Supp. at 17.
- ¹⁵⁰ *Costello*, 171 F. Supp. at 18–19.
- ¹⁵¹ *Costello*, 171 F. Supp. at 35.
- ¹⁵² *Costello*, 171 F. Supp. at 35.
- ¹⁵³ *Costello* Oral Argument, *supra* note 54.
- ¹⁵⁴ *Id.*
- ¹⁵⁵ *Id.*
- ¹⁵⁶ *Costello*, 365 U.S. at 272.
- ¹⁵⁷ *Costello* Oral Argument, *supra* note 54.
- ¹⁵⁸ *Costello*, 365 U.S. at 280.
- ¹⁵⁹ *Costello v. Immigration and Naturalization Service* ("Costello II"), 376 U.S. 120 (1964).
- ¹⁶⁰ Immigration and Nationality Act § 241(a), 8 U.S.C.A. § 1251(a)(4) (1952).
- ¹⁶¹ *Costello II*, 376 U.S. at 121.
- ¹⁶² Audio tape: Oral Argument, *Costello v. Immigration and Naturalization Service* ("Costello II"), 376 U.S. 120 (1964) (No. 83) (on file with the National Archives).
- ¹⁶³ *Id.*
- ¹⁶⁴ *Id.*
- ¹⁶⁵ *Id.*
- ¹⁶⁶ Immigration and Nationality Act § 241(a), 8 U.S.C.A. § 1251(a)(4) (1952).
- ¹⁶⁷ *Costello II*, 376 U.S. at 122.
- ¹⁶⁸ *Costello II*, 376 U.S. at 123.
- ¹⁶⁹ Pack, *supra* note 28, at 274.
- ¹⁷⁰ *Id.*
- ¹⁷¹ Williams, *supra* note 86, at 186.
- ¹⁷² *Id.* at 186–88.
- ¹⁷³ *Id.* at 190.
- ¹⁷⁴ Alan Dershowitz, "Winning Was Everything," *N.Y. Times*, Dec. 15, 1991.
- ¹⁷⁵ Ken Gormley, "In Memoriam: Archibald Cox," 118 *Harv. L. Rev.* 11 (2004).
- ¹⁷⁶ Letter from Hillary Rodham to Edward Bennett Williams (May 30, 1971) (on file with the Library of Congress).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Millions were reminded on January 20, 2009, that the inauguration of an American President is as remarkable as it is routine. In this distinctly republican rite, the chief executive publicly subordinates himself to the fundamental law of the land. As the Constitution dictates, “[b]efore he enters on the Execution of his Office, he shall take the following Oath or Affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”¹ This display of constitutional fealty was remarkable because the variety of political systems, experiences, and cultures across today’s globe graphically illustrates that the seamless and peaceful transfer of authority from one political party or individual to another, as was witnessed at President Barack Obama’s inauguration and at President George W. Bush’s inauguration in 2001, is not always a foregone occurrence everywhere. January’s event was routine in that, from the outset of government under the Constitution and with the notable and tragic exception of 1860, the defeated party or individual has accepted, if not welcomed, the verdict rendered by the electoral process. That was the outcome even in 1800, when the notion of a violence-free shift of control in a country founded on the principle of government by the “consent of the governed”² was first put to the test at the presidential level. The assumption of authority by Thomas Jefferson and the Democratic-Republicans from John Adams and the Federalists marked the world’s first peaceful transfer of power from the vanquished to the victors as the result of an election.³ Given the stark national partisan differences that had crystallized in the short time since ratification of the Constitution and the fact that finalization of the election required extraordinary intervention by the House of Representatives to break an Electoral College tie, this outcome was a greater achievement than is sometimes acknowledged. “Partisanship prevailed to the bitter end and showed no signs of abating,” according to one historian who has recently revisited this critical and precedent-setting election. “Over the campaign’s course, George Washington’s vision of elite consensus leadership had died, and a popular two-party republic . . . was born.”⁴

Yet as the ceremony proceeded on the west front of the Capitol in 2009, some spectators were surely mindful of the uniqueness of the event even beyond the fact that the 44th President is also the nation's first African-American President. Chief Justice William H. Rehnquist had administered the oath to President Bush in 2004. In 2009, that inaugural function was performed for the first time by Chief Justice John G. Roberts Jr.,⁵ once a law clerk to Rehnquist, who died in 2005. The Obama inauguration also marked the first time that a Chief Justice swore in a President who, as a United States Senator, voted against the Chief Justice's confirmation.⁶

Indeed, the contrast between Roberts and Obama that was symbolized by the latter's negative vote underscored the fact that the Supreme Court and the kind of judicial nominations Democratic contender Obama and Republican challenger Senator John McCain might make as President had been a pointed topic of discussion in the 2008 campaign. Senator Obama emphasized that he would prefer a "judge who is sympathetic enough to those on the outside, those who are vulnerable, those who are powerless, those who can't have access to political power and as a consequence can't protect themselves from being—from being dealt with sometimes unfairly."⁷ Referring on another occasion specifically to two members of the current Court (Justices David Souter and Stephen Breyer), Obama laid out his preference. "That's the kind of justice that I'm looking for," he elaborated, "Somebody who respects the law, doesn't think that they should be making the law, but also has a sense of what's happening in the real world and recognizes that one of the roles of the courts is to protect people who don't have a voice." He added that the "special role" of the Court is to protect "the vulnerable, the minority, the outcast, the person with the unpopular idea."⁸ Earlier in the campaign, Senator McCain decried "the common and systematic abuse of our federal courts by the people we entrust with judicial power" and said that Chief Justice Roberts

and Justice Samuel A. Alito Jr. "would serve as the model for my own nominees, if that responsibility falls to me."⁹ Moreover, at the Saddleback Presidential Candidates Forum on August 16, both Obama and McCain answered questions from Pastor Rick Warren as to sitting Justices on the Supreme Court whom they would *not* have appointed.¹⁰

The comments by Obama and McCain and the questions from Warren are reminders that references to the Supreme Court at election time are hardly atypical of the past two centuries of American electoral politics. Focus by the candidates on the judiciary may have been the exception and not the rule, but examples of the Court's entanglement in presidential campaigns are almost as old as the Republic itself. Altogether, one finds that the federal judiciary has been a major focus in nearly one-fifth of all presidential elections between 1800 and 2008, inclusive.

Against a background of vacillating political fortunes and evolving party systems, at least two tensions in American government have allowed—perhaps even promoted—the intersection of campaigns and the Court. One pits the principle of popular sovereignty against that of limited government; the other inheres in the idea of an independent judiciary.

Popular sovereignty is institutionalized at all levels of the political system, from city councils to Congress. In his address at the Gettysburg battlefield in 1863, President Abraham Lincoln called this principle "government by the people." Accordingly, voters possess the authority, facilitated by political parties, not only to choose those who will rule over them but to remove those officials from office. After all, the right to vote—that is, the claim of the many to confer authority to govern on the few—would mean little if it did not also entail the right to withdraw that authority.

In contrast, the principle of limited government resides in the nature of a constitution itself. In John Adams' classic formulation on the eve of the American Revolution, the goal is a "government of laws and not of men."¹¹

A constitution, explained Justice William Paterson two decades later, “is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established.”¹² Ironically, the Constitution is at once both the consummation of popular sovereignty (“We the People,” as the Preamble affirms) and the embodiment of limits on what the people, through their representatives, may do (“Congress shall make no law,” as the First Amendment declares).

There should be little surprise, therefore, when presidential campaigns and the Court sometimes intersect. Elections are the most visible recurring displays of popular sovereignty, and political parties exist to harness popular support for their candidates with an eye toward shaping public policy. The Constitution in turn places limits on what the people through political parties and elected officials may do. The Supreme Court’s custodianship and application of those limitations makes the judiciary unavoidably political—not “political” in the sense that the Justices campaign for votes or publicly endorse one candidate or another, but political in the sense that their decisions affect the allocation of power and the content of public policy. Given the impact that a President may have on the membership of an electorally unaccountable Bench, the judicial stakes in an election can be high. Thus, the judiciary may become part of partisan combat both in spite of and because of the “independence” the Constitution mandates for the third branch of the national government.

Recent books about the Supreme Court illustrate how quickly the Court and its Justices can be drawn into controversy. Two of the volumes involve major decisions on religious liberty, specifically the First Amendment’s proscription of “law[s] respecting an establishment of religion.” **The Battle over School Prayer**,¹³ by historian Bruce J. Dierenfield of Canisius College, is a case study of *Engel v. Vitale*.¹⁴ His book is one of the latest volumes to appear in the Landmark Law Cases & American Society Series. Published

by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, the series now claims several dozen titles, almost all of them treating decisions by the Supreme Court. Additional entries are in preparation.¹⁵ Complementing Dierenfield’s work is **Ellery’s Protest**¹⁶ by Stephen D. Solomon, who teaches journalism at New York University. Solomon tells the story of *School District of Abington Township v. Schempp*.¹⁷ Decided within a year of each other, *Engel* and *Schempp* elevated the “wall of separation between church and state”¹⁸ to new heights, helped to provoke a sharp backlash against the Court and, like several other rulings by the Warren Court, severely tested the limits of judicial power. Both volumes are carefully researched,¹⁹ and each is enriched by detail gleaned from interviews with those who were closest to the litigation. Indeed, Solomon’s draws from several hours of interviews with Ellery²⁰ Schempp; Dierenfield’s includes material from interviews with members of all five families that participated in *Engel*. Dierenfield’s excels in laying out the cultural dimension of the constitutional question, while Solomon’s excels in its presentation of the judicial process, particularly the internal workings of the Court. The decisions reviewed in both volumes were pieces of a transformation in American constitutional law that had been underway in the United States for at least two decades.

A major consequence of the “Constitutional Revolution” of 1937 was judicial acceptance of government’s authority at all levels to enact economic and social legislation.²¹ However, two jurisprudential fault lines protruded into this consensus. By the 1960s, decisive shifts along each moved the Court further into programmatic liberalism. One fault line roughly paralleled Footnote Four from the *Carolene Products* case.²² If courts allowed legislators wide latitude on social and economic matters, such tolerance frequently did not extend to laws that restricted liberties that the Justices considered

fundamental. In effect, a new hierarchy of constitutional rights emerged, as the about-face of 1937 effectively wrote traditional property-rights protection out of the Constitution. In its place the Court—tentatively in the 1940s and aggressively in the 1960s—placed in a preferred position rights derived from the Bill of Rights and the Fourteenth Amendment. The new legal order meant that the government had not only to justify each restriction on a preferred liberty, but ordinarily to do so to a greater degree than had been required for regulations on property before 1937. As much as any decisions by the Warren Court during the 1960s, *Engel* and *Schempp* graphically demonstrated this trend at work.

The second fault line revealed differences over the meaning of the Due Process Clause of the Fourteenth Amendment and the degree to which its strictures applied not merely to the national government but to the states (and local governmental entities) as well. If a provision of the Bill of Rights applied to the states, individuals would have recourse under the national Constitution, in addition to whatever protections their state constitution might provide. The rights or right in question would thus be “federalized” or “nationalized.” Justices inclined along the first fault line toward a rigorous protection of individual liberties were usually also those who favored rapid Fourteenth Amendment absorption of the Bill of Rights. As these Justices more and more frequently controlled the outcome of decisions during the Warren Court, the effect was twofold: a broadening of “the substantive content of the rights guaranteed, giving virtually all personal rights a wider meaning than they had theretofore had in American law,”²³ and their application to every state, county, city, and crossroads in the land.

The Supreme Court had initially made the First Amendment’s Free Exercise Clause applicable to the states in 1940²⁴ and then began to apply the Establishment Clause to the states in 1947.²⁵ That pronouncement on the Establishment Clause upheld taxpayer reimburse-

ment of transportation expenses incurred by families with children attending religious and non-religious private schools, as well as public schools. Within a span of only five years, another decision marked the first statute invalidated on Establishment Clause grounds, as the Court struck down an on-site released-time program for religious instruction in public schools in Illinois held during the school day, but then upheld a similar school day program conducted off site in New York State.²⁶ During an era when Protestant Christian religious exercises of various kinds were common in many school districts across the United States, the released-time decisions left considerable doubt as to how much religious presence would be constitutionally acceptable in a public school setting.²⁷ *Engel v. Vitale* provided an initial answer to that question. **The Battle over School Prayer** includes discussion of the school-transportation and released-time cases but provides ample broader context as well, including a survey of religious practices in American public education, efforts to expunge devotions, and the reaction to such efforts that entailed pressures to expand the exercises.

The litigation that resulted in what is known today as the Supreme Court’s first school-prayer case began with a decision in 1951 by the New York Board of Regents to adopt what Dierenfield calls “the nation’s first government-prepared prayer for public schools,”²⁸ which was intended to further the Regents’ program of moral and spiritual training. The prayer was composed by a team of clerics the membership of which generally reflected the religious diversity of the Empire State: 50 percent Roman Catholic, 20 percent Protestant, 25 percent Jewish, and 5 percent “unidentified.”²⁹ Their efforts yielded a twenty-two-word supplication devoid of any explicit Christian reference: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country.”³⁰ Designed to be nondenominational and one-size-fits-all, the prayer was nonetheless hardly without

theological content as it embodied notions of monotheism and a sustaining and providential deity responsive to human petitions. Having adopted the prayer with recommendations that local school districts employ it as part of a school day's opening exercises, however, the Regents did not mandate that the prayer be used. Rather, the stipulation was that if a district chose to direct that any prayer be recited, the prayer had to be the Regents' prayer. By 1955, use of the prayer was spotty at best, with about 17 percent of New York's school districts having directed use of the prayer. While this number included many rural districts, the Regents' prayer was also mandated in some larger communities as well such as Binghamton, Rochester, and Syracuse. Other districts considered the matter a "hot potato" that was best left alone.

The Herricks School District in Nassau County on Long Island first considered the prayer in 1951, but formal adoption did not come until 1958, when the board, headed by its president William Vitale, Jr., voted 4 to 1 to make the prayer, along with the Pledge of Allegiance, a part of the beginning of each school day. Moreover, the board, which by this time had a membership that was majority Roman Catholic, directed that "no school official could tell students how to pray or to comment on who did not pray"³¹ and approved an excusal provision. After the board rejected a request by the Roth, Engel, and other families to rescind its policy, and with the assistance of the American Civil Liberties Union and the New York Civil Liberties Union, legal action commenced. Once the trial and appellate divisions of state supreme court and then the New York Court of Appeals had sustained the prayer as acceptably falling within the contours of the Establishment Clause,³² *Engel v. Vitale* was on its way to the United States Supreme Court.

Although Dierenfield does not indicate precisely which sources yielded the information, it appears that *Engel* came close to joining that vast number of cases every Term in

which the Court denies review. Hugo Black, then the senior Associate Justice, "was eager for the Court to hear the school prayer case, but wanted to be sure that his colleagues would strike down the regents' prayer." "I want to know what these guys do before I vote to take it," he confided to his law clerk.³³ Potter Stewart and Charles Whittaker opposed taking the case, with the latter noting "I can't agree to take this case. I feel strongly—very deeply—about this."³⁴ Even Chief Justice Earl Warren was lukewarm to the petition, believing the prayer was as innocuous as the Pledge of Allegiance. Nonetheless in a 7–2 vote in December 1961 that was encouraging to Black, the Court granted review.

Lively exchanges between Court and counsel marked oral argument in April. When it became known that two of the petitioners were Jewish, a concerned Justice Stewart, noting that the prayer did not speak of a Christian God, queried "What is there in this prayer that people of the Jewish faith find objectionable?" Attorney William Butler explained that "the prayer violated the way in which some Jews (although none of the litigants) pray—only in the synagogue, wearing yarmulkes, facing east."³⁵

The conference deliberation was brief, with only Stewart in doubt. For the Chief Justice, because respondents "practically conceded this was religious instruction," the prayer was "the camel's nose under the tent."³⁶ With only Stewart dissenting, the published vote when the case came down on June 25, 1962 was 6–1.³⁷

Black had expressly requested the opinion-writing assignment, and Warren agreed. Black, after all, had spoken for the Court in the seminal *Everson* and *McCullum* cases some years before. The result was an opinion that was characteristic of the Alabaman: direct and forceful. "We think that, by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause,"³⁸



The Battle over School Prayer, a new volume in the Landmark Law Cases & American Society Series, was written by historian Bruce J. Dierenfield of Canisius College. Pictured are some members of the Long Island, New York families who participated in *Engel v. Vitale*, the 1962 case that solidified the wall of separation between church and state. Dierenfield interviewed many of them.

declared Black practically at the outset. "By the time of the adoption of the Constitution," he continued, "our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. . . . Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs."³⁹

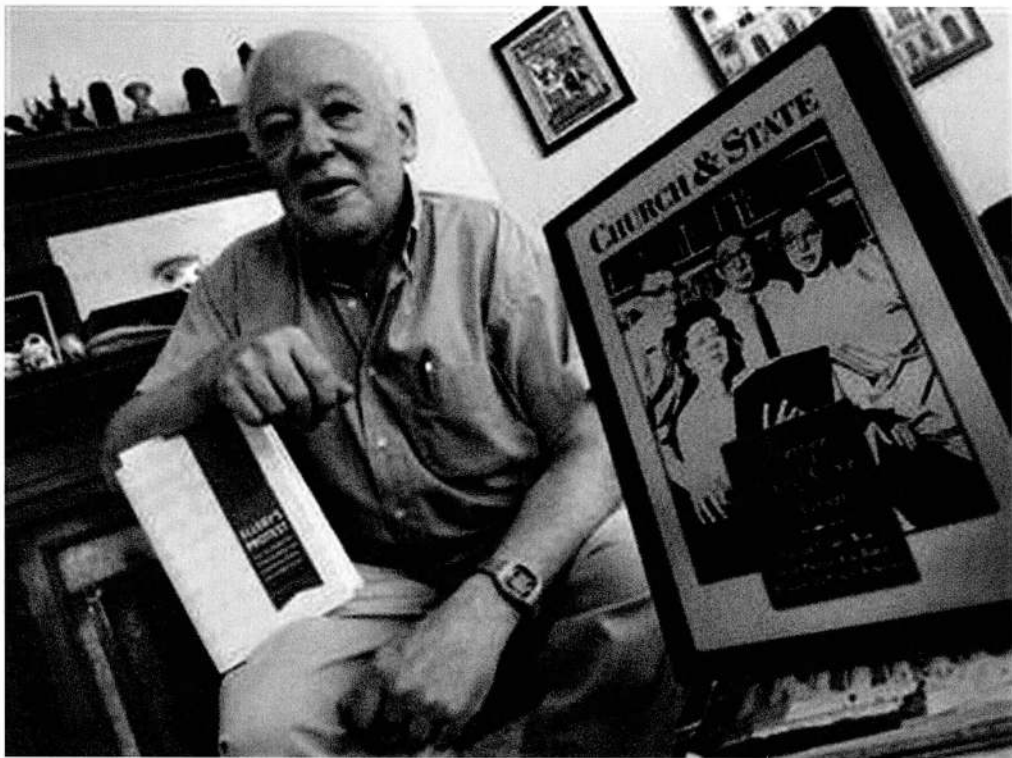
Notably, for all the feeling packed into the opinion, Black "did not cite a single substantive case in support of his argument."⁴⁰ That fact would shortly prove to be as consequential an omission as was the absence of guidance in the opinion as to the constitutionally permissible extent of religion in a public-school setting. Was any religious presence allowed? If so, how much was too much? Presumably, it was not sufficient merely to agree with the petitioners' contention that "the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State."⁴¹ Thomas Jefferson's wall metaphor⁴² had been a key part of Black's *Everson* and *McCullum* opinions, but as a bright-line legal test it seemed singularly unhelpful here. Although *Engel* was a clear

victory for those who wanted greater distance between religion and government, for those who craved greater clarity on what the correct distance should be, it seemed to be a missed opportunity.

Solomon's **Ellery's Protest** recounts the Court's return to the matter. The result was a ruling that decided a pair of cases arising from a somewhat different factual record than the Justices found in *Engel. Murray v. Curlett*, which the Court eventually paired with the *Schempp* case for decision, entailed a suit filed by professed atheist Madalyn Murray on behalf of her son William against the board of school commissioners of Baltimore City in Maryland. She challenged on Establishment Clause grounds a rule the board adopted in 1905 that called for school-day opening exercises consisting of the "reading, without comment, of a chapter in the Holy Bible and/or

the use of the Lord's Prayer."⁴³ In a 4–3 decision, the Court of Appeals of Maryland, that state's highest tribunal, upheld Baltimore's school policy.⁴⁴

School District of Abington Township v. Schempp,⁴⁵ which forms the core of Solomon's book, tested the constitutional validity of a statute the Pennsylvania legislature enacted in 1913 mandating that ten verses of the Bible be read to the children in public schools each day. This rule was then reincorporated into a revised school code as late as 1949. The requirement was hardly unique to Pennsylvania. Surveys by the U.S. Office of Education in 1896 and 1913, for example, found that the Bible was read in three-fourths of the public schools. By the middle of the twentieth century, the national percentage had declined to 42 percent, although the practice varied considerably by region, with Bible-reading in schools being



Ellery's Protest, a new volume by Stephen D. Solomon of New York University, tells the story of *School District of Abington Township v. Schempp* (1963). Solomon interviewed Ellery Schempp (Pictured), the Pennsylvania high-school student who refused to participate in school prayer.

most common in the South and the Northeast and least common in the Midwest and West.⁴⁶

The *Schempp* case began after Ellery Schempp, a high-school student at Abington High School in suburban Montgomery County, outside Philadelphia, protested the state rule by silently reading the Koran while Bible verses were being read over the public address system during the homeroom period and by not standing during recitation of the Lord's Prayer.⁴⁷ A suit in the United States District Court for the Eastern District of Pennsylvania yielded a decision invalidating the state statute.⁴⁸ Murray's petition for certiorari to the Maryland Court of Appeals reached the High Court on May 15, 1962, precisely thirteen days ahead of the Abington school district's appeal of the district-court decision.⁴⁹

When the Supreme Court considered in the fall of 1962 how to proceed on the two cases, several Justices, but not a majority, were inclined toward a summary affirmance in *Schempp* and a summary reversal in *Murray*, in light of the fact that they had rendered the decision in *Engel* less than four months earlier. Neither step, however, would have generated an opinion of the Court. It is thus highly significant that all eight participating Justices⁵⁰ voted to schedule oral arguments for both the Maryland and Pennsylvania cases.

By then a 22-year-old graduate student at Brown University, Ellery Schempp attended the oral argument in "his" case in February. He would surely have agreed with attorney Henry Sawyer's statement to the Bench that the Commonwealth of Pennsylvania intended to sponsor a religious exercise in the public schools. "I think it's ingenuous [sic] to suggest that the legislature had anything else in mind but that. . . . And it's just, to me, a little bit easy and I say arrogant to keep talking about our religious tradition. It suggests that the public schools, at least of Pennsylvania, are a kind of Protestant institution to which others are cordially invited."⁵¹

In the wake of *Engel*, it would have been remarkable had the Court *not* affirmed the

district court in Pennsylvania and reversed the Maryland state court. Indeed, only Justice Stewart dissented. What made the outcome particularly notable were the opinions that accompanied the decision. In what Solomon believes to be a strategic opinion assignment, Chief Justice Warren asked Justice Tom Clark to write for the majority. "Black was already regarded as a strong proponent of church-state separation, and his authorship of yet another decision on religion in the schools would certainly not bring any more weight to the Court's position. In comparison, Clark was a cautious conservative Texan . . . likely to produce the kind of centrist opinion that would keep the Court from splintering." With Stewart determined to dissent, Warren "couldn't afford to lose any more justices from the majority and still have the Court speak with the weight that he thought necessary."⁵²

Solomon found nine drafts of Clark's opinion in the Tom Clark Papers at the library of the University of Texas School of Law, and there may have been more that were not preserved. It is in those drafts that it became apparent that the case would come down and be widely known as *Schempp* and not *Murray*. Giving the larger billing to an avowed atheist might have further agitated the vocal critics that the Court fully expected to emerge soon after publication of the judgment. Accordingly, Clark emphasized that it was the religious ceremony, not religion itself, that was being evicted from public schools. Moreover, Clark introduced a two-part test that the Court might apply in future cases to judge when policies violated the Establishment Clause. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that, to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁵³

While Clark was at work on the lead opinion, Justice William J. Brennan, Jr. and his two clerks (Robert O'Neil and Richard Posner) crafted a concurring opinion that attempted, among other things, to "mine the rich history behind the First Amendment's religion clauses" and "to fully [sic] explain the rationale for removing religious ceremonies from the public schools."⁵⁴ At seventy pages, Brennan's was three times the length of Clark's. Perhaps Brennan hoped to calm the anticipated public storm. Combined, the twin efforts went substantially beyond what Black had offered in *Engel*. But as seems so often to be true, the real labor was largely expended by the clerks. Solomon learned from a discussion with O'Neil in April 2004 that, because of inadequate resources within the Supreme Court building, his research, in that era before the Internet and electronic databases, led him to places outside the Court, but he also "had to keep his fingerprints off anything that could be traced back to the Court and thereby provide clues as to how the decision might turn out." As O'Neil described his efforts, "They actually sent me one day to the Department of Agriculture library. . . . The Supreme Court librarian said, don't let anybody see you. Park some blocks away or take—there wasn't a Metro yet—take a bus or something. . . . We don't want it known that you or anybody else from the Court is actually looking or something. So just wander in like you're a farmer."⁵⁵ Apparently O'Neil was able to retrieve his sources successfully without actually having to drive a tractor across town.

The concern within the Court about the hostile reaction that might await *Schempp* was well founded. As Dierenfield writes, after *Engel* the Court received some 5,000 mainly negative letters about the decision, "more than on any previous case in its history."⁵⁶ Because Chief Justice Warren's Court had been stirring the constitutional pot on several key issues, including race, opposition to the decision became entangled with opposition to integration of the public schools. "They put the

Negroes in the schools," declared Representative George Andrews of Alabama, "and now they're driving God out."⁵⁷ One group picketed the White House with signs reading "Remove Warren, Restore God."⁵⁸ A number of Court-curbing and prayer-restoring measures were introduced in Congress in the wake of the decision. Remarkably, even in that era, before the heightened awareness later afforded congressional debates by C-Span and talk radio, none passed.

As Solomon observes, the dismantling of devotionals in public schools after *Schempp* may have proceeded most smoothly in Abington, where they ceased immediately.⁵⁹ Elsewhere, the results were decidedly mixed. One study of school practices in 1964–1965 found devotionals continuing in only 11 percent of public schools in the East, 5 percent in schools in the West, and 21 percent in those in the Midwest—but in 64 percent of Southern schools.⁶⁰ Other studies reported similar regional differences. Overall, the statistics manifested a severe test of judicial power. State officials in Delaware and Idaho simply ignored the ruling altogether.⁶¹ Perhaps the most creative, if temporary, defiance occurred in Netcong, New Jersey, where school officials in 1969 scheduled a daily five-minute assembly at 7:55 a.m., in the gymnasium where a student read verbatim from the *Congressional Record*, specifically including the chaplain's "remarks" that consisted of a passage from the Bible and a prayer.⁶²

Much of the cultural and legal background for the *Engel* and *Schempp* cases is explored in "Law and Religion, 1790–1920,"⁶³ a comprehensive essay by historian and legal scholar Sarah Barringer Gordon, of the University of Pennsylvania Law School. Her essay is part of an impressive collection of studies on legal history described below that has been published by Cambridge University Press. Noting Alexis de Tocqueville's observation in 1830 about the power and proliferation of religion in American life,⁶⁴ she explains that any study of law and religion in the United States must take

into account an important paradox: that multiple faiths have thrived in a nation that has witnessed the growing power of government but the absence of an official faith or religious establishment.⁶⁵

As her essay demonstrates, by the time the Bill of Rights became part of the Constitution in 1791, two competing visions or ways of thinking had developed that shaped laws affecting religious liberty: accommodation and separation. As the Dierenfield and Solomon books reveal, debates about the meaning of the religion clauses in the Constitution have sometimes been defined in terms of which of these visions is to prevail.

Accommodation, the older of the two visions, has stressed freedom of religion. Alongside protection for religious practice, it sought government acknowledgment of—and sometimes support for—religion (Protestant Christianity, in particular, in the eighteenth and nineteenth centuries). Accommodationists have believed that government could best serve its own purposes by encouraging religion and recognizing its contributions to society, all while it tolerated different faiths. Government was not to meddle in the affairs of particular denominations, but laws should respect—and reflect—dominant religious values. That would be central to the promotion of that faith and morality so essential in the growth of a healthy polity. This perspective seems to have been the prevailing view in most of the American states in the late 1700s and for a long time afterward.

A second, more secular, vision that took shape in the United States was closely identified two centuries ago with leaders such as Thomas Jefferson and James Madison. It has stressed separation—freedom *from* religion. It has sought greater distance between religion and government in a nation that is not only one of the most religious but also one of the most religiously diverse countries on earth. For separationists then as now, both political and religious institutions are more likely to prosper if each involves itself as little as possible in the affairs of the other.

Elements of the separationist vision found a place in a sometimes overlooked part of the Framers' handiwork. In the original text of the Constitution, there is a single, but nonetheless significant, reference to religion: Article VI declares that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." At the outset, by barring religious tests—a religious-belief requirement—the Constitution disallowed a policy for the nation that was followed by most of the American states and virtually every other country at that time. In its leadership, the federal government could not be sectarian.

In the Bill of Rights, the twin provisions of nonestablishment and free exercise in the First Amendment embodied complementary objectives—preserving liberty and order. The Free Exercise Clause preserved a sphere of religious practice free of interference by the government. Most Americans of two centuries ago probably did not crave tolerance for beliefs other than their own. Given the presence of so many faiths, however, they had no choice. The violent alternative—as vividly demonstrated in some places in the world today—was unacceptable.

Even though a few states still maintained some kind of officially supported or designated church in 1791, the Establishment Clause declared that the nation could not have one. Nonestablishment was thus part of the price of union. The First Amendment set the national government off limits as a prize in a nation of competing faiths. The two religion clauses thus protected religious liberty by disabling all groups so that none could commandeer public resources to advance itself and to threaten the others. As Professor Gordon observes, the "place where religion and law meet . . . has been the field of combat between rival faiths. Predictably . . . the combination of encounters has produced a tangled, unsettled, and contentious law of religion," a confusion "best viewed in this larger and historically grounded context."⁶⁶

Her essay appears in the impressive **Cambridge History of Law in America**, under the editorship of historian and legal scholar Michael Grossberg of Indiana University and Christopher Tomlins, who is Senior Research Fellow at the American Bar Foundation.⁶⁷ Grossberg and Tomlins oversaw the labors of sixty authors who produced the forty-five essays that comprise this three-volume resource.⁶⁸ The separate volumes reflect the separate eras that form the organizational structure for the essays. The first volume is subtitled “Early America (1580–1815),” and the second volume, which contains Professor Gordon’s essay, is subtitled “The Long Nineteenth Century (1789–1920).” “The Twentieth Century and After (1920–)” follows as the third. As a bonus, each volume contains a valuable bibliographical essay. Although each volume has a specific chronological focus, the editors explain that some subjects—such as criminal justice, legal education, and legal thought—that might be treated in an early volume are revisited in a later volume. As a starting point, the editors deploy pamphleteer Thomas Paine’s assertion from 1776 that “in America THE LAW IS KING.”⁶⁹ “We know ourselves that what he claimed for the law then remains mostly true now. Yet, we should note, Paine’s claim was not simply prophecy; it made good sense in good part because of foundations already laid. . . . The power and position of law . . . are apparent throughout American history, from its earliest moments.”⁷⁰ So the object of the **Cambridge History** is to “explain why Paine’s synoptic insight should be understood both as eloquent foretelling of what would be and an accurate summation of what already was.”⁷¹ The intended audience for the **Cambridge History** includes the scholarly community, the legal profession, and the general public with an interest in legal matters. Because “Americans continue to turn to law as their key medium of private problem solving and public policy formulation and implementation on an expanding-global-stage,” the editors intend the volumes’ extensive en-

tries to “offer some reflection on what an encounter with the past might bring by way of advice to the ‘many encounters’ of life lying ahead.”⁷²

Gordon’s essay on religion precedes “Legal Innovation and Market Capitalism, 1790–1920,” by Tony A. Freyer of the University of Alabama School of Law. His contribution appropriately refers⁷³ to the landmark and politically provocative decision by the Marshall Court in *McCulloch v. Maryland*,⁷⁴ which, along with the institution it sustained, figured prominently both in the presidency of Andrew Jackson and particularly in the presidential election of 1832. Happily, the case has been the subject of book-length treatment for the second time in as many years. The first was Mark R. Killenbeck’s *McCulloch v. Maryland: Securing a Nation* (2006).⁷⁵ The second is *Aggressive Nationalism*⁷⁶ by historian Richard E. Ellis of the University at Buffalo, State University of New York.

As many readers of this *Journal* are aware, *McCulloch* stemmed from one of the first disputes over the meaning of the Constitution to arise in President Washington’s first term: whether Congress could and should charter a bank. In 1791, Congress followed Alexander Hamilton’s views, rejected Thomas Jefferson’s, and chartered the Bank of the United States. After the Madison administration allowed the Bank to expire in 1811, Congress created the Second Bank in 1816 (Ellis uses “2BUS”⁷⁷ throughout as shorthand for the Second Bank). It was this institution that by 1818 had become the target of considerable anti-Bank sentiment in some states. A Maryland statute then stipulated that the Bank buy special stamped paper from the state on which to print its notes or pay a fee of \$15,000 per year. When Bank cashier James McCulloch refused to comply with the law, the state brought suit to compel obedience. Following defeats in two Maryland courts, the Bank appealed to the United States Supreme Court. The questions the case presented to the High Court were simply stated but profound in their implications:

Did Congress possess the authority to charter the Bank? If so, could Maryland tax the Bank?

The Bank won and Maryland lost on both questions. But the significance of the decision went well beyond an affirmation of congressional authority to create a bank and a denial of Maryland's authority to tax it. Chief Justice Marshall rested Congress's authority on an exceedingly expansive reading of national powers, echoing Hamilton's own argument to Washington in support of a bank twenty-eight years before. In Marshall's view, the Necessary and Proper Clause of Article I, section 8,⁷⁸ not only gave Congress a choice of means in carrying out the powers that the Constitution expressly granted, but also, by "necessary," indicated that these implied powers need be merely convenient and appropriate, not essential. Thus, Congress possessed not only those powers *granted* by the Constitution, but an indefinite number of others as well unless *prohibited* by the Constitution.⁷⁹ Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide.

As for Maryland's tax on the Bank, Marshall's opinion practically assumed that the state had taxed a department of the national government, not merely a corporation chartered by Congress in which the national government held a minority interest. A part of the union, Marshall insisted, could not be allowed to cripple the whole.

For defenders of state prerogatives, Marshall's opinion was a double dose of bad news. First, the ordinary remedy for unacceptable *national* legislation lay not with the Court but with Congress; second, the judiciary would be attentive to alleged victims of *state* policies. *McCulloch* therefore stood for the proposition that the Supreme Court was to be less a forum to judge the limits of national power and more a forum to protect national from local interests. Once Congress acted, the Bank (and, inferentially, any other national instrumentality) enjoyed constitutional immunity from hostile state actions. "[A] state of things has

now grown up in some of the states," Justice William Johnson would write in another Bank case, "which renders all the protection necessary, that the general government can give to this bank."⁸⁰ A good measure of the significance of *McCulloch*, from the perspective of the twenty-first century, is to ponder the long-term consequences for the nation had the case been decided against the Bank on both questions. It was in *McCulloch* that Marshall made his truistic assertion that "we must never forget that it is a *constitution* we are expounding"⁸¹—a statement that, well over a century later, Justice Felix Frankfurter said "bears repeating because it is, I believe, the single most significant utterance in the literature of constitutional law—most important because most comprehensive and comprehending."⁸²

Seeing the Bank as a political lightning rod explains the title Ellis chose for his book. The context of the decision—a context that the author explores in detail—was a "series of innovative, major social and economic changes that swept over the United States,"⁸³ especially in the years after 1815. Historians, Ellis explains, describe these modifications collectively as "the market revolution."⁸⁴ This economic upheaval consisted of the development of a banking industry, proliferation of credit, and an enlarged money supply that replaced the old barter system. Some applauded, while others feared this upheaval. *McCulloch* was at the center of the controversy, because it propelled rather than retarded the process that was already under way.

Alongside this context, as well as discussion of the Bank's travails in other states, Ellis advances what is generally known about *McCulloch* because of the light the book casts on the role that the state of Maryland played in the litigation. Rather than portraying Maryland's tax as a device to rid the state of the Bank—the way in which the conflict is conventionally presented⁸⁵—Ellis believes that the tax was truly a revenue measure: "Maryland was not in any sense opposed to the 2BUS or its

branch in Baltimore for either constitutional or policy reasons."⁸⁶ In contrast to anti-Bank legislation in other states, *McCulloch v. Maryland* was an "arranged case in which the state played the role of facilitator in order to get a case dealing with the question of state taxation of the branches of the 2BUS before the U.S. Supreme Court as quickly as possible. After the decision was handed down, the state quietly accepted it and totally withdrew from the fray."⁸⁷ From this perspective, Maryland viewed the Bank as an income source to help defray expenses incurred in the War of 1812,⁸⁸ during which the state had suffered considerable loss of infrastructure and public as well as private property. What the state wanted, according to the author, was affirmation of its authority to tax the Bank, not destruction of the Bank.

Ellis pays attention as well to Chief Justice Marshall's role in the litigation. "His cooperation was necessary to get the Supreme Court to hear the case as quickly as it did. He may also have influenced the content of the argument made on behalf of the 2BUS by its lawyers, which among other things slowed the Chief Justice to engage in the *obiter dicta* that constituted the extensive first part of his decision. Marshall also delivered his famous decision in just three days after the closing of oral arguments. The timing of this was important because the High Court's ruling came down only a day before the Pennsylvania legislature was to begin debating the levying of a tax on the 2BUS in Philadelphia and its branch in Pittsburgh."⁸⁹ In this light, Marshall's opinion in *McCulloch* thus becomes more interesting, not less important.

If Ellis's study shows how judicial decisions can involve the Supreme Court in a political storm, it is also true that sometimes individual Justices may become caught up in controversy outside the context of particular cases. That seems to be the lesson gleaned from a remarkable episode during the long judicial tenure of Justice Stephen J. Field.⁹⁰ The story is one of twenty-five legal tales found

in **Law Makers, Law Breakers and Uncommon Trials** by Robert Aitken and Marilyn Aitken.⁹¹ Authored by the Aitkens, each essay was originally printed as a "Legal Lore" article in *Litigation*, a journal issued quarterly by the Section of Litigation of the American Bar Association. The subjects treated in the volume include several landmark Supreme Court decisions, such as the *Dred Scott* case⁹² and *Marbury v. Madison*,⁹³ and individuals as varied as Rosa Parks and Wild Bill Hickok. Yet none of the stories that the Aitkens recount is any more riveting than the events that led to *In re Neagle*.⁹⁴

When Abraham Lincoln appointed Field, the first Justice from California, to the Court's new tenth seat in 1863, the President doubtless had two goals in mind: to keep this important state firmly cemented to the United States during a time of national turmoil, when the existence of the Union was still in doubt, and to make sure that the Court would provide a hospitable forum for Republicanism.⁹⁵ Yet Lincoln would have had no way of knowing that, with Field, he was also setting events in motion that would eventually augment national power.

One of Field's contemporaries once observed, "When Field hates, he hates for keeps."⁹⁶ That characterization may partly explain the Justice's behavior in what sadly evolved into an episode that combined greed, passion, loathing, and the law. Field seemed to have had a special talent both for making enemies and for being one. The episode in the Aitkens' volume involved former Texas Ranger David Terry, who, as chief justice when Field joined the California supreme court, had been Field's nemesis and who had killed one of Field's friends in a duel. During the 1880s, a woman named Sarah Althea Hill claimed to have a marriage contract proving that she was married to William Sharon, a railroad magnate and senator from Nevada. A state court decree granted her a share of Sharon's property, even though Sharon claimed that she had only been his mistress. After Sharon died, Mrs. Sharon

(or Miss Hill) married David Terry. Field as circuit judge then held that no wedding contract had existed. Terry acted as his wife's attorney in Field's courtroom as the Justice ordered the surrender of the contract, but not before making gratuitous comments about her character. Terry interrupted the proceedings with insults, and Field ordered the marshal to remove him from the room. When Terry struck the marshal, a bystander named David Neagle helped restrain him. Field then sentenced the Terrys to jail for contempt.

Because of David Terry's subsequent threats on Field's life, Neagle, now a federal marshal, accompanied Field on his circuit trip west in 1889.⁹⁷ As the Aitkens recount the events, Field was traveling by train between Los Angeles and San Francisco when the antagonists happened to meet in the dining room at the Lathrop Station during a railroad meal stop.⁹⁸ After Terry struck Field twice, Neagle shot and killed Terry on the spot. Neagle was arrested and charged with murder in state court, but Judge Lorenzo Sawyer of the U.S. circuit court (who, with Field, had invalidated the disputed marriage between Hill and Sharon) ordered his release on habeas corpus. According to Sawyer, Neagle had been carrying out his federal duty, and Sawyer's court had jurisdiction because the state prosecution interfered with the U.S. attorney general's directive that Neagle protect Field. The U.S. Supreme Court, with Field not participating, agreed 6–2 that the definition of federal "law" encompassed any act (such as the order assigning protection to Field) done under the authority of the United States. Hence, reasoned Justice Samuel Miller for the majority, the federal interest preempted a local prosecution brought under state law and thus rescued Marshal Neagle from the capriciousness of California justice. Writing some three decades later, Charles Warren described *Neagle* as "the broadest interpretation yet given to the implied powers of the National Government under the Constitution."⁹⁹ "Even



Robert and Marilyn Aitken's new book, *Law Makers, Law Breakers and Uncommon Trials*, features essays on some of the most colorful trials in American history. It includes the fascinating *In re Neagle* case that was brought before the Supreme Court in 1890. Sarah Althea Hill Terry (pictured) was the cause of the conflict, which involved her silver-mine-owning first husband, her hot-tempered second husband, a quick-drawing U.S. Marshal, and Justice Stephen Field.

in his feuds," added Robert McCloskey, "Field spawned constitutional law."¹⁰⁰

With a zest surely closer to the Wild West than to the refined ways of Washington, Justice Field's California adventure, along with the other books surveyed here, suggests that the Supreme Court is—sometimes in unexpected ways—never far removed from controversy.

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

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DIERENFIELD, BRUCE J. **The Battle over School Prayer: How *Engel v. Vitale* Changed America** (Lawrence: University Press of Kansas, 2007). Pp. xv, 263. ISBN: 1-8978-070061526-1, paper.

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GROSSBERG, MICHAEL, AND CHRISTOPHER TOMLINS, EDs. **The Cambridge History of Law in America**, 3 volumes (New York: Cambridge University Press, 2008). Pp. xviii, 760 (volume 1). Pp. xviii, 867 (volume 2). Pp. xviii, 976 (volume 3). ISBN: 978-0-521-80305-2, cloth (volume 1). ISBN: 978-0-521-80306-9, cloth (volume 2). ISBN: 978-0-521-80307-6, cloth (volume 3).

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ENDNOTES

¹U.S. Constitution, Article II, section 1, paragraph 8.

²The phrase appears in the Declaration of Independence (1776).

³Richard Hofstadter, **The Idea of a Party System** (1969), 128.

⁴Edward J. Larson, **A Magnificent Catastrophe** (2007), 270.

⁵The presidential oath was actually administered a second time on Wednesday evening, January 22, 2009, at the White House, after the new President and the Chief Justice fumbled the wording of the oath at the Tuesday inauguration. Jeff Zelnj, "I Really Do Swear, Faithfully: Obama and Roberts Try Again," *New York Times*, January 22, 2009, p. A-1.

⁶By my count, only fifteen of the previous forty-three Presidents had also been Senators.

⁷Patrick Healy, "Seeking to Shift Attention to Judicial Nominees," *New York Times*, October 2008, p. A-15.

⁸David G. Savage, "The Supreme Chance to Alter the Court," *Los Angeles Times*, November 17, 2008, p. A-12.

⁹Juliet Eilperin, "McCain Says He Would Put Conservatives on Supreme Court," *Washington Post*, May 7, 2008, p. A-9.

¹⁰Available at <http://transcripts.cnn.com/TRANSCRIPTS/080816/se.02.html> (last visited April 5, 2009).

¹¹Constitution of Massachusetts (1780), Part the First, Article XXX. John Adams popularized the phrase on the eve of the Revolutionary War. He later incorporated it into the Constitution of Massachusetts, the oldest of the American state constitutions still in force. See John Adams, "Novanglus Papers," no. 7, in Charles Francis Adams, ed., **The Works of John Adams**, vol. 4 (1851), 106, quoted in Suzy Platt, ed., **Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service** (1989), 189.

¹²*Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dallas) 304, 308 (C.C. Pa. 1795).

¹³Bruce J. Dierenfield, **The Battle over School Prayer** (2007), hereafter cited as Dierenfield.

¹⁴370 U.S. 421 (1962).

¹⁵A current list of titles is available online at <http://www.kansaspress.ku.edu/printbyseries.html> (last visited April 5, 2009).

¹⁶Stephen D. Solomon, **Ellery's Protest** (2007), hereafter cited as Solomon.

¹⁷374 U.S. 203 (1963).

¹⁸Some Americans actually believe that the phrase is part of the Constitution. In fact the phrase comes from a letter Thomas Jefferson sent in reply to the Danbury Baptist Association of Connecticut, January 1, 1802. Saul K. Padover, ed., **The Complete Jefferson** (1943), 518-19.

¹⁹Inexplicably, Dierenfield refers to Princeton's legendary constitutional scholar Edward S. Corwin as "Erwin Corwin." Dierenfield, 56. The error is repeated in the index. *Id.*, 244.

²⁰The reader learns that Ellery Schempp spelled his name "Ellory" at the outset of his suit when he was in high school, but changed it to "Ellery" as an adult. For consistency, Solomon uses "Ellery" throughout the book. See Solomon, 349, n.1.

²¹That position was so settled that it hardly rated reconsideration. For example, see *Ferguson v. Skrupa*, 372 U.S. 726 (1963). The only significant exception was continued scrutiny under the Commerce Clause of state and local commercial regulations that were "protectionist" or otherwise unduly interfered with interstate commerce. For example, see *Southern Pacific v. Arizona*, 325 U.S. 761 (1945), where a divided Bench struck down a state train limit law. But there was no dispute over Congress's authority to enact such a statute, if it chose to do so.

²²*United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

²³Bernard Schwartz, **A History of the Supreme Court** (1993), 282-83.

²⁴*Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²⁵*Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

- ²⁶*McCullum v. Board of Education*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952).
- ²⁷Note, "The 'Released Time' Cases Revisited: A Study of Group Decisionmaking by the Supreme Court," 83 *Yale Law Journal* 1202, 1226 (1974). The author of this Note is Samuel A. Alito, Jr., then a student at Yale Law School and an editor of the *Yale Law Journal*.
- ²⁸Dierenfield, 67.
- ²⁹*Id.*
- ³⁰*Id.*
- ³¹*Id.*, 81.
- ³²10 N.Y.2d 174, 176 N.E.2d 579 (N.Y. 1961).
- ³³Dierenfield, 119.
- ³⁴*Id.*, 120.
- ³⁵*Id.*, 124.
- ³⁶*Id.*, 127.
- ³⁷There was a bobtailed Court because, barely two days after oral argument, Justice Frankfurter was hospitalized as a result of a crippling stroke that left him unable to speak. Whittaker had assumed senior status in March, and Byron White, his replacement, took no part in the decision.
- ³⁸370 U.S. at 424.
- ³⁹370 U.S. at 429.
- ⁴⁰Dierenfield, 130–31.
- ⁴¹370 U.S. at 425.
- ⁴²See *supra* note 18.
- ⁴³374 U.S. at 211.
- ⁴⁴*Murray v. Curlett*, 179 A.2d 698 (Md., 1962).
- ⁴⁵374 U.S. 203 (1963).
- ⁴⁶Solomon, 130.
- ⁴⁷Despite his choice of the Koran, Ellery was not Muslim: He and his family regularly attended services at a Protestant church.
- ⁴⁸*Schempp v. School District of Abington Township*, 201 F. Supp. 815 (E.D., Pa, 1962).
- Under federal jurisdictional rules of the day, suits in district court raising questions under the U.S. Constitution were heard not by a single judge, but by a panel of three judges—in this instance, one judge from the United States Court of Appeals for the Third Circuit and two judges from the district court. Any appeal from a three-judge court then moved on direct appeal to the Supreme Court, bypassing the Court of Appeals. It would also fall under the Supreme Court's mandatory appellate—as opposed to certiorari, or discretionary—jurisdiction, thus significantly increasing the chances that the Justices would issue a formal decision in the case. In 1988, Congress enacted a major overhaul of the Supreme Court's jurisdiction. With the start of the October 1988 Term, the Court's appellate jurisdiction became almost entirely discretionary, meaning that nearly every case now comes to the Court on certiorari. The mandatory appeal category has been virtually abolished, except for decisions by three-judge district courts (now required by Congress in only a few instances, such as those involving the Voting Rights Act).
- ⁴⁹Solomon, 264.
- ⁵⁰Justice Arthur J. Goldberg had only recently taken Justice Frankfurter's seat.
- ⁵¹*Id.*, 278–29.
- ⁵²*Id.*, 285.
- ⁵³374 U.S. at 222.
- ⁵⁴Solomon, 295–96.
- ⁵⁵*Id.*, 296.
- ⁵⁶Dierenfield, 151.
- ⁵⁷*New Republic*, July 9, 1962, p. 2.
- ⁵⁸Dierenfield, 151.
- ⁵⁹Solomon, 310.
- ⁶⁰*Id.*
- ⁶¹*Id.*, 313.
- ⁶²In a legal challenge, the city school board was enjoined from continuing the practice. See *State Board of Education v. Board of Education of Netcong*, 262 A. 2d 21, 31 (N.J. Superior Court, 1970).
- ⁶³Sarah Barringer Gordon, "Law and Religion, 1790–1920," in Michael Grossberg and Christopher Tomlins, *The Cambridge History of Law in America* (2008), vol. 2, 417–48, hereafter cited as Gordon.
- ⁶⁴"There is an innumerable multitude of sects in the United States. . . . America is still the place where the Christian religion has kept the greatest real power over men's souls; and nothing better demonstrates how useful and natural it is to man, since the country where it now has widest sway is both the most enlightened and the freest." Alexis de Tocqueville, *Democracy in America*, J.P. Mayer and Max Lerner, eds. (1968), 267–68.
- ⁶⁵Gordon, 417.
- ⁶⁶Gordon, 448.
- ⁶⁷Michael Grossberg and Christopher Tomlins, *The Cambridge History of Law in America*, 3 vols. (2008), hereafter cited as Grossberg and Tomlins.
- ⁶⁸As such, the *Cambridge History* differs significantly from collections such as *Select Essays in Anglo-American Legal History* (1907). Published in three volumes, the latter was compiled by a committee of the American Association of Law Schools and consisted almost entirely of essays that had appeared in print elsewhere, either as articles in periodicals or as chapters or parts of chapters in books.
- ⁶⁹Grossberg and Tomlins, vol. 1, vii.
- ⁷⁰*Id.*
- ⁷¹*Id.*
- ⁷²*Id.*, xi.
- ⁷³*Id.*, 459.
- ⁷⁴17 U.S. (4 Wheaton) 316 (1819).
- ⁷⁵See "The Judicial Bookshelf," 32 *Journal of Supreme Court History* 346 (2007).
- ⁷⁶Richard E. Ellis, *Aggressive Nationalism* (2007), hereafter cited as Ellis.
- ⁷⁷*Id.*, 4.

⁷⁸“The Congress shall have Power . . . to make all Laws which shall *be necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof” (emphasis added). The addition of this “elastic clause” by the Philadelphia Convention was a major difference between the Constitution and the Articles of Confederation. The latter lacked anything like this provision in Section 8. Indeed, the Articles made a point of *denying* implied powers to the Congress: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States, in Congress assembled.” Articles of Confederation, Article I (emphasis added).

⁷⁹In Marshall’s words, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 17 U.S. at 421.

⁸⁰*Osborn v. Bank*, 22 U.S. (9 Wheaton) 738, 871–72 (1824). *Osborn* involved yet another attack on the Bank of the United States, this time in Ohio. Ellis gives a detailed account of this spirited case at 143–67. Rejecting the state’s argument that *McCulloch* had been wrongly decided, the Supreme Court sided with the Bank on all issues in the case.

⁸¹17 U.S. at 407 (emphasis in the original).

⁸²Felix Frankfurter, “John Marshall and the Judicial Function,” 69 *Harvard Law Review* 217, 219 (1955).

⁸³Ellis, 8.

⁸⁴*Id.*, 9.

⁸⁵Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development** (7th ed., 1991), vol. 1, 183.

⁸⁶*Id.*, 6.

⁸⁷*Id.*, 5.

⁸⁸*Id.*, 68–69.

⁸⁹*Id.*, 7–8.

⁹⁰Field sat from 1863 until 1897. Field held the longevity record for tenure on the Court until surpassed by Justice William O. Douglas.

⁹¹Robert and Marilyn Aitken, **Law Makers, Law Breakers, and Uncommon Trials** (2007), hereafter cited as Aitkens.

⁹²*Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

⁹³5 U.S. (1 Cranch) 137 (1803).

⁹⁴135 U.S. 1 (1890). See “Justice Stephen Field, Justice David Terry, and Sarah Althea Hill” in Aitkens, 147–60.

⁹⁵Paul Kens, **Justice Stephen Field** (1997), 93.

⁹⁶Robert G. McCloskey, “Stephen J. Field,” in Leon Friedman and Fred L. Israel, **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions** (1969), vol. 2, 1084.

⁹⁷Aitkens, 157.

⁹⁸Aitkens, 147.

⁹⁹Charles Warren, **The Supreme Court in United States History** (rev. ed., 1926), vol. 2, 697.

¹⁰⁰McCloskey, “Stephen J. Field,” 1084.

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Correction: In the March 2009 issue, the image on top of page 91 incorrectly identified Paul Freund. He is the man in the middle.