Introduction

Melvin I. Urofsky

As we go to press, we have just received word of the resignation of Justice John Paul Stevens from the Supreme Court after a long and distinguished career. The *Journal* will pay tribute to Justice Stevens, long a friend of the Society, in our next issue.

The case of *Dred Scott* (1857) continues to receive attention more than a century and a half after the Taney Court handed down what Chief Justice Charles Evans Hughes called a "self-inflicted wound." Scholars and laypersons alike for many years were unanimous in their condemnation of Chief Justice Taney's opinion, which is considered one of the worst case examples of judicial activism and a cause of the Civil War that broke out four years later. More recent scholarship, while not defending slavery, notes that the Court had precedents for at least some of its arguments, and that it also mirrored public sentiment in many important particulars. Associate Justice Stephen Breyer reflects some of this new thinking in his visit to one of the most famous—or infamous—cases in the Court's history.

While we do take the Court and its members seriously, we need to be reminded from time to time of Judge Jerome Frank's admonition that just because a person dons the silk robe, he or she does not stop being a fully rounded human being with interests that reach beyond the bench. The ancient and noble game of golf is, when referring to government leaders, often associated with the executive branch. William Howard Taft, Dwight Eisenhower, and William J. Clinton were all well known for their love of—if not always success at—playing the game. But apparently members of the Court also enjoyed going to the links, and Ross Davies shows us how two members of the Court became enamored of—one might even say addicted to—trying to get that little ball into the cup.

While working on his dissertation at the University of Minnesota, David Schroeder experienced what every graduate student in history dreams about: getting access to a hitherto unknown cache of private documents. In his case, the family of Justice Pierce Butler allowed him to examine a box of letters that Butler wrote to his son during the time between Butler's nomination to the Court by President

Warren G. Harding in late 1922 and the time he took the oath in early 1923. In those days, nominees did not appear personally before the Senate Judiciary Committee, and so could not personally answer charges made against them. How Butler felt about the attacks on him and how he weathered the storm comprise the basis for this article.

Well into the latter part of the twentieth century, historians of the Court had to rely primarily on the published record, the briefs filed by litigants, and the opinions in the *U.S. Reports*. Not until Harlan Fiske Stone allowed Alpheus T. Mason access to his Court papers did we begin to get a glimpse of the inner workings of the nation's highest tribunal. Since then, other Justices have allowed scholarly access to their papers, usually by depositing them in the Library of Congress and occasionally placing time restrictions on when they will be opened. But when we do begin to read the case files, the notes left by Justices and their clerks, as well as the inter-Chambers memoranda, we get a much better idea of how the Court conducts its business. L.A. Powe, a professor of law at the University of Texas Law School, experienced the business of the Court firsthand when he served as a law clerk to William O. Douglas, and his books on the Court have been marked not only by a keen intelligence but also by a familiarity with the Court's inner workings. In this article, he shows how the Warren Court's efforts to deal with obscenity and the strictures of the First Amendment led to some compromises among the Justices that adversely affected at least one person, Ralph Ginzburg.

Today, we are so used to Justices issuing concurring opinions that we often assume that, like majority and dissenting opinions, such opinions have always been there. In some ways, this is true: they have been there in embryonic form ever since the Court gave up seriatim opinions during the tenure of Chief Justice John Marshall. But they were not always seen or identified as concurrences for many years. In their article, Charles Turner, Lori Beth Way, and Nancy Maveety trace the emergence of these "comments" into what we now recognize as concurrences.

Last, but not least, Grier Stephenson brings us up to date on some of the more important books that have appeared recently relating to the history of the Court.

As always, a diverse menu, and we hope you will enjoy.

Beginning to Write Separately: The Origins and Development of Concurring Judicial Opinions

CHARLES C. TURNER, LORI BETH WAY, AND NANCY MAVEETY*

Introduction

While political scientists and legal academics have both evinced a "fascination with disagreement on courts,"[1] this scholarly concentration on conflict rather than consensus has tended to focus on dissent and dissenting opinions. As far as we can tell, there is no authoritative history of concurring opinions in the U.S. Supreme Court. This article is a first effort to correct that oversight by examining developments and change in concurring behavior from the founding through the White Court (1921). This period covers the emergence of an institutionally independent national judicial branch and ends before the start of the modern, policy-making Court era, which we argue begins with the Taft Court and the creation of a fully discretionary docket.

Why should there be a history of concurrences on the Supreme Court? For one, it remains unclear whether propositions about the causes and consequences of dissent on multi-member appellate courts also apply to concurrence. In other words, are they variants of the same phenomenon of dissensus, or are they categorically different decision- and policy-making expressions? Some early legal writings on the practice of separate opinion-writing assert that it is "unnecessary" to distinguish dissenting and concurring opinions.[2] Other authors agree that the increasing prominence of constitutional adjudication drives an increase in all separate opinions.[3] Yet their difference in proportion relative to opinions for the Court in the two centuries since the Court's first instance of substantive discord suggests that concurrence should be accounted for differently from dissent.[4]

Another reason for attention to the concurring opinion is that there has been a great

deal of change in the use of this device over the nation's history. Indeed, from its founding up through the 1940 Term, the Supreme Court issued 306 concurrences. In comparison, in the five Court Terms from 1967 through 1971 there were 335 concurrences. Schwartz remarked on the "proliferation of concurring opinions" since 1937, a date strongly linked with the replacement of Charles Evans Hughes, a strong Chief Justice, by Harlan Fiske Stone, a weaker leader.[5] Other scholars, concurring with this observation, have offered a variety of institutional, legal interpretative and personnel-based explanations for the increase.

One of our goals here is to explore the institutional, behavioral, and perhaps attitudinal developments that help account for this radical change. We are interested not only in frequency, but in the content and rhetorical purpose of the concurring opinion over time. Our approach in this article will be to examine the very definition of concurrence, then trace the institutional development of concurring opinions over the Court's first 130 years and explore the messages being sent by the concurrences themselves. The concluding discussion offers some tentative suggestions about the development of the concurring opinion.

Defining Concurrence

We define a "concurring" opinion as one in which a Justice who has voted with the majority in the disposition of the case but is not content to merely join the majority writes separately. Often, such an opinion will explicitly state its reasons for separation, though it is not necessary for it to do so. Today, such opinions always take a written form, even in the rare circumstance in which a Justice insists on reading from the Bench. In the early Court, however, remarks were more typically delivered orally.[6] Table 1 provides a cursory look at the quantity of concurrences in early Courts.

Though this definition is unlikely to raise more than a quibble today, defining a concurring opinion has not always been so straightforward. Some of the first American dictionaries, **Webster's Dictionary** (1806) and Samuel Johnson's **A Dictionary of the English Language** (1824), focused primarily on the non-legal, agreement-based definitions of the term.[7] For example, Johnson's second definition of "concur" is "to agree; to join in one action, or opinion," and his second definition of "concurrence" is "agreement; act of joining in any design or measures." Webster's

TABLE 1: Concurrences by Chief Justice Era[70]

Chief	Years	Number of Concurrences	Total Number of Opinions	Concurrences as % of Total Opinions
Jay	1789–1795	0	27	.00
Rutledge	1795–1796	0	6	.00
Ellsworth	1796–1801	2	37	.05
Marshall	1801–1835	40	1,238	.03
Taney	1837*–1864	64	2,007	.03
Chase	1864–1873	25	1,424	.02
Waite	1874–1887	36	3,684	.01
Fuller	1888–1910	67	6,037	.01
White	1910–1921	18	3,167	.01

*There was no Chief Justice during the 1836 Term. No concurrences were issued that year.

expanded dictionary, published as **An American Dictionary of the English Language** in 1828, defined "concur" as "to agree; to join or unite, as in one action or opinion; to meet, mind with mind; as, the two houses of parliament concur in the measure."[8] The definitions are substantively unchanged almost two decades later in the revised edition.[9] These definitions all stress the commonality connotations of concurrence and do not suggest a difference between agreeing and concurring, which difference is central to the modern legal use of the term. Though it is impossible to determine with certainty whether this nuanced difference was generally agreed upon in legal circles at the time, the evidence below from early opinions indicates that the term was commonly used in Court opinions, whether everyone meant the same thing by it or not.

Though the word was in common usage throughout the Court's history, there is evidence to suggest that its meaning changed over the course of the nineteenth century. While earlier definitions of concurrence included the word "consent," it was always explicitly presented as consent among equals, never as consent to a higher power or authority. This begins to change by the early twentieth century, when Webster includes the definition "to assent; to consent" and lists as synonyms "acquiesce; assent."[10] These definitions imply something unequal about the relationship between the concurrer and the concurree; the former seems to be giving in to the latter, or acknowledging legitimacy, in a manner akin to modern legal usage.

The standard American legal dictionary, **Black's Law Dictionary**, was not published until 1891.[11] The brief definitions of both "concur" and "concurrence" in that volume refer to the equal rights of claimants in the French civil-law tradition and make no acknowledgement of the term's use in judicial opinion-writing. It is only in the second edition of **Black's Law** (1910) that the modern judicial sense of "concur" is finally presented:

> To agree; accord; consent. In the practice of appellate courts, a "concurring opinion" is one filed by one of the judges or justices, in which he agrees with the conclusion or the result of another opinion filed in the case (which may be either the opinion of the court or a dissenting opinion) though he states separately his views of the case or his reasons for so concurring.[12]

Significantly, this definition is published at roughly the same time as the change in the Webster definition. What might this mean? One possibility seems to be that, while judges had been "concurring" for over a century, it was only in the early years of the twentieth century that wordsmiths and legal scholars alike began to acknowledge and reflect upon this process in an overt, explicit manner. If the American legal community and the citizenry at large underwent changes in their use of this term between the late eighteenth and early twentieth centuries, then one might expect to see the catalyst for that change in the evolution of concurring behavior by jurists during this era.

Seriatim and the Prehistory of Concurrences

The lack of an explicitly acknowledged legal definition of the term makes identifying concurring opinions during the early years of the Supreme Court a challenge. The practice of seriatim, in which each judge delivers an individual opinion, was developed in English appellate courts and adopted by colonial, and then state and federal, appellate courts in America.[13] As the first Chief Justice, John Jay—always more of an elitist than an innovator—adopted this approach due in part to the cachet it would hold among European nations,

the respect of which he vigorously sought for the new nation.[14] In fact, though the practice largely ceased at the Supreme Court in 1801, it continued for some time in other U.S. appellate courts.

During the late eighteenth and early nineteenth centuries, there were many cases in which separate opinions were given that defy the contemporary four-category scheme of opinion of the court, concur, concur in part and dissent in part, and dissent.[15] Some scholars merely list these others as "opinions" or "statements" or ignore them entirely.[16] We would like to suggest, however, that at least some of these early writings should be regarded as proto-concurrences. Indeed, though the norm of concurrence was not yet formalized in this era, examining separate opinions in which a Justice presents a written (or transcribed oral) opinion that is distinguished from the opinion of the Court (or the majority of his Brethren), but does not disagree with the disposition of the case, allows us to understand the ways in which concurrences developed over time. Due to the ambiguity of many of these separate opinions and the differing categorizations employed by scholars, our method has been to read through each case in this early era to identify proto-concurrences.

This search for proto-concurrences and/or concurring opinions begins with the Court years from 1790 to 1800. This time period is generally considered the seriatim era,[17] with the language of decisions presented with words to this effect—"The judges delivered their opinions *seriatim* in the following manner"—preceding the individual opinions. The seriatim era presents a particular challenge for the study of concurrence because, with every (or nearly every) Justice stating an opinion in most cases, the case ends up with what might be considered *only* concurrences and dissents. Indeed, even distinguishing concurrences from dissents becomes tricky, because Justices did not always feel the need to explicitly state their view on the case outcome or how those views may be similar to or different from the views of their Brethren. Presumably the lawyers present were able to decipher who won and who lost.

Despite the seriatim reputation of the pre–Marshall Court, there are cases in this period with "by the Court" rulings, and not every Justice felt compelled to speak in every case.[18] We believe there are also a handful of opinions in this era that are properly labeled proto-concurrences—ones where a Justice explicitly points out that the basis of his ruling differs from the other Justices, even though he reaches the same conclusion in the case outcome.

In one such case, *Calder v. Bull* (1798), Justice James Iredell writes, "Though I concur in the general result of the opinions, which have been delivered, I cannot entirely adopt the reasons that are assigned upon the occasion."[19] This is the first opinion issued by a Supreme Court Justice that explicitly uses the term "concur." Justice Iredell could arguably be deemed the father of judicial concurrences, since it was he again, in *Sims v. Irvine* (1799), who used language that is fairly typically found in modern concurrences. Iredell begins his opinion in *Sims* by saying that "[t]hough I concur with the other Judges of the Court in affirming the Judgment of the Circuit Court, yet as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly."[20] We identify such opinions as part of the development of the concurrence because the Justice is commenting on his ideas relative to what he sees as the majority's reasonings and is claiming his views as unique from theirs. Such contextual remarks were not generally made in the seriatim period, as each Justice merely sought to give his view of the case. As has been historically illustrated, Chief Justice John Marshall was most inclined to encourage the Justices of the Court to speak in one voice. His leadership inspired a profound change in the Court that can be seen, in some cases, through separate opinions.

Chief Justice Marshall and the End of Seriatim

The conversation between Chief Justice Marshall and his fellow Justices over the issuing of separate opinions may have gone somewhat like Bob Dylan's description of a conversation between God and Abraham on the issue of free will: "You can write separately if you want, but next time you see me you'd better run." Indeed, during the entire thirty-four-year period that Marshall served, concurrences were issued in only thirty-one cases according to our count (about 3 percent of all cases) and dissents were issued in only seventy cases (about 6 percent).[21] Marshall himself only wrote three concurrences and two dissents, despite issuing some 486 majority opinions.[22] Marshall took office on January 31, 1801, and in the first case decided under his leadership, the opinion begins: "MARSHALL, *Chief Justice*, delivered the opinion of the court."[23] This style signaled the end of seriatim and the beginning of the opinion structure used today.[24]

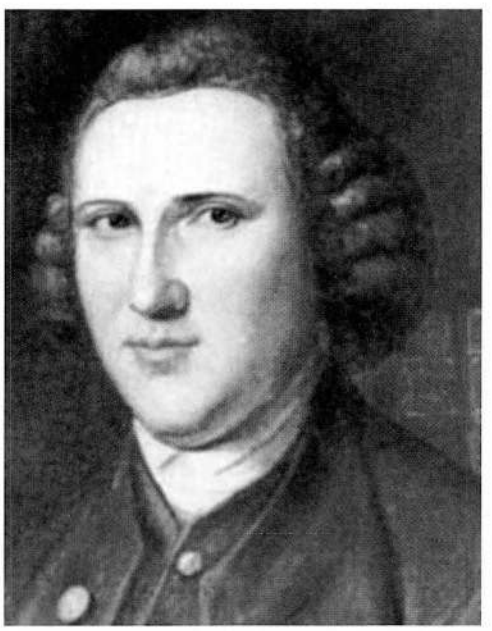
The shift was sudden and dramatic. Justices went from speaking their mind in nearly every case to falling in line with a single opinion, typically that of the Chief. In fact, no one concurred on the Marshall Court until Justice Samuel Chase issued the following in 1804:

> I concur with my brethren, as to the operation of the testimony given by the Providence Insurance Company in evidence to the jury, and that it created no legal obligation on the company; but I am also of opinion that the testimony given by them in evidence was inadmissible, and that the circuit court ought not to have permitted the same to have been given in evidence to the jury.[25]

This first concurrence of the post-seriatim era is notable because it clearly and briefly states the essence of what has come to be the "textbook" concurrence: Chase agrees with his Brethren on some particulars, including the case outcome, but differs on others. While there are other ways to concur, as will be seen below, Chase's opinion illustrates what most Court observers think of when they hear the term.

We also find in the Marshall era a number of "hidden" or "potential" concurrences. These sometimes take the form of one-line statements with no indication of reason: for example, "Cushing, J., concurred." Occasionally, it seems, extenuating circumstances prevent Justices from saying all they would in a case. For example, Cushing was probably ill in this example from the end of the 1806 Term, as he was listed as too ill to attend the entire 1807 Term. Though we consider these concurrences for enumerative purposes, we have classified them as "concurring without opinion."[26]

Hidden or potential concurrences can also be found lurking inside majority opinions. For example, in *Rhinelander v. Insurance Company of Pennsylvania*, Chief Justice Marshall writes the sole opinion, but he hints that another Justice agrees in the outcome but is persuaded by different reasons.[27] That



In 1804, Justice Samuel Chase issued the first concurring opinion of the post-seriatim era. He agreed with his Brethren on some particulars, including the case outcome, but differed on others.

Marshall identifies neither the Justice in question nor his reasons suggests that such disagreements may have been viewed as unimportant by the Marshall Court, or at least by Marshall himself.[28] Further evidence that Marshall may have cowed his colleagues into agreement can be found in majority opinions in which Marshall speaks of "unanimous" agreement, only to have another Justice speak up and say that he disagrees. One can only guess how many potential concurrences are lost to us due to Marshall's domineering approach. Indeed, in some cases, Marshall takes the responsibility out of the hands of his Brethren entirely, by including in his opinion of the Court the reasons other (unnamed) judges have given for deciding the case and then concluding that "they acquiesce, however, cheerfully in the opinion of the majority of the court."[29]

This issue—of Justices making their disagreements known in Chambers but not to the public—speaks directly to the issue of vocality that we are concerned with in this project. It appears that Justices of the early Court often saw their task as a unitary one—voting on the case outcome—and left the other part, legal reasoning, to the opinion of the Court. This may explain why majority opinions sometimes suggest a lack of agreement, and even some dissent, in cases where no written opinions exist to express these differing views. If Marshall Court Justices tended to see their task as deciding, and Justices today see deciding and speaking as coequal,[30] then it is worth attempting to identify when, why, and how this significant change in the judiciary took place.

Further complications arise from the failure of Justices on the early Courts to fully vet their opinions prior to announcing them. In this era, Justices occasionally issue spontaneous concurrences from the Bench after hearing the views of another. In one illustrative case, *Young v. Black*, Justice Joseph Story delivers the opinion of the Court and then Justice Brockholst Livingston concurs in the opinion, offering some views that he believes differ from those expressed in the opinion of the Court.[31] Following this, Justice Story joins Livingston's concurrence! One suspects that, had the judges more thoroughly aired their views in conference or during the opinion-drafting process, as is the standard practice today, there would have been no need for Livingston to concur.

This early era of the Court was populated by cases and controversies very different from those typical today. Maritime and prize cases were much more common than those dealing with civil rights and liberties, particularly after the War of 1812. Another difference was the likelihood of a Justice hearing a case at the Supreme Court that he had already been responsible for deciding while traveling on the circuit. Justices responded to this circumstance with marked irritability, particularly at times when their Brethren disagreed with them, though they recused themselves from voting in these cases. Justice Story seems to have been particularly likely to "say something" in such cases. Though such statements are not usually identified by the Court Reporter as concurrences, since they are the comments of non-voting judges, we have noted their presence because they suggest a desire by some Justices in some circumstances to speak as well as vote. Indeed, in some cases they speak when they *cannot* vote.[32]

By roughly 1816, coinciding with the beginning of Henry Wheaton's tenure as official Court Reporter, some uniformity begins to occur in the issuing of opinions, such that it becomes easier to distinguish separate opinions from mere statements or other errata. In March of that year, Congress passed a law requiring publication of all Court decisions. This institutional development certainly increased public awareness of Court opinions and may have created an additional incentive for writing separately. Justices may have been more willing to take on the task of issuing separate opinions with the knowledge that their views would have some permanence beyond the immediate courtroom.

That being said, the failure to record exact votes of Justices and the lack of specific "concur" or "dissent" language in these opinions makes distinguishing between these two types laborious. Moreover, as opinions were not required to be filed in writing until 1835, there may have been some early oral concurrences that were reported either inaccurately or not at all.[33]

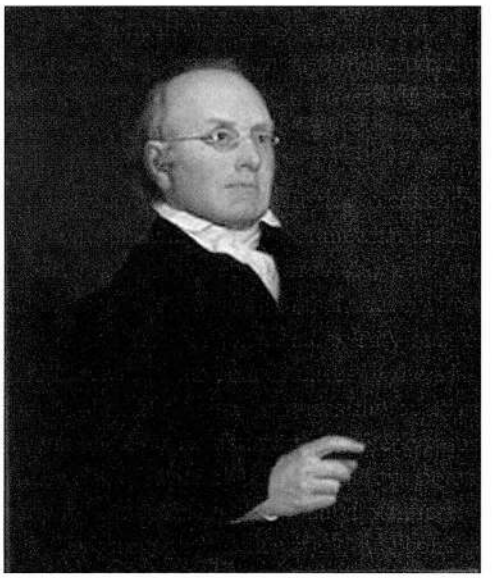
Finally, many of the opinions that some sources list as merely "opinion" rather than as concurrences or dissents may actually be best classified as concurring opinions in light of the historical development of this type of writing.[34] Some concurrences even end up being labeled dissents. Court Reporters, and even the Justices themselves, might not have yet developed the communal vocabulary to think of these writings as "concurrences" at the time and therefore did not label them as such. However, read with our definition of the term in mind, many of these opinions are likely concurrences, and we suggest that they should be labeled as such. For example, in *Cherokee Nation v. State of Georgia*, LexisNexis lists both William Johnson and Henry Baldwin's opinions as dissents.[35] When one reads those opinions, however, it becomes clear that both reject the plaintiff's motion and therefore agree with the decision in Marshall's Opinion of the Court. In an era prior to the institutionalization of opinion language, Justices often failed to make their vote clear when they wrote separately. In order to develop an accurate picture of the evolution of the concurrence, we have sought to correct these categorization errors wherever possible.

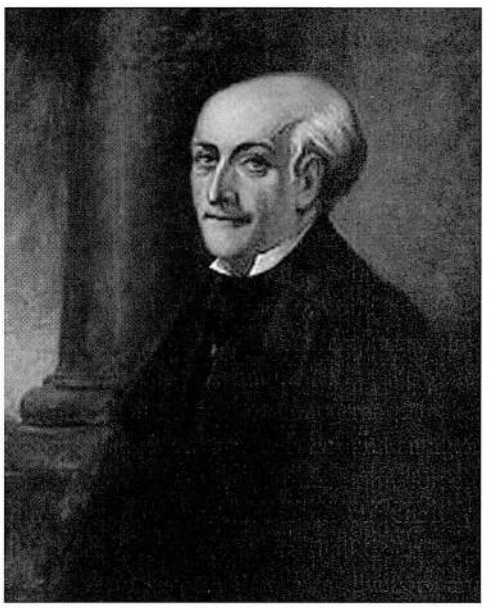
Justice Johnson, the first of President Thomas Jefferson's appointees and therefore the first political rival of Marshall and the Federalists, became the first Justice to distinguish himself as a frequent concurrer. Much has been made of Justice Johnson's reply to Jefferson's inquiry about the demise of seriatim, in which the Justice claims that his colleagues would be incapable of continuing the practice: "Cushing was incompetent, Chase could not be got to think or write, Paterson was a slow man and willingly declined the trouble, and the other two Judges (Marshall and Bushrod Washington) you know are commonly estimated as one judge."[36] In his book on the pre–Marshall Court, Scott Gerber points out, however, that Johnson and Jefferson were both Democrat-Republicans, and that Johnson was disparaging his Federalist brethren.[37] Politically motivated or not, Johnson was sincere about his desire to speak: he singlehandedly wrote more than half of all the Marshall Court concurrences.

Johnson's commitment to writing separately makes his concurrences a good place to look for a better understanding of the practice on the Marshall Court. Why and when did Johnson concur? The answer to the first question seems to be that he wanted to provide a judicial voice for his political party, or at least provide an alternative to the Federalist-dominated majority opinions. As to when, Johnson offers some insight in his concurrence to *Cherokee Nation v. Georgia*, where he states that it is his practice to write opinions in all constitutional questions. This is an overt statement that the subject matter and/or salience of a case has, at least for some Justices, a bearing on the decision to concur.

The movement toward uniformity that began during Wheaton's tenure was largely complete by the early Peters Reportership, which began in 1828. Richard Peters indicates most separate opinions as either concurrences or dissents. Thus, the transition from seriatim to the modern practice of opinions of the Court, concurrences, and dissents was largely formalized by the end of the Marshall Court.

Despite Marshall's institutionalization of the single-opinion approach, the possibility, appropriateness, and usefulness of multivocality remained an issue of contention throughout his tenure. Motives, of course, were often self-interested. Both President Jefferson and President James Madison advocated a return to seriatim because, while individual opinions would prove the worth of each Justice, they feared the





Because Justices on the early Courts did not fully vet their opinions prior to announcing them, they occasionally issued spontaneous concurrences from the Bench after hearing the views of another Justice. Joseph Story (above) once delivered the opinion of the Court. Then, when Brockholst Livingston (below) concurred in the opinion, offering some views that he believed differ from those expressed in the opinion of the Court, Story joined Livingston's concurrence.

Marshall practice removed individual responsibility and weakened chances for impeachment as a check on the judiciary.[38] Despite occasional pining for a return to past practice, however, no Justice seriously embarked on this return. Even Justice Johnson, the first reasonably prolific concurrer, was resigned to merely filing his own opinions, rather than challenging larger Court practice. Marshall wanted the Court to speak with a unified voice and, during his tenure, it did so the vast majority of the time.

Concurrence Content on the Marshall Court

Empirical quantification of concurring opinions on the early Court is fraught with difficulty, and extant sources disagree on a solution. Both LexisNexis and **The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States** (1978) by Albert P. Blaustein and Roy M. Mersky count and categorize concurrences in a manner that differs from our count, which was based on our own close review of the Marshall opinions, using the bound volumes of the **U.S. Supreme Court Reports**.

Analysis of the Marshall Court inevitably raises the question of "the Marshall factor": the power of personality or a personal leadership style in shaping institutional norms and conventions. Institutional norms of judicial agreement do seem to have been established in the Marshall era—at least, their presence can be inferred from patterns of behavior. In their study of time and consensual norms on the Supreme Court, Gregory Caldeira and Christopher J.W. Zorn have argued that concurrence and dissent are co-integrated, that a common element underlies levels of both, and that, historically and developmentally speaking, increases in concurrence appear to follow or lag increases in dissent.[39] While their findings are subject to the interpretation of error-correction models in general, they conclude that "the influence of chief justices on concurrences and dissents operates primary through its effect on the long-term norms of the Court."[40] Consensual norms are thus a dynamic process. The

TABLE 2: Types of Concurrences

Category	Description
Groundlaying	Establishes an alternative test or interpretation for possible future use; points to a different part of the Constitution or different statute than does the majority opinion; can take on three forms: (1) The majority is correct regarding the particular law or section of the Constitution at issue and is correct regarding the legal test they used, but their interpretation was wrong. (2) The majority is correct regarding the particular law or section of the Constitution at issue but is utilizing the wrong legal test or emphasizing the wrong precedent. (3) The majority is incorrect regarding the particular law or section of the Constitution at issue.
Signaling	Speculates on how the Justice might decide future cases; indicates to future litigants what types of cases to bring (or not bring) or arguments to make (or not make); goes out of the way to discuss issues not in contention; makes recommendations to legislatures; makes recommendations to parties or courts in a remand.
Weakening	Narrows the scope of the majority opinion (and, therefore, its *stare decisis* power) by specifically pointing to disagreements with the majority opinion; notes that the majority made a decision that was unnecessary and should not have been made; often notes they are not signing on to a portion of the Court's opinion.
Preserving	Residual category that indicates that the opinion does not meet the requirements of any of the other three codes; provides a descriptive history; "just noting" for the record; sometimes expresses a warning or expresses annoyance; simply a dialogue with a dissent, other concurrence, or even an *amicus* brief.

most salient aspect of Caldeira and Zorn's research for this study is their observation of no Chief Justice–specific influences on short-term changes in concurrences, with Chief Justices responding to and exerting influence on norms on the Court in dealing with conflict.[41]

Concurrences are not all the same. Lawrence Baum's recent work on judging as "self-presentation" to audiences notwithstanding, Justices' motives are fairly difficult if not impossible to ascertain.[42] We can, however, evaluate the content of their concurrences for consistent themes. In previous work, we have identified four categories of modern concurrences.[43] Those categories include Groundlaying, Signaling, Weakening, and Preserving concurrences. A brief description of each category of concurrence follows (see Table 2 for a more thorough description). Groundlaying concurrences are those in which a Justice disagrees with the way in which the majority interpreted the issues in the case or preferred a different means of analysis. Signaling opinions send a clear message to a specific audience regarding the opinion of the Justice on a relevant matter: for example, a concurrence is coded as Signaling when the Justice indicates to a lower court or legislative body how he would

like to see them behave. Weakening concurrences are those in which the Justice either narrows the scope of the opinion or indicates that the Court has made a ruling on a particular matter it should not have. Finally, Preserving is the residual category of concurrences. In these concurrences, Justices are not saying anything that is of jurisprudential significance. Historically, many have viewed concurrences as all being Preserving opinions. In other words, the assumption was that concurrences said little of importance. Our examinations of the content of concurrences, however, have revealed that concurrences often contain contentions that are both jurisprudentially and institutionally important. While the general rule is to create exhaustive and exclusive categories, some opinions do contain more than one theme and, therefore, receive more than one code (with, of course, the exception of Preserving opinions).

In order to compare the content of concurrences, we employ thematic analysis. This process provides for the categorization of qualitative information; it helps make "thick description" comparable.[44] Here, thematic analysis involved the development of a set of codes for identifying recurring themes and goals in concurring opinions. In examining the text of the concurrences, we looked for both particular phrases in an opinion—including key words—and the general goal of the concurrence, which could be traced back to the text of the opinion. The key factor here is the explicit language of the concurrence, not what can merely be inferred or extrapolated.

Next, we began a detailed reading of each of the Marshall Court members' concurrences from the 1801 through the 1835 sessions. We identified 40 opinions of the Marshall Court as concurrences. If these first concurrences say little of jurisprudential significance, then we should expect that a high percentage of the Marshall Court concurrences would be Preserving opinions. The results of the thematic analysis resulted in the coding of eighteen, or 45 percent, of the concurrences as Preserving opinions. Therefore, a little over half of the opinions contained language of jurisprudential and/or institutional significance. An example of a Preserving opinion can be found in Johnson's opinion in *U.S. v. Morris* (1825). Here Johnson writes, "I entirely concur with my brethren in the opinion, that the power of the Secretary to remit extends as well to cases after as before judgment rendered. The question is one which I have had to consider repeatedly in my circuit, and which I so decided more than twelve years ago."[45] He then goes on to write about what he decided in previous cases.

Fourteen, or 35 percent, of the opinions were coded as "Groundlaying." In these opinions, Justices largely indicated that while they agreed with the outcome of the case, they did so for different reasons and felt compelled to note why. An example of a Groundlaying opinion is Livingston's concurrence in *Durousseau v. the United States* (1810). There, he writes that "I concur in the reversal of these judgments, but not in the construction which the Chief Justice puts upon the third section of the act of March, 1808"; he then explains how that section should be interpreted.[46]

Eight, or 20 percent, of the concurrences indicated "Signaling" language. In these concurrences, Justices were largely indicating to lower courts how they should rule in particular areas of case law. For example, Johnson signals in *Huidekoper's Lessee v. Douglass* (1805) when he decides to give his opinion on a question that was not addressed by the Court. He says that "I concur in the decision given by the Court in this case; but there was a question suggested and commented on in the argument which has not been noticed by the court, but which appears to me to merit some consideration."[47] Subsequently, he gives his legal opinion on the matter.

Finally, the smallest number of concurrences was coded "Weakening." Only five opinions, or 12.5 percent, of concurrences exhibited Weakening language. In these concurrences, Justices explicitly indicated that the

Court had interpreted the law incorrectly or ruled on some issue they should not have. Given what we know about the Marshall Court, it is not surprising that this category results in the smallest number of opinions. The only concurrence that Justice Thomas Todd wrote was a Weakening opinion, in *Finely v. Lynn* (1810). This was what would today be an opinion concurring in part and dissenting in part. In it, Todd indicated that he "concurred in the opinion of the court that the debt of Wells & Co. was a debt to be paid by Finley, but he differed upon the other part of the case, being of opinion, that the complainant was not entitled to a relief which by his bill he had made a merit of waiving."[48]

Only four of the opinions indicated two categories of behavior (e.g., Groundlaying and Weakening).

Given this analysis, it appears from the very early days of the Court that Justices were engaging in concurring behavior that was jurisprudentially and institutionally significant. Groundlaying concurrences are important jurisprudentially because they identify alternative means for interpretation of the doctrine at issue. Weakening concurrences are significant in both dimensions: they undermine the Court's interpretation, which could have the impact of reducing the persuasiveness of the majority's legal reasoning; and they are institutionally significant because they indicate when Justices feel comfortable with or compelled to undermine the majority coalition. Signaling behavior results in obvious messages to other institutions or possible future litigants and therefore indicates interaction between institutions. Finally, Preserving opinions are indications of the "judicial egocentrism" that some Court watchers have worried about regarding separate opinion-writing.[49]

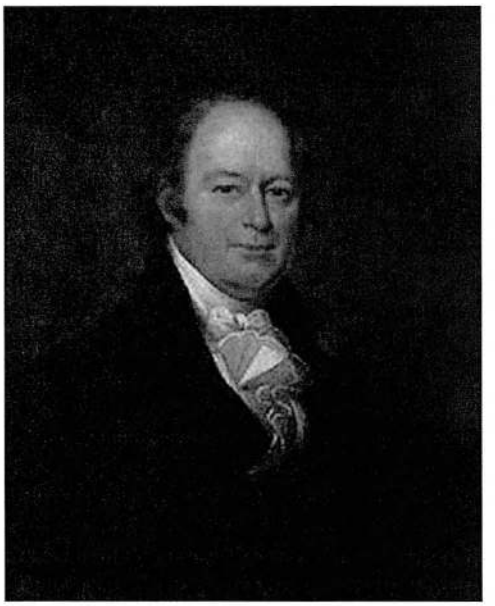
Table 3 identifies all the Justices of the Marshall Court, the number of concurrences they wrote, and (if they wrote any) the

TABLE 3: **Concurrence Types during the Marshall Court**

Justice	Total Concurrences	Groundlaying	Signaling	Weakening	Preserving
Cushing	0	0	0	0	0
Paterson	0	0	0	0	0
Chase	1	0	1	0	0
Washington	2	0	0	0	2
Moore	0	0	0	0	0
Marshall	3	0	0	0	3
Johnson	21	8	6	2	9
Livingston	6	2	1	2	1
Todd	1	0	0	1	0
Duvall	0	0	0	0	0
Story	3	2	0	0	1
Thompson	0	0	0	0	0
Trimble	0	0	0	0	0
McLean	2	0	0	0	2
Baldwin	1	1	0	0	0
Wayne	0	0	0	0	0
Total	40	13	8	5	18

types of concurrences. As previously noted, Johnson was by far the most prolific concurrer. In fact, it would not be overstating the case to say that the story of concurrences on the Marshall Court is mostly a one-man show. While Iredell was the first Justice to concur, it was Johnson who made it a somewhat regular practice. Of the sixteen Justices who served on the Marshall Court, seven of them never wrote a concurrence. Johnson wrote twenty-one, or 52.5 percent, of the concurrences of the Marshall Court. His behavior raises the question early in the Court's history of whether concurring behavior is merely idiosyncratic or potentially influenced by institutional dynamics.

Examining the themes of the first concurrences allows us to consider not just how the number of concurrences changed over time, but also how the content of those concurrences may or may not have changed. Laura Krugman Ray, who utilizes a functional characterization of concurring opinions, insightfully observes that the "diversity in the functions of the concurrence apparently has discouraged commentators on the appellate process from extended analysis of its role," which is more "pragmatic" than dissent.[50] While her work concerned a limited and contemporary time period—the early Rehnquist era—she notes that the "dual nature" of concurrence makes it both "an agent of *stare decisis* and an agent for change."[51] As the starting point for our future examinations of the concurrences of the Courts to follow, the Marshall Court gives us reason to suspect that such diversity and dual nature was present from the outset, even though the use of the concurring practice was not frequent.



Justice William Johnson (pictured) was by far the most prolific concurrer on the Marshall Court, contributing twenty-one of the concurrences during that era, or 52.5 percent.

Concurrence in the Antebellum Era

When Roger B. Taney assumed the Chief Justiceship in 1837, he became head of an institution with which he was very familiar. Taney had served as Attorney General from 1831 to 1833, a post in which he argued many cases before the Supreme Court and had ample opportunity to observe the practices and culture of the Marshall Court. Following a great innovator, Taney was faced with the decision of whether to maintain the practices and processes that Marshall had developed over nearly thirty-five years or to strike out on his own and endeavor to reshape the Court. On the whole, Taney and his associates kept the most fundamental aspects of the Court intact. There was, for example, no return to the seriatim opinion writing that some Democrats may have desired.[52] Despite this surface-level procedural consistency, the concurring opinion continued to develop in small but significant ways during Taney's twenty-eight years as Chief.

The quantity of concurrences on the Taney Court suggests that the practice of concurrence writing did not drastically expand or contract during Taney's tenure. The most contentious period for the Court, in terms of both concurrence and dissent, was from 1853 to 1858. This six-year period is only about one-fifth of the Taney Court era, but 45 percent of all Taney Court concurrences and 34 percent of dissents

were written in these tense antebellum years. Despite this intensive period—which includes Taney's most infamous decision, *Dred Scott v. Sandford*[53]—the overall percentage of concurring opinions remained essentially the same as it had been during the Marshall Court.

In addition to consistency in the number and ratio of concurrences, observation of the form of reported opinions indicates an additional area in which there was a lack of significant institutional change over the course of the Taney Court. The first six years of the Taney Court were reported by Peters, whose formalization of reporting is discussed above. Justices Baldwin and John Catron were unhappy with Peters for his delays in publication and led a move to fire him in 1842.[54] The fact that Taney was unable to delay the vote on this matter until the full Court, which would have supported Peters, arrived may indicate his relative lack of power as Chief. The opinions for the remainder of this era were collected by three different reporters: Benjamin Howard (1843–1860), Jeremiah Black (1861–1862), and John William Wallace (1863–1864). Howard appears to have continued the competent traditions of Peters with little innovation. Black had served as Chief Justice of the Pennsylvania Supreme Court, U.S. Attorney General, and Secretary of State, and at one point he was considered a possible successor to Taney as Chief.[55] He was nominated as an Associate Justice during the lame duck period of the Buchanan administration in early 1861, but not confirmed. These circumstances, combined with the outbreak of the Civil War, made his brief two Terms as reporter competent, though not expansive. Finally, Wallace was a wartime appointee who reported for Taney's final two Terms and did not add new elements to the reports during this time. Despite the mutiny against Peters, therefore, reporting on the Taney Court seems to have continued the standards he established.

Some evidence of Taney's thoughts about concurrences can be seen in the separate opinions he authored himself. An important concurrence here is Taney's opinion in the Fugitive Slave Act case of *Prigg v. Pennsylvania* (1842), discussed in Donald E. Lively's 1992 work, **Foreshadows of the Law: Supreme Court Dissents and Constitutional Development**.[56] Lively characterizes the views expressed in Taney's concurring opinion as "so profoundly divergent from the Court's, however, [that] it is [the opinion's] *dissenting spirit* that is most notable."[57] Taney's own writing of forceful concurrences suggests that the practice may have been accepted as standard in this era. Such concurrences, coupled with Taney's much greater willingness to allow majority opinions to be written by others, might indicate that Court culture became somewhat more accepting of separate writing on the Taney Court, even if there was not a dramatic increase in the practice.

Post–Civil War Docket Growth

The Supreme Court under Chief Justice Salmon Chase (1864–1873) "was of only 'little less importance' than that under John Marshall," according to one source citing a contemporary remark. This source continues, describing the Court during this period as being characterized "by forcefulness and not timidity, by judicious and self-imposed restraint rather than retreat, by boldness and defiance instead of cowardice and impotence, and by a creative and determinative role with no abdication of its rightful powers"[58] It is worth noting that during this period, the Court also decided one of the most closely divided and multivocal decisions of the nineteenth century: the *Slaughter-House Cases* of 1873.[59]

On this latter point, Robert J. Steamer charges in his 1986 study of Chief Justice leadership that "Chase appears to have had less interest in crafting opinions or in obtaining a consensus on the Court than any chief before or since."[60] Historian Charles Fairman notes that a regular practice at the Chase Court conference was for each Justice who had been

assigned the writing of an opinion to bring his manuscript and simply read it, the others hearing it for the first time and essentially as an individual effort.[61]

Concurring Behavior in the Late Nineteenth to Early Twentieth Century

The Waite-Fuller Chief Justiceships (1874–1888, 1888–1910) are often considered together as a single Court era of judicial supremacy and pro-business rulings. The White Court (1910–1921), on the other hand, is sometimes distinguished as a period of occasional Progressivism and a less unequivocal approach to the judicial role. While this periodization may make sense jurisprudentially, for the purposes of our analysis of concurrence, it is appropriate to speak of a Waite-Fuller-White era of the norm of public unanimity. An institutional as well as individual compulsion toward consensus obtained under these three Chiefs, but there is some evidence of intra-Court discord and, in Chief Justice Edward Douglass White's case, no exercise of sanctions against overt conflict by the Court leader.[62]

Court leadership is obviously related to Court conflict, or at least the management thereof. Steamer identifies Morrison R. Waite and Melville Fuller as good social leaders, Chiefs who used persuasion and compromise to bring about unanimity.[63] Indeed, Waite worked energetically toward consensus through the use of personal relations and a willingness to sacrifice his own views.[64] This picture of consideration and concession comports with an analysis of Waite's docket books showing the Justices' private conference votes, which reveal disagreement at conference followed by consensual public voting and specifically a movement from the minority to the majority coalition.[65] Of course, such patterns are not conclusive evidence of specific social leadership—as opposed to a general Court norm of consensus—being responsible for judicial unity.

Steamer's portrait of White in the leadership realm of his job diverges sharply from the above observations and is worth quoting in full because of its implication for judicial inter-agreement:

> White, a genial, well-liked man did not, could not give the conference firm leadership. Encountering a difficult case, he was known to say: "Here's a baffling case. I don't know what to do with it. God help us!" Clearly, such prefatory remarks to the discussion of a case give wide berth to the brethren to debate *ad infinitum* until one of them assumes the leadership role abandoned by the chief.[66]

Despite this, the early White period was fairly tranquil, with dissent being far less frequent than it was during courteous but ailing Fuller's final decade in office. Indeed, at the opening of White's time as Chief Justice, his colleague Justice Oliver Wendell Holmes recalled that White was "plainly anxious to create an atmosphere of friendliness and to *promote agreement* in the disposition of cases ... [W]e became a reasonably happy family."[67] Harmony really only dissipated on the White Court with the appointments of certain strong-willed and/or strong-intellect judges—James C. McReynolds in 1914, Louis D. Brandeis in 1915, John H. Clarke in 1916—whose presence, combined with White's diffuse style of conference management, induced discord. Yet none of this is really apparent in aggregate figures for concurrence, which remain fairly constant from 1874 to 1921. Still, **Supreme Court Compendium** figures report a discernible increase in cases with concurring filings from 1904–1909, then an uptick again in 1920. Cursory examination of these years of the White Court reveals that this may be an artifact of ambiguities in the description of the data. As Lee Epstein and her coauthors explain, "[W]e cannot determine whether data [prior to the 1953 Term] represent the number of concurring opinions or the number of cases with

concurring opinions. Hence, the proportion may not be comparable across all terms."[68]

More qualitative, detailed analysis of particular concurring opinions is necessary to ascertain the developmental pattern of the Waite-Fuller-White era and to tease out differences between Court concurring behaviors under these three Chief Justiceships. But our future study will be guided by our preliminary investigation of the founding and Marshall periods of the Court, and by the question that emerged from our observation of "the Johnson factor": whether concurring behavior across the premodern Court era was merely idiosyncratic or was influenced by changing institutional dynamics.

Discussion

The observations presented above suggest a few conclusions. First, even before the end of the practice of seriatim, Justices began issuing opinions that could be considered proto-concurrences. Second, there was more concurring vocality in the early Court than most previous scholarship has acknowledged.[69] Not only were concurring voices raised, but concurring purposes were more varied than the relatively low frequencies of concurring opinions might suggest. Third, even with the inclusion of this larger number of concurrences, the patterns of concurrence in the nineteenth and early twentieth centuries clearly differ from the patterns in more recent Courts. Contemporary Justices arguably value and practice both deciding *and* speaking. Ultimately, our goal is to learn when, why and how individual Justices and, more importantly, the Supreme Court as a collective came to see the judicial task in this way, facilitating dissent *and* concurrence. Fourth, there is both explicit and implicit evidence to suggest that institutional factors have shaped the Court's decision-making patterns. The preferences of Chief Justices, the adherence to common-law traditions of English, colonial, and early state and federal court systems, and the individual Justices' views of their job responsibilities were all variables that contributed to the number and type of concurrences.

From its earliest instance, the concurring message was a judicial tool in collegial Court decision-making. This relationship between concurrence and collegiality marks the developmental history of the Supreme Court.

ENDNOTES

*The authors would like to thank Anna Ball for her excellent research assistance and Brad Canon and Bradley Joondeph for their helpful comments on an earlier draft of this manuscript.

[1]Steven A. Peterson, "Dissent in American Courts," *Journal of Politics* 43 (May 1981), 433.

[2]Richard B. Stephens, "The Function of Concurring and Dissenting Opinions in Courts of Last Resort," *University of Florida Law Review* 396 (1952).

[3]Laura Krugman Ray, "The Justices Write Separately: Uses of Concurrence by the Rehnquist Court," *University of California, Davis, Law Review* 23: 778–79, n.3 (1990).

[4]Donald E. Lively, **Foreshadows of the Law: Supreme Court Dissents and Constitutional Development** (Westport, CT: Praeger Press, 1992). Lively notes that a study of the Court's first 183 years disclosed that a total of 27,916 decisions included 3,915 dissenting opinions and 1,322 concurring opinions. Lively, xxiv. While no further details about the study or its methods of classification are provided, the figures corroborate the tallies reported by Lee Epstein and others, who present evidence that throughout the period 1800–1921, the proportion of cases with at least one concurring opinion was in no year greater than .040 and was substantially less most years, while the proportion of cases with at least one dissenting opinion achieved and sustained 10 percent by mid-century. Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas Walker, **The Supreme Court Compendium** (4th ed. Washington, D.C.: Congressional Quarterly Press, 2007), Tables 3-3 and 3-2 (211–13, 216–18),

[5]Bernard Schwartz, **The Supreme Court: Constitutional Revolution in Retrospect** (New York: Ronald Press, 1957), 357.

[6]Only remarks made after Justices have begun delivering opinions can be considered concurrences. Those made during oral argument, whether presented as questions or statements, are not considered part of the decision of a case.

[7]Though commonly referred to as Webster's Dictionary, the official title of the first edition was **A Compendious Dictionary of the English Language.** *See* Noah Webster,

A Compendious Dictionary of the English Language (1806; reprint, New York: Crown, 1970). Samuel Johnson, **A Dictionary of the English Language**: in which the words are deduced from their origin, and illustrated in their different significations by examples from the best authors. To which are prefixed a history of the language, and an English grammar (London: G. and J. Offor, et al., 1824).

[8]A searchable version of the 1828 edition, **An American Dictionary of the English Language** (New Haven: Hezekiah Howe), is available at http://www.1828-dictionary.com/ (last visited May 23, 2010).

[9]Noah Webster, **An American Dictionary of the English Language** (rev. ed. New York: Harper & Brothers, 1846).

[10]Noah Webster, **Webster's Revised Unabridged Dictionary of the English Language** (Springfield, MA: G. & C. Meriam Company, 1913), *available online* at http://machaut.uchicago.edu/websters (last visited May 23, 2010).

[11]Henry Campbell Black, **A Dictionary of Law Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern** (St. Paul: West Publishing Co., 1891, 1910, 1968, 1990).

[12]*Id.* at 238. This same definition appears verbatim through at least the sixth edition (1990).

[13]Scott Douglas Gerber, ed., ***Seriatim:* The Supreme Court before John Marshall** (New York: New York University Press, 1998), 20.

[14]Sandra Frances Van Burkleo, "'Honor, Justice, and Interest': John Jay's Republican Politics and Statesmanship on the Federal Bench," in Gerber, *supra* note 13, at 26–69.

[15]We are aware of contemporary exceptions to these four categories as well, but believe that nearly all opinions now fall into these categories.

[16]*See, e.g.,* Linda A. Blandford and Patricia Russell Evans, eds., **Supreme Court of the United States 1789–1980: An Index to Opinions Arranged by Justice**, 2 vols. (Millwood, NY: Kraus International Publications, 1983); Albert P. Blaustein, and Roy M. Mersky, **The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States** (Hamden, CT: Shoe String Press, 1978).

[17]*See* Gerber, *supra* note 13.

[18]In his history of the Court, Charles Warren refers his readers to *Bas v. Tingy*, 4 U.S. 37 (1800), as an example of such a case. Charles Warren, **The Supreme Court in United States History**, 2 vols. (Boston: Little, Brown, and Company, 1926), vol. 1, 654, n1.

[19]3 U.S. 386, 398 (1798) (Iredell, J., concurring).

[20]*Sims v. Irvine*, 3 U.S. 425, 457 (1799) (Iredell, J., concurring).

[21]Epstein, et al., *supra* note 4, at 227.

[22]*See* Blandford and Evans, *supra* note 16. Illustrating the problem of categorization, Blaustein and Mersky list Marshall as having authored 508 Opinions of the Court, no concurrences, and six dissents. *Id.* at 124. Throughout the text, references to concurrences are based on our own count.

[23]*Talbot v. Seeman*, 5 U.S. 1, 26 (1801).

[24]That being said, opinions were still occasionally rendered seriatim, typically when Marshall was not present. *See, e.g., Lambert's Lessee v. Paine*, 7 U.S. 97, 126 (1805).

[25]*Head & Amory v. The Providence Insurance Company*, 6 U.S. 127, 169 (1804) (Chase, J., concurring).

[26]*Randolph v. Ware*, 7 U.S. 503, 513 (1806).

[27]8 U.S. 29, 46 (1807).

[28]Indeed, Marshall's apparent distaste for disagreement extends even to dissent. In *Grant v. Naylor*, Marshall issues the only opinion, but uses the phrase "It being the opinion of the majority of the court" instead of speaking of a unanimous court, as he does elsewhere. 8 U.S. 224, 236 (1808).

[29]*Piesch v. Ware*, 8 U.S. 347, 366 (1808).

[30]For support of this assumption, see Nancy Maveety, Charles C. Turner, and Lori Beth Way. "The Rise of the Choral Court: Use of Concurrence in the Burger and Rehnquist Courts," *Political Research Quarterly*, forthcoming.

[31]11 U.S. 565, 569 (1813) (Livingston, J., concurring).

[32]*See, e.g., U.S. v. 1960 Bags of Coffee*, in which Justice Story insists on including for the record his Circuit Court opinion in the case, even though he was unable to vote when the case reached the Supreme Court. 12 U.S. 398, 405 (1814).

[33]Warren, *supra* note 18, at v. 1, 455n.

[34]*See, e.g.,* Blandford and Evans, *supra* note 16; Lexis-Nexis.

[35]30 U.S. 1, 21, 31 (1831) (Johnson, J., dissenting; Baldwin, J., dissenting).

[36]Quoted in Warren, *supra* note 18, at v.1, 655n1.

[37]Gregory A. Caldeira and Christopher J.W. Zorn, "Of Time and Consensual Norms in the Supreme Court," *American Journal of Political Science.* 42 (July 1998), 874–902, 100.

[38]Warren, *supra* note 18, at v. 1, 644.

[39]Caldeira and Zorn, *supra* note 36, at 888.

[40]*Id.* at 897.

[41]*Id.*

[42]Lawrence Baum, **Judges and Their Audiences: A Perspective on Judicial Behavior** (Princeton, NJ: Princeton University Press, 2006).

[43]Charles C. Turner and Lori Beth Way, "Classifying Supreme Court Concurrences: The Case of Justice Clarence Thomas," *Journal of Political Science*, 31: 139–71 (2003); Lori Beth Way and Charles C. Turner, "Disagreement on the Rehnquist Court: The Dynamics of Supreme Court Concurrence," *American Politics Research*, 34(3): 293–318 (2006). Other categorization schemes exist for concurring opinions. Both Laura Krugman Ray and B.E. Witkin offer a functional

classification of concurrence and speak of expansive or emphatic concurring opinions, limiting or qualifying concurring opinions, or doctrinally different concurring opinions. Laura Krugman Ray, "The Justices Write Separately: Uses of Concurrence by the Rehnquist Court," *University of California, Davis, Law Review* 23, 777–831 (1990); B.E. Witkin, **Manual on Appellate Court Opinions** (St. Paul, MN: West Publishing Co., 1977). Witkin also speaks of "reluctant" concurrences, and Ray of "unnecessary" concurrences—mainly those that supply merely a statement of concurrence with the majority opinion.

[44]For a discussion of this method, see Richard E. Boyatzis, **Transforming Qualitative Information** (Thousand Oaks: Sage, 1998).

[45]*U.S. v. Morris*, 23 U.S. 246, 296–97 (1825) (Johnson, J., concurring).

[46]*Durousseau v. U.S.*, 10 U.S. 307, 323 (1810) (Livingston, J., concurring).

[47]*Huidekoper's Lessee v. Douglass*, 7 U.S. 1, 72 (1805) (Johnson, J., concurring).

[48]*Finley v. Lynn*, 10 U.S. 238, 252 (1810) (Todd, J., concurring).

[49]Caldeira and Zorn, *supra* note 36, at 877.

[50]Ray, *supra* note 3, at 781.

[51]*Id.* at 783.

[52]Taney's conservatism on this front may have been a product of the circumstances of his nomination. The Chief reached office over the vigorous objections of Whig Senators who saw him (accurately) as President Andrew Jackson's lead soldier in his battle against the Bank of the United States. *See* Ben W. Palmer, **Marshall and Taney: Statesmen of the Law** (Minneapolis: University of Minnesota Press, 1939), 185.

[53]60 U.S. 393 (1857).

[54]Warren, *supra* note 18, at v. 2, 106.

[55]*Id.* at vol. 2, 353.

[56]Lively, *supra* note 4, at 10–11.

[57]*Id.* at xxi (emphasis added).

[58]Stanley I. Kutler, **Judicial Power and Reconstruction Politics** (Chicago: University of Chicago Press, 1968), 6.

[59]83 U.S. 36 (1873). The decision was 5–4, with Justice Stephen Field filing a dissenting opinion in which three Justices concurred. Two of those Justices, Joseph P. Bradley and Noah Swayne, also filed what Kutler labels "separate statements." Kutler, *supra* note 57, at 139.

[60]Robert J. Steamer, **Chief Justice: Leadership and the Supreme Court** (Columbia: University of South Carolina Press, 1986), 249.

[61]Fairman, Charles. **History of the Supreme Court of the United States, Vol. 6: Reconstruction and Reunion, 1864–88, Part 1** (New York: Collier-Macmillan, 1971), 34.

[62]This trait also apparently applied to Chief Justices Taney and Chase. *See* Caldeira and Zorn, *supra* note 36, at 878.

[63]Steamer, *supra* note 59 at 132.

[64]*Id.* at 132.

[65]Epstein, et al., *supra* note 4, at 366.

[66]Steamer, *supra* note 59, at 28.

[67]Alexander M. Bickel and Benno C. Schmidt, Jr., **The Judiciary and Responsible Government, 1910-1921**, vol. IX, **Oliver Wendell Holmes Devise History of the Supreme Court of the United States** (New York: Macmillan Publishing Co., 1984), 80 (emphasis added).

[68]Epstein, et al., *supra* note 4, at 236, n.c.

[69]For example, Blaustein and Mersky find twenty-three Marshall Court concurrences and we find forty. Blaustein and Mersky, *supra* note 16, at 137–38. This is significant because the Blaustein and Mersky book is used as a source for Epstein, et al., *supra* note 4.

[70]Data original for concurrences. Other data compiled from Blaustein and Mersky, *supra* note 16.

A Look Back at the *Dred Scott* Decision

STEPHEN G. BREYER

Thank you for inviting me to deliver the 2009 Annual Lecture of the Supreme Court Historical Society. I am a great admirer of the Society's commitment to preserving the history of the Supreme Court and to increasing the public's awareness of the Court's contributions to our nation's history.

This is an especially interesting time for the Society to be meeting because the Court, for the third time in the past fifteen years, is about to have a change in its membership. As soon as my friend and colleague Justice Souter announced his intent to retire, public speculation began as to whom President Obama would nominate to replace him. And as soon as the President put an end to the speculation with his announcement that he had selected Judge Sotomayor, commentators began discussing and debating her legal views and how her presence will affect the Court's decisions. The public's interest in a change in the Court's membership reminds us that the Court, for all the technical cases it decides, also can decide controversial, contentious cases that raise questions that lie at the heart of contemporary political debates.

Today, I shall re-examine one such case: the *Dred Scott* decision, a case that many believe is the Court's worst mistake. By examining the case in detail, I hope to find something of value for our present-day judicial institution.

The case I have chosen stands at the intersection of law and politics. Throughout its history, the Supreme Court has decided cases containing legal issues that have a significant political impact. And how the Court can, or should, make its decisions in such cases is a topic of abiding interest. Alexander Hamilton, one of the Framers of our Constitution, argued that a court is better suited than a legislative or executive body to insist that the Constitution be followed—particularly in an instance where doing so is politically unpopular. But he did not explain how we know in such instances that the public—or the other branches of government—will do what the Court says. And while we now assume as a matter of course that the Court's decisions will be followed, that was not always the case. For

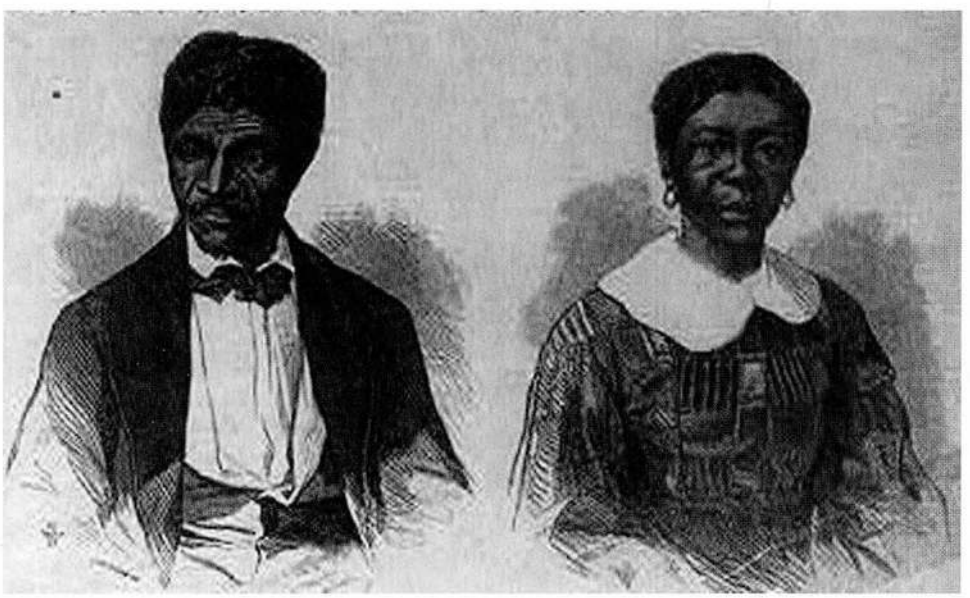
example, despite an 1834 Court determination that the Cherokee Indians owned northern Georgia, President Andrew Jackson evicted the Indians, supposedly saying that Chief Justice John Marshall "has made his decision; now let him enforce it."

Americans have gradually, over time, developed customs and traditions that lead them to accept and follow Court decisions. But how that has come to be is a complicated question, a question that itself touches on politics. The answer, in part, has something to do with the way in which the Court has responded to legal issues that have political impact. This afternoon I hope to illustrate the relation by speaking about *Dred Scott*. The Court decided *Dred Scott* in 1817 at a time when political tensions about slavery ran high. In that case, the Supreme Court held that no African American could be a citizen entitled to sue in federal court and that no African American could become free simply because he was taken into a free state by his owner. *Dred Scott* was a legal and practical mistake. And for that very reason it can tell us something about the more general question: namely, it can tell us what courts cannot and should not do when politics and law overlap.

Let us, then, look back to the mid-nineteenth century, to the era of slavery in the United States. And let us consider the background, the issues, the reasoning, the immediate consequences, and the topical lessons of *Dred Scott*.

I. Background

Three individuals play key roles in this story: Dred Scott, Roger Taney, and Benjamin Curtis. Scott was born a slave on a Virginia plantation in the early 1800s. His first owner, Peter Blow, took Scott with him to St. Louis, Missouri; he sold Scott to an army doctor, John Emerson; Emerson took Scott with him from base to base, including Fort Armstrong in the free state of Illinois and Fort Snelling in the free territory of Wisconsin (now in Minnesota). During his three-year stay at Fort Snelling, Scott married. Dr. Emerson then returned to St. Louis with



After Dred Scott—pictured here with his wife, Harriet—lost his suit before the Supreme Court, he was bought by a son of his original owner, Peter Blow, who set them both free. Within a year, however, Scott had died of tuberculosis.

Scott, Scott's wife, Harriet, and Scott's newly born child, Eliza. After Emerson died, Scott and his family ultimately became the property first of Emerson's wife and eventually of his wife's brother, Sanford. Scott—or perhaps his wife Harriet—was not satisfied with this arrangement, and they brought a lawsuit, first in state, then in federal court. They argued that their lengthy stay in free territory legally had made Scott a free man.

Roger Taney, Chief Justice of the United States, wrote the majority opinion in the *Dred Scott* case. Taney was born in Maryland in 1777 to a family of tobacco farmers. A longtime supporter of Andrew Jackson, he became Attorney General in the Jackson administration and was appointed Chief Justice in 1835. He was an excellent lawyer, possessing what one observer called a "moonlight mind"—a mind that gave "all the light of day without its glare." He had argued for a gradual end to slavery, an institution which he viewed to be an "evil" and a "blot on our national character;" he had represented abolitionists; and he had freed his own slaves. On the other hand, as Attorney General, Taney advised the President that the "African race, even when free, . . . hold whatever rights they enjoy" at the "mercy" of the "white population."

And, finally, Benjamin Curtis wrote the main dissent in *Dred Scott*. Curtis was a native of Massachusetts. President Millard Fillmore appointed him to the Supreme Court in 1851 in part because of his reputation as a "moderate" on the slavery issue. He served on the Court for only six years, resigning after the *Dred Scott* decision, in part because, as he said, he doubted his usefulness on the Court "in [its] present state," and perhaps for financial reasons as well.

You should also keep in mind that slavery was the main political issue of the day. The Constitution's Framers, aware that the South would not join a Union that prohibited slavery, in effect postponed the question, writing into the Constitution a series of compromises. They included language that said Congress, prior to 1808, could not prohibit the "migration or importation" of slaves into the United States; that prohibited any amendment affecting that bar; and that apportioned legislators (in the lower house of Congress) among the states according to population, which was to be determined by "adding to the whole number of free persons, . . . [and] three fifths of all other persons"—that is, slaves. This method of counting—allowing the South more representatives based on its slaves while it forbid slaves to vote—meant that the South was overrepresented in the lower House of Congress and in the vote count for President, giving it sufficient political power to block abolitionist efforts.

During the first half of the nineteenth century, however, population grew in the Northwest, rather than in the Southwest, as the South had expected. That fact cost the South its political advantage, and the South began to fear abolitionist legislation. At the same time, the North feared that the South would use every political and legal device within reach to extend slavery into new territories, thereby securing the election of pro-slavery Senators and helping the South to maintain its political power.

In this atmosphere, Congress had to decide how to treat new territories—for example, those taken from Mexico in 1848. In the 1830s, Congress forbade slavery in territories north and west of Missouri; in 1845, it admitted Texas as a slave state; in 1850, it admitted California as a free state. And in 1854 it departed from the Missouri Compromise principles, permitting two states north and west of Missouri—namely Kansas and Nebraska—to choose themselves whether to become slave states or free states.

The upshot is that in 1854, the legal status of slaves in the territories was of enormous political importance. The South feared those territories, if free, would soon mean a Congress that abolished slavery; it wanted the Supreme Court to find that the right to own slaves, even in the territories, was a right the Constitution required the North to respect. The North feared

that a pro-slavery interpretation of the Constitution would permit the South, not only to maintain its evil institution, but also to spread slavery throughout the nation. Many hoped, or feared, that the Court would use the *Dred Scott* case to clarify the legal status of slaves brought by their owners into free territory.

II. The Legal Issues

Dred Scott initially brought his case against his owner, Mrs. Emerson, in a Missouri state court. He pointed to earlier Missouri cases holding that a slave who resided for a time in free territory became a free man. The Missouri supreme court, however, rejected his claim, noting that "times are not now as they were when the former decisions were made." Before the Missouri court decision was final, Scott brought the same suit against his new owner, Sanford, in a lower federal court. That court, stating that it must accept Missouri's decision, rejected Scott's claim. And Scott appealed to the U.S. Supreme Court.

Benjamin Curtis vigorously dissented in *Dred Scott*, concluding that Congress had the right to prohibit slavery under the Missouri Compromise. He resigned from the Court shortly thereafter, citing the need to return to private practice to support his family.

The case attracted considerable attention. A prominent attorney, later a member of President Lincoln's Cabinet (along with Benjamin Curtis's brother), represented Scott. Three prominent lawyers, including two United States Senators, represented Sanford. The issues were the following:

- First, a jurisdictional question—a question about the Court's power to hear the case: The lawsuit was properly in federal court only if a "citizen" of one state was suing a "citizen" of another state. Sanford was a citizen of New York. Even if we assume, with Scott, that the law made him a free man, was he then a "citizen" of Missouri?
- Second, if Scott was a "citizen" and jurisdiction was proper, then what about the basic issue on the merits? Did the law make Scott a free man?

The lawyers argued this case over the course of four days in February 1856. On May 12, the Court asked for re-argument on the jurisdictional question. Court notes reveal that a majority agreed to a compromise: Justice Grier would write a short jurisdiction-based opinion rejecting Scott's claim. When two of the Justices said they would write a dissent, however, the compromise unraveled. Chief Justice Taney reassigned the opinion to himself. On March 6, 1857, Taney read his lengthy opinion from the Bench; the next day Curtis read and then released his dissent. Taney then rewrote his opinion, releasing his final version in May.

III. The Decision and the Reasoning Behind It

Let me turn now to the decision itself. The Court initially considered the jurisdictional question. That question, the Chief Justice says, is whether "a negro, whose ancestors were imported into this country, and sold as slaves" is "entitled to sue as a citizen in the courts of the United States." The Chief Justice, and the majority, setting forth highly legalistic

arguments, held that the answer to this question is "no." Even if Dred Scott is a free man, he is not a "citizen."

Here is why: The Constitution allows the suit only if the case arises "between citizens of different States." The word "citizens" is limited to "citizens of the United States when the Constitution was adopted." And that group, says Taney, could not possibly have included freed slaves. Why not? "Public opinion" would not have allowed it. Writing in language that has since become infamous, Taney explains that public opinion at that time considered Africans "so far inferior" to the "white race" that they had "no rights which the white man was bound to respect." Even northern states, such as Massachusetts, Rhode Island, Connecticut, and New Hampshire—states where abolitionist sentiment was strong and slavery had been outlawed—forbade slaves to serve in the state militia, limited their educational opportunities, and forbade interracial marriage. Moreover, many of the Founders, themselves slaveholders, could not have intended the "equality" they preached to extend to slaves or former slaves. Further, some contemporaneous federal statutes distinguished between "citizens" and "persons of color," showing that the latter were not included among the former. In addition, some Attorneys General of the United States had expressed that view.

Finally, the Constitution guarantees to "citizens of each State . . . all privileges and immunities of the several States." How, in 1789, could anyone have thought that the South would have granted "privileges and immunities" to former slaves whom the North considered free? The Court, Taney concludes, must not "give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . It must be construed now as it was understood then."

Curtis, in a powerful dissent, strongly disagreed. In his view, "every free person born on the soil of a State, who is a citizen of a State by force of its Constitution or laws, is also a citizen of the United States" and consequently can sue a citizen of a different State in federal court. Why?

For one thing, looking back to the Republic's founding in 1789, one finds five states—New Hampshire, Massachusetts, New York, New Jersey, and North Carolina—which then included freed slaves among their citizens. Granted, these states imposed some disabilities on those freed slaves, but the laws of the first four states permitted those freed slaves to vote, and the supreme court of the fifth state, North Carolina, had explicitly held that "slaves, manumitted here, became freemen and therefore, if born within North Carolina, are citizens of North Carolina." How can one read the Constitution, silent on the subject, as excluding from its term "citizen" some of those very persons who were allowed, in those states, to vote on the Constitution's ratification?

For another thing, without (Curtis says) entering "into an examination of the existing opinions of that period respecting the African race," a "calm comparison" of the assertion in the Declaration of Independence that "all men are created equal" with the "individual opinions and acts" of its authors "would not leave these men under a reproach of inconsistency." It would show that they "were ready and anxious to make" the "great natural rights which the Declaration of Independence asserts . . . effectual wherever a necessary regard to circumstances would allow."

Further, the purpose of the jurisdictional clause was to extend federal judicial power "to those controversies into which local feelings or interests might so enter as to disturb the course of justice." And that purpose is similarly served whether a party to the case is of "white" or "African descent."

Curtis also states that the majority's arguments are unusually weak. Its statutory claim proves nothing, for, if the language of some old federal statutes suggests that freed slaves are not "citizens," the language of other old federal statutes suggests the precise opposite. Nor is its "privileges and immunities" argument

convincing once one learns that the Constitutional provision simply repeats an older guarantee in the Articles of Confederation that entitled "free inhabitants of each of these States . . . to all the privileges and immunities of free citizens in the several States." That is because, at the time the earlier language was adopted, state delegates explicitly voted down, by a vote of eight to two, a North Carolina amendment that would have inserted the word "white" between the words "free" and "inhabitants," so that the guarantee would have applied only to free white inhabitants. How can one say then that the Framers intended to exclude all but white persons from the clause's protection?

The Court, after having held that it had no jurisdiction to decide the merits of Dred Scott's legal claim, then nonetheless went on to do just that. Curtis, in reply, points out that a court that lacks jurisdiction cannot decide anything further; in violating this basic legal rule the majority "transcends the limits of the authority of the court," though Curtis concedes that he can go on to express his views on the merits because he believes jurisdiction exists.

Finally, the Court majority held that Dred Scott's claims lacked legal merit: his three-year sojourn in the free Territory of Wisconsin and in the free state of Illinois did not emancipate him. The majority might have reached this conclusion by simply relying on the fact that Missouri state courts had reached it and federal courts should follow state courts as a matter of state law. But in the 1850s that was not always so: federal courts often second-guessed state courts on state law matters, particularly where the matter concerned common law, not statutory law. And in respect to slavery, both common law and foreign law were uniform and clear. As Curtis pointed out, when a master took a slave into free territory, living there "for an indefinite period of time," taking "part," for example, in the territory's "civil or military affairs," and certainly when the slave married and had children in that place, the slave became free. Indeed, important federal statutes—the Missouri Compromise, for example—made this clear, for they insisted that the law of the locality determined the status of the slave; and the law of Wisconsin, the locality around Fort Snelling, gave Dred Scott his freedom.

The majority reasoned that the laws of Congress did not apply, however, for, in its view, Congress lacked the power to make those laws. It had to concede that the Constitution's "Territories Clause," Article IV, Section 3, Clause 2, says that Congress "shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." But, says the majority, the language, history, and structure of the Constitution make clear that this clause applies only to those territories that were territories in 1789—namely, certain land belonging then to Virginia, North Carolina, and a few other states, which those states intended to cede to the federal government. Congress, the majority conceded, has an implied power to hold territory for the sole purpose of turning that territory into new states. But it cannot interfere with the rights of citizens entering or living within that territory, any more than if they were citizens of states. And were they such citizens, the Constitution would forbid the federal government to interfere with their rights to own slaves. That is because the Constitution forbids Congress to "deprive" a "person" of "property" without "due process of law." It recognizes the "right of property of the master in a slave." And nothing gives "Congress a greater power over slave property . . . than property of any other description." Rather, the Territories Clause insists that the federal government "guard" and "protect" the slave "owner in his rights."

The Court's conclusion: it "is the opinion of the Court that the act of Congress, which prohibited a citizen from holding and owning property of this kind . . . is not warranted by the Constitution and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory, even if they had been carried

there by the owner with the intention of becoming a permanent resident."

Curtis, adopting the common-law position discussed earlier, replies to the majority's argument as follows: First, the Territories Clause certainly does give Congress the right to hold territory acquired from a foreign nation, to make all necessary rules for governing that territory, and to include among those rules a prohibition against slavery. Congress has acted upon that assumption since the Nation was founded, buying the Territory of Louisiana from France, carving it into at least six present states, enacting ordinances and laws excluding slavery from various ones of the territories (for example, the Northwest Ordinance, the Missouri Compromise) and explicitly excluding slavery from at least eight states carved out of either Louisiana or other acquired territories. When interpreting the Constitution, Curtis writes, a "practical construction nearly contemporaneous with the adoption of the Constitution and continued by repeated instances through a long series of years may influence the judicial mind and in doubtful cases should determine the judicial mind."

As for the Fifth Amendment's due-process argument, a slave is not an ordinary piece of "property." Slavery is a "right existing by positive law ... without foundation in the law of nature or the unwritten common law." Nor could "due process of law" mean that a slave remains a slave when his master moves from, say, slave state A to live permanently in free state B. What law would then govern the slave, the slave's wife, his house, his children, his grandchildren? State B has no such laws. And State B's judges could not work with a proliferating legal system under which each slave, coming to B, brought with him his own law, from A or from C or from whatever other slave state he happened to be from.

More importantly, says Curtis, the phrase "due process of law" comes from the Magna Carta. When Congress passed the Northwest Ordinance in 1787, it did not think that law violated the Magna Carta. And "I am not aware that such laws, though they may exist in many States were ever supposed to be in conflict with the principle of Magna Carta incorporated into the State Constitutions."

Still, Curtis and two others were in dissent. The Court's majority of six had prevailed. That majority held:

1) Scott cannot bring his case in federal court because freed slaves are not citizens of the United States.
2) Many congressional anti-slavery-spreading statutes, including the Missouri Compromise, are unconstitutional.
3) The Fifth Amendment's Due Process Clause protects the ownership rights of slave holders even when they take their slaves into free territories and into free states to live for extended periods of times.

IV. The Aftermath

The Chief Justice issued his opinion in the spring of 1857. The South and Southern sympathizers reacted favorably; President Buchanan (perhaps forewarned) favorably referred to the opinion in his March inaugural address and in his December State of the Union address. But the Northerners' reaction was vehemently negative. Horace Greely's *New York Herald Tribune* described the holding as "wicked" and "inhumane." "If epithets and denunciations could sink a judicial body," another observer wrote, "the Supreme Court ... would never be heard of again."

For example, the New York state senate judiciary committee's report stated that the decision had "destroyed the confidence of the people in the Court," predicted that it would be "overruled," and described Taney's statement that "the colored race" had "no rights which white men were bound to respect" as "inhuman, unchristian, atrocious, —disgraceful to the judge who uttered it and to the tribunal which sanctioned it." The report said the

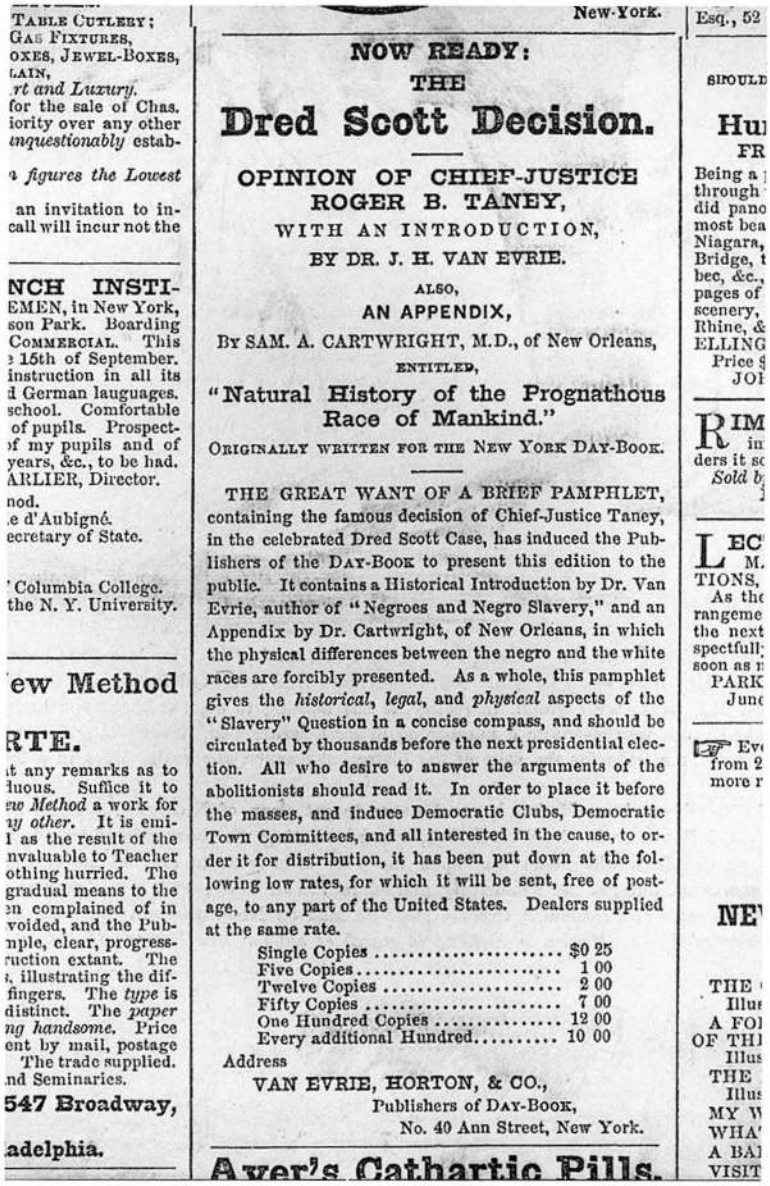


TABLE CUTLERY;
GAS FIXTURES,
OXES, JEWEL-BOXES,
LAIN,
rt and Luxury.
for the sale of Chas.
iority over any other
inquestionably estab-

a figures the Lowest

an invitation to in-
call will incur not the

NCH INSTI-
EMEN, in New York,
son Park. Boarding
COMMERCIAL. This
e 15th of September.
instruction in all its
d German lauguages.
school. Comfortable
of pupils. Prospect-
of my pupils and of
years, &c., to be had.
ARLIER, Director.
nod.
e d'Aubigné.
ecretary of State.

Columbia College.
the N. Y. University.

ew Method

RTE.

it any remarks as to
luous. Suffice it to
w Method a work for
y other. It is emi-
l as the result of the
nvaluable to Teacher
othing hurried. The
gradual means to the
n complained of in
voided, and the Pub-
nple, clear, progress-
ruction extant. The
, illustrating the dif-
fingers. The *type* is
distinct. The *paper*
ng handsome. Price
ent by mail, postage
The trade supplied.
nd Seminaries.

547 Broadway,

adelphia.

New-York.

NOW READY:

THE

Dred Scott Decision.

OPINION OF CHIEF-JUSTICE ROGER B. TANEY,

WITH AN INTRODUCTION,

BY DR. J. H. VAN EVRIE.

ALSO,

AN APPENDIX,

BY SAM. A. CARTWRIGHT, M.D., of New Orleans,

ENTITLED,

"Natural History of the Prognathous Race of Mankind."

ORIGINALLY WRITTEN FOR THE NEW YORK DAY-BOOK.

THE GREAT WANT OF A BRIEF PAMPHLET, containing the famous decision of Chief-Justice Taney, in the celebrated Dred Scott Case, has induced the Publishers of the DAY-BOOK to present this edition to the public. It contains a Historical Introduction by Dr. Van Evrie, author of "Negroes and Negro Slavery," and an Appendix by Dr. Cartwright, of New Orleans, in which the physical differences between the negro and the white races are forcibly presented. As a whole, this pamphlet gives the *historical*, *legal*, and *physical* aspects of the "Slavery" Question in a concise compass, and should be circulated by thousands before the next presidential election. All who desire to answer the arguments of the abolitionists should read it. In order to place it before the masses, and induce Democratic Clubs, Democratic Town Committees, and all interested in the cause, to order it for distribution, it has been put down at the following low rates, for which it will be sent, free of postage, to any part of the United States. Dealers supplied at the same rate.

Single Copies	$0 25
Five Copies	1 00
Twelve Copies	2 00
Fifty Copies	7 00
One Hundred Copies	12 00
Every additional Hundred	10 00

Address

VAN EVRIE, HORTON, & CO.,
Publishers of DAY-BOOK,
No. 40 Ann Street, New York.

Ayer's Cathartic Pills.

Esq., 52

SHOULD

Hu
FR
Being a
through
did pano
most bea
Niagara,
Bridge, t
bec, &c.,
pages of
scenery,
Rhine, &
ELLING
Price $
JOI

RIM
in
ders it s
Sold b

LEC
M.
TIONS,
As the
rangeme
the next
spectfull
soon as r
PARK
June

Ev
from 2
more r

NE

THE
Illus
A FOI
OF THI
Illus
THE
Illus
MY W
WHA
A BAI
VISIT

While other abolitionists decried the *Dred Scott* decision as an abomination, Fredrick Douglass called it "a means of keeping the nation awake on the subject." "[M]y hopes were never brighter than now," he wrote. Shown is an advertisement for a pamphlet of the decision.

opinion paved the way for slavery's spread to free states. If "a master may take his slave into a free State without dissolving the relation of master and slave," then "some future decision of the Supreme Court will authorize a slave driver . . . to call the roll of his manacled gang at the foot of the monument on Bunker Hill, reared and consecrated to freedom."

In another example, Frederick Douglass, the well-known abolitionist, devoted a New York lecture to the subject, saying that, despite this "devilish decision" produced by "the slaveholding wing of the Supreme Court," the Court "cannot" make "evil good" or "good evil." The "decision," he concluded, "is a means of keeping the nation awake on the subject"; "my hopes were never brighter than now."

Indeed, the decision did keep the nation awake. Northern supporters circulated the Curtis dissent widely in the form of a pamphlet. Abraham Lincoln, then a

Republican candidate for Senate, spoke often about the decision, describing it as a "legal astonisher," while arguing that Taney's "whites only" views had turned "our once glorious Declaration" of Independence into a "wreck" and "mangled ruin." Lincoln based his Coopers' Union speech—a speech that made him a national political figure—on Curtis's dissent. He argued for the Founders' view of the Constitution—a view that denied the despotism of slavery—unless, he added, that view conflicted with some yet more basic principle that the Founders had held, of which there was none. Lincoln fed the North's fear of spreading slavery by asking, what "is necessary for the nationalization of slavery? It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial legislature can do it."

Historians debate the precise role *Dred Scott* played in bringing on the Civil War, but at the least the decision energized the antislavery North. It became the Republican party's rallying cry; it helped bring about Lincoln's nomination and election as President; and these circumstances together led to that most fierce War Between the States.

Eventually, the North won. And the Nation added the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution, ending slavery while securing equal treatment, voting rights, and basic civil rights to the newly freed slaves. On a more individual level, Chief Justice Taney remained on the Court until his death in 1864; Curtis resigned from the Court immediately after *Dred Scott*; and Dred Scott and his family were bought by a son of his original owner Peter Blow, who set them all free. Within a year, however, Scott died of tuberculosis.

V. Topical Lessons

History has not treated *Dred Scott*—or Roger Taney—kindly. Modern critics describe the case as, for example, "infamous," "notorious," "an abomination," "odious," a "ghastly error," and "judicial review at its worst." Chief Justice Charles Evans Hughes said the decision was a "self-inflicted wound that almost destroyed the Supreme Court." **The Oxford Companion to the Supreme Court** says that "American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court."

These judgments reflect the immorality of the decision. But what can people today learn from it? By reading with care, one can draw certain lessons that remain relevant today. I suggest five. The first concerns judicial rhetoric. Today, as in 1857, the language a judge uses to set forth his argument matters. Taney's words about Americans of African descent having no "rights that a white man must respect" is lurid, more so than can be found in other Supreme Court opinions, including opinions that Taney wrote. An experienced Supreme Court Justice does not write such a phrase ignorant of the fact that others will repeat it and will emphasize its judicial origin in order to make the sentiment appear legitimate. Putting the words in the mouths of others—that is, writing that others might have thought this, as Taney wrote—does not help. The public will simply ignore the effort to put moral distance between the sentiment and the author. And the Justice knows it. The language was morally repugnant then and now. Curtis's disdainful reply seems right: "I shall not enter into an examination of the existing opinions of that period respecting the African race," while calling for a "calm comparison."

The second lesson reinforces the optimistic judicial view that, when a judge writes an opinion, even in a highly visible, politically controversial case with public feeling running high, the opinion's reasoning—not simply the author's conclusion—can make all the difference. Curtis's opinion was but one of three dissents. Its language is not the most colorful. But its reasoning is by far the strongest. Indeed, it paints the Taney majority into a logical corner from which it has never emerged.

What is the answer to Curtis's claim that five states treated slaves as citizens—and hence they were U.S. citizens—at the time the Constitution was written? He supports the claim by pointing to a state supreme court decision, explicit on the point, and to the fact that five states allowed freed slaves to vote. Taney, in reply, refers only to racially discriminatory marriage and military service laws—laws that are consistent with citizenship and hence do not significantly undercut Curtis's argument.

What is the answer to Curtis's jurisdictional argument? If Dred Scott was not a "citizen," then the Court lacked jurisdiction to hear the case. If it lacked jurisdiction, it had no business deciding the merits of the case, holding the Missouri Compromise unconstitutional, and depriving Congress of the power to maintain slavery-free territories in the process.

What sound response can the majority make to Curtis's explanation of the scope of the Constitution's Due Process and Territories clauses? The Constitution is a practical document, yet the majority's proposed legal system is not a practical system. How could judges of a single free state or territory (say, Wisconsin) administer a legal system under which different slave-state laws (say, Alabama law, Georgia law, Virginia law, and so on), would have to govern well into the future the family relationships of different slave families brought permanently to live in that single free state? How could one harmonize the majority's view of the Territories Clause with the fact that federal legislation enacted under the authority of that clause had led to the admission into the Union of several new states? It is not surprising that modern historians believe that the Curtis dissent paints the more accurate historical picture.

Given the strength of the Curtis reasoning, it is not surprising that those opposed to slavery circulated Curtis's dissent, not the other dissents, in pamphlet form throughout the Nation. Nor is it surprising that Lincoln's speeches, abolitionist lectures, and informed Northern reaction reflected Curtis's analysis. A third lesson concerns the relation between Court decisions and politics. The kindest view of the majority's opinion sees it as seeking a political objective. Many in Congress had asked the Court to "umpire" the great political issue dividing the nation. Taney and his majority might have thought that by reaching out unnecessarily to decide a politically sensitive legal question—that is, by settling the constitutional status of slavery in the territories—the Court would promote an eventual, peaceful resolution of the slavery question, perhaps through eventual abolition.

If that is what Taney believed, he was wrong. The Court's decision did nothing to heal the Nation. It did not slow the momentum toward civil war. It reinforced the North's fears of Southern dominance by, in the words of New York's legislature, permitting the "slave driver" to bring his "manacled gang" to the foot of Bunker Hill. It helped Lincoln obtain the Republican party's nomination for President. It promoted the political standing of that antislavery party. As Douglass predicted, it solidified the case for abolition, thereby helping to "awaken" America to the strength of that case. And as a purely legal matter, the antislavery constitutional amendments resulting from the Civil War effectively reversed the *Dred Scott* decision.

There are, of course, institutional, jurisprudential, and ethical arguments that militate strongly against judges of a constitutional court holding up their fingers to the political winds. Hamilton's writings make clear that the very point of granting such a Court the power of judicial review was to offer constitutional security where doing so is politically unpopular. But to such reasons, *Dred Scott* adds another, purely practical consideration. Judges are not necessarily good politicians. Their view about what is politically expedient could well turn out to be completely wrong. Such, as history shows us, was the case in *Dred Scott*.

The fourth lesson concerns the Constitution seen as a whole. The Taney Court's decision must find its constitutional justification in a view of the underlying document as no more than a political compact among independent states, with its central focus upon compromise about slavery in particular. Such a view would permit the majority to argue for a reading of the Constitution consistent with a need to secure a consensus that included slave states before the Nation embarked upon a course that would lead to abolition.

Yet the Constitution's language does not support such a reading. The protection it provides the slave trade expired in the year 1808. The constitutional guarantees of equal state representation in the Senate and the census-related supermajority status of slave states in the House of Representatives were written in terms that permitted the political destruction of the protection they offered the South. The Preamble says that "We the People of the United States ... ordain and establish this Constitution"—language broad enough to cover *Dred Scott*.

One cannot easily reconcile Taney's vision with the expressed abolitionist hopes of many of the Framers. Nor, most importantly, can one reconcile this vision with the Constitution's most basic objective, the creation of a single nation. The Constitution does so by creating political institutions strong enough to permit the "people" to govern themselves, determining policies and resolving problems ranging in subject matter from defense to territorial expansion to commerce, while protecting basic personal liberties across (the Framers hoped) the centuries. The concept of a political treaty among sovereigns, focusing primarily upon slavery, is not compatible with this more basic constitutional objective. And, of course, if the *Dred Scott* majority doubted that fact in 1859, the post–Civil War amendments to the Constitution—ending slavery, guaranteeing voting rights, defining citizenship, assuring individuals equal protection of the laws, and protecting basic individual liberty from state interference—overturned the legal precedent they created.

The upshot is that Taney's vision of the Constitution was not a constitutional vision; it was a view about a treaty that linked states, not about a Constitution that created a central government.

Finally, *Dred Scott* tells us something about morality's relation to law. A famous and good novel of the day, **Uncle Tom's Cabin**, well describes the moral incoherence of slavery. And a contemporary personal experience showed me the relation between that moral incoherence and judicial decision-making. When discussing *Dred Scott* at a law-school conference, I asked the audience to consider a hypothetical question. Suppose you were Benjamin Curtis. Imagine that Chief Justice Taney comes to your Chambers and proposes a narrow ground for deciding the case. He asks if you will agree to a single paragraph unsigned opinion for the entire Court, in which the Court upholds the lower court on the ground that the matter is one of Missouri law in respect to which the Missouri supreme court must have the last word. He will agree to this approach provided that there is no dissent.

Should you agree? If you do, the majority will say nothing about citizenship, nothing about the Missouri Compromise, nothing about slavery in the territories and the Due Process Clause. As a result the Court will create no significant new law; it will not diminish its own position in the eyes of much of the Nation; it will not issue an opinion that increases the likelihood of civil war; and, since no one knows who would win such a war (the North almost lost), the prospects for an eventual abolition of slavery will be unaffected, perhaps increased. Not a bad bargain. The audience was uncertain. Then a small voice came from the back of the room. "Say no." And the audience broke into applause. That applause made clear the moral nature of the judge's legal obligation in that case.

A close examination of the *Dred Scott* opinion, then, can teach us something about

rhetoric, reason, politics, constitutional vision, and morality. These lessons still might apply to the work of a Supreme Court judge. They help us understand the role of the judge in a politically sensitive case, including cases involving the protection of individual rights, particularly in instances where the Constitution points one way and public opinion another. To understand how courts do act, or might best act, today under such circumstances, we need to know more about the kinds of cases modern courts must resolve. But our examination of *Dred Scott*, the Court's "worst case," can teach us, through negative example, at least the basic elements of an answer.

* * *

There is much to learn from this single historical example. *Dred Scott* teaches us the importance of solid reasoning, the dangers of reliance upon rhetoric, the need for practical constitutional interpretation consistent with our nation's underlying values. And it teaches us the important role that morality and values play—or should play—at the intersection of law and politics. *Dred Scott* is thus one example that helps shed light on how courts can, and should, decide cases. But it is one of many. The Supreme Court Historical Society, by helping to ensure that the Court is studied and its decisions discussed and deliberated, plays a key role in helping us to think about these broader questions. I thank the Society for its interest.

The Judicial and Ancient Game: James Wilson, John Marshall Harlan, and the Beginnings of Golf at the Supreme Court

ROSS E. DAVIES†

Golf has a long history at the Supreme Court simply as an entertaining pastime for some of its members. Yet the Justices' interest in the sport can also be viewed as a reflection of the evolving work and culture of the institution and of the nation it serves. This article revisits a few early developments involving the first golfer on the Court (Justice James Wilson), the first golf enthusiast (the first Justice John Marshall Harlan), and the first golfing majority (October Term 1906).

Wilson in Scotland

The earliest visible connection between the Supreme Court and golf predates the Court. In the summer of 1765, James Wilson was in Edinburgh, Scotland, studying bookkeeping and merchant accounting. According to Wilson biographer Charles Page Smith, "[t]he drudgery of accounting turned out to be no more congenial than the drudgery of tutoring [Wilson had recently given up teaching], and his brief experience with ledgers and accounts merely hardened Wilson's resolve to go to America."[1] Wilson would indeed emigrate the next year and, after a distinguished career in private practice and public service, serve on the Supreme Court from 1790 until his death in 1798. But before he left Scotland in 1766, he played at least one round of golf. Writing to Wilson in 1785, his accounting instructor recalled the event:

> Upon recollection you will remember, that on June 13th, 1765, you did me the honour to begin the writing [of] a Course of Bookkeeping.... I have often reflected with regret, that our acquaintance had no sooner commenced, than it was inter[r]upted, by your going abroad.... You will

> perhaps recollect, that during your stay here, I one day pressed and prevailed with you, to take a game at golf with me on Brun[t]sfield links,[2] a diversion you was totally unacquainted with, my proposal was to instruct you in it, but how sadly was I mortify'd at your beating me every round; this I thought often since, had something prophetic in it; & may it always happen to you, and your opponents in all your laudable undertakings.[3]

Wilson does not seem to have kept up with the game in the New World. There are glimpses to be had of golf in America from the mid-eighteenth century to the early nineteenth, scattered from New York to the District of Columbia to South Carolina to Georgia. But there is not enough evidence to say with confidence that the game was actually being played anywhere in particular at any particular time, or perhaps even at all. Thus, although Wilson's work on the Court and on circuit took him to or through all those places,[4] it may well be that he never encountered someone with whom to play.[5]

The consensus among golf scholars is that if anyone was playing golf in the early Republic, they gave it up sometime in the early 1800s, and no one took up the game again for a long time. In his authoritative **A History of Golf**, Robert Browning offers a compact and representative summary of this stage of golf in the United States:

> A reference to golf in Georgia appears as late as 1818, but the declaration of war by the United States against Great Britain in 1812 may have had something to do with the fading out of the popularity of the game. For the next seventy years or so golf in the United States would appear to have fallen into desuetude, and it is not until the early eighties that we find the game beginning to attract attention again.[6]

And so it should come as no surprise that there is nothing to be seen of members of the Court playing the game during that period.

The Return of Golf

During the American golf renaissance (or perhaps nascence) in the late nineteenth century,[7] golf reconnected with the bar in general[8] and the Supreme Court in particular.

The first recorded reconnection with the Court was a remotely familial one involving Beatrix Hoyt, a granddaughter of Chief Justice Salmon P. Chase (1864–1873). In 1896, the sixteen-year-old Hoyt won the U.S. women's amateur golf championship.[9] She repeated in 1897 and 1898, and remained the youngest women's amateur champion until 1971, when Laura Baugh succeeded to that honor.[10] Since Hoyt's heyday, several fine players have served or served on the Court, but none has come close to matching her accomplishments.

Golf was soon making closer approaches to the Court. Indeed, in the late 1890s and early 1900s, several Justices were in the vanguard of what rapidly became one of the country's most popular pastimes.[11] And a vanguard it was. The idea of mature, devout, professional men engaging in frivolous, strenuous, competitive sports—especially on Sundays—was still novel and controversial.[12] Thus, for example, one turn-of-the-century periodical could approvingly report of President William McKinley,

> The President is not a sportsman.... Tho Cabinet officers and even Justices of the Supreme Court have been known to play golf or tennis, no President has ever done so. Mr. McKinley is fortunate in requiring little exercise....[13]

And another could almost simultaneously observe that

> [m]any prominent public men are devotees of the game [of golf], and

> find in it great relaxation from the severe strain of public life. The Justices of the Supreme Court of the United States do not consider themselves lapsing too much from their dignity when wielding a mashie, or fear that they may get into a legal bunker at their next session if they devote too much time to lofting a stymie.[14]

Justice John Marshall Harlan was the first of those Justices, and one of the greatest golf enthusiasts in the history of the Court.[15]

Harlan in Canada

While Hoyt was winning championships, Harlan was learning the game. In **Some Memories of a Long Life, 1854–1911**, Malvina Shanklin Harlan recalled her husband's introduction to golf in 1897:

> Shortly after his arrival at Murray Bay [a resort town in Quebec, now known as La Malbaie], sometime in July, my husband was persuaded to learn the game of golf, which was, and still is, the chief diversion among the men visitors at Murray Bay. It was a radical change in his habits of life, for up to that summer he had never indulged in any out-of-door diversion as a relief from the constant strain of his exhausting professional labours. It proved to be a most healthful pastime for him, both mentally and physically. His love for the game grew upon him steadily, and during the next fifteen summers which he spent at Murray Bay [that is, until his death in 1911] his interest in it never flagged.[16]

Malvina then cut short her golf narrative, saying,

> As my son Richard was the one who persuaded my husband to take up Golf, giving him his first lessons, he is better qualified than I am to tell the story of how his father became interested in "The Ancient and Royal Game."[17]

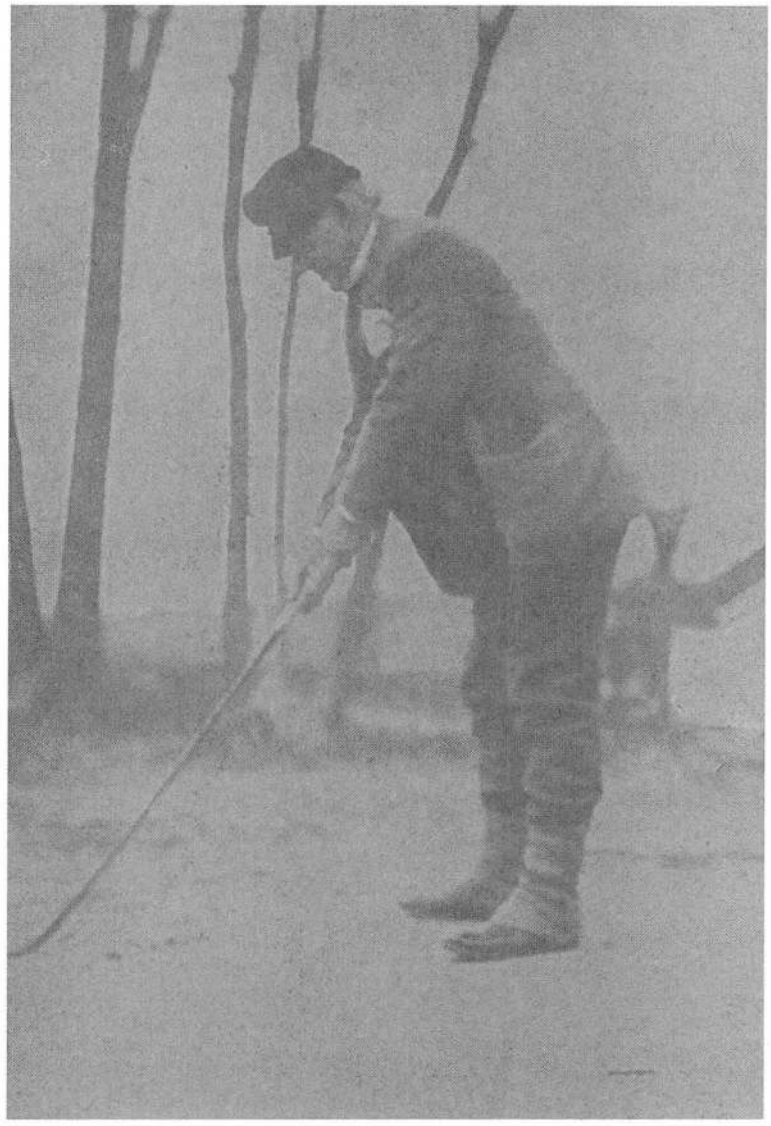
At this point, alas, the publisher of Malvina's memoir confesses, "This story was never added." It would seem that Malvina, who completed her memoir in 1915 and died the following year, never had a chance to incorporate her son's memories of Justice Harlan and golf.[18] But that does not mean that Richard Harlan never told the story.[19] It appeared in *Scribner's Magazine* in 1917, shortly after Malvina's death,[20] and is reproduced in its entirety at the end of this article.

In short, Richard's narrative described a typical introduction to golf. Justice Harlan at first was reluctant to play. Then, when he tried it, he found it simultaneously frustrating and fascinating. Finally, once he was good enough to fail less than spectacularly some of the time, he was hooked for life. Every summer thereafter, Harlan would play innumerable rounds of golf at Murray Bay, many of them with his good friend William Howard Taft.[21]

Harlan in the U.S.A.

When Harlan returned to Washington from Murray Bay in 1897, the newspapers quickly noted that he had brought his newfound passion for golf home with him. In October, the *Baltimore Sun* reported,

> Lately Justice Harlan developed a fancy for golf, and is so much fascinated with the game that he devotes much of his leisure time to its enjoyment. He finds abundant room in the spacious grounds attached to his mansion on Fourteenth street for indulgence in the pastime, and takes much pleasure in showing off his prowess with the crooked club to his friends.[22]

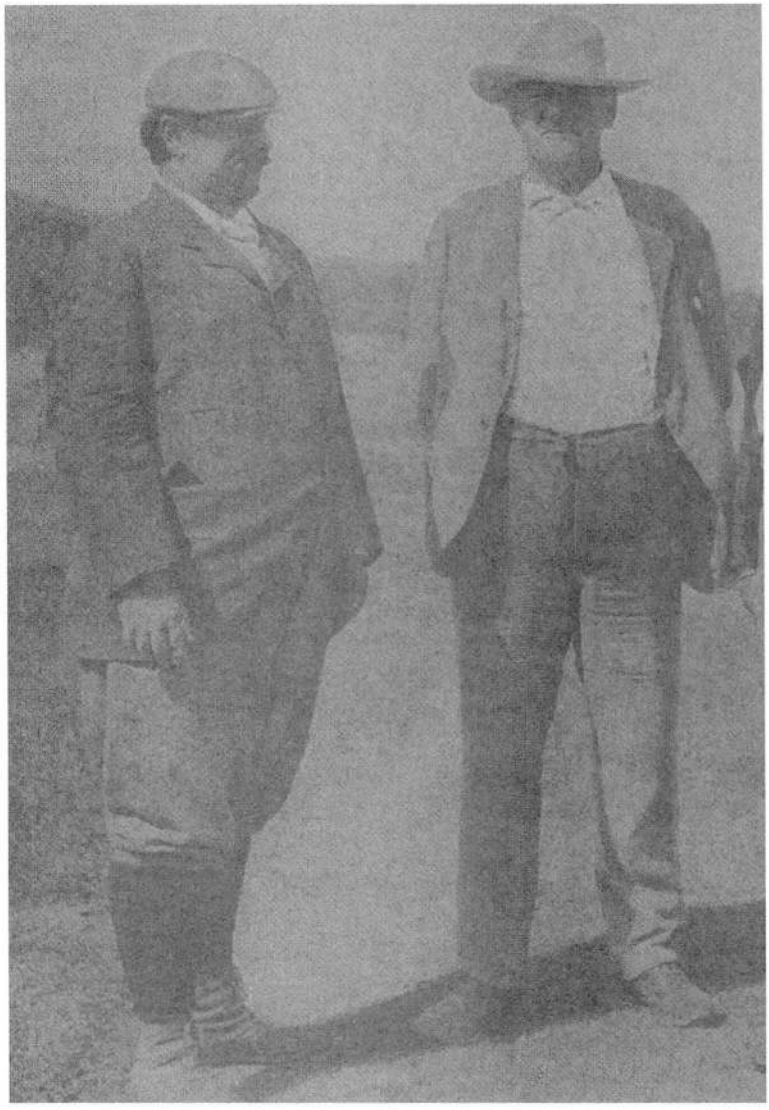


John Marshall Harlan was the first Justice to be passionate about golf. When golfing, he preferred to wear leggings, rather than baggy trousers.

Golf remained a part of Harlan's routine for the rest of his life. As his son reported in the *Scribner's* article, Harlan filled his summers with golf at Murray Bay. And in other seasons he golfed wherever and whenever he could. Contemporary news stories and gossip columns make clear that when the Supreme Court was in session, he played nearly every day at the Chevy Chase Club in Bethesda, Maryland, weather permitting.[23] And when opportunity knocked, he played on circuit as well.[24]

Moreover, golf became an important part of Harlan's public persona. When he shot a 75 on his seventy-fifth birthday in 1908, it was national news.[25] From 1897 until his death in 1911, newspapers and magazines abounded with anecdotes about his golf.[26] Some made connections between his work as a judge and his passion for the game. For example, in 1908 the *Green Bag* published this story under the title "Conflicting Evidence":

> The venerable and learned Justice John M. Harlan, during a game of golf at Chevy Chase, explained the intricacies of evidence to a young man.



Harlan and his friend William Howard Taft played golf together at their summer enclave in Murray Bay, near Quebec, where it was a popular pastime among the men.

"Usually, in conflicting evidence," he said, "one statement is far more probable than the other, so that we can decide easily which to believe.

"It is like the boy and the house hunter.

"A house hunter, getting off a train at a suburban station, said to a boy:

"'My lad, I am looking for Mr. Smithson's new block of semidetached cottages. How far are they from here?'

"'About twenty minutes' walk,' the boy replied.

"'Twenty minutes!' exclaimed the house hunter. 'Nonsense! The advertisement says five.'

"'Well,' said the boy, 'you can believe me or you can believe the advertisement; but I ain't tryin' to make no sale.'"[27]

Nor was public attention to Harlan's interest in golf limited to the journalistic. Speaking at a dinner in 1902 honoring Harlan "[i]n

recognition of the completion of twenty-five years of distinguished service on the bench," Edward Blake—a prominent Canadian Liberal party politician, longtime chancellor of the University of Toronto, and "the leading Canadian lawyer of his day"[28]—took as his theme a week in the life of Harlan the vacationer at Murray Bay. Blake concluded with a few comments about Harlan's golf habit:

> But almost all that I have talked about is play. I come to the serious side and the real business of his Murray Bay life. I have known Harlan the Golfer! [Laughter.] Not that I play the game. It is enough for me to watch the judge. My wife and I have often driven, in the late afternoon, on the village road which borders the links. They are all deserted; the golfers have gone home for the day. Presently we catch in the distance, between trees and rocks, a little scarlet gleam that lights up the sombre landscape. As we approach we discern one human form—did I say human? No! A form "larger than human, on the turf-clad hill." [Laughter.] It is the Judge, clad in a red garment, followed by one forlorn and melancholy caddie; filling all alone the vast area of the links; selecting his weapon; poising it and testing it; meditating his tactics; and in the end delivering, hit or miss, a terrific assault upon one small ball, driving it I know not whither, and pursuing it I know not why. [Great laughter.] Strenuous in this as in all else, he enables me to apply to a good man the description the Roman writer gives of one of those "bad men who do," spoken of by the President [Theodore Roosevelt] to-night, "Quid vult id valde vult."[29] And my opinion is that, next to those prime objects of his devotion which have been mentioned—the Bible and the Constitution—he holds in his heart the laws and practices of the game of golf.[30]

At the same event, Justices David J. Brewer and William R. Day reportedly combined to characterize Harlan's three great interests in life, saying that he "slept with the Bible in one hand, the constitution in the other and his golf sticks under his pillow."[31]

Other Harlan-and-golf anecdotes revealed durable truths about the game that might resonate with modern observers of the Court. Compare, for example, the story of Harlan's game with the Reverend Doctor James M. Sterrett in Richard Harlan's essay below to Justice John Paul Stevens' recent insight in *FCC v. Fox Television Stations, Inc.*, the cursing-on-television case:

> As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.[32]

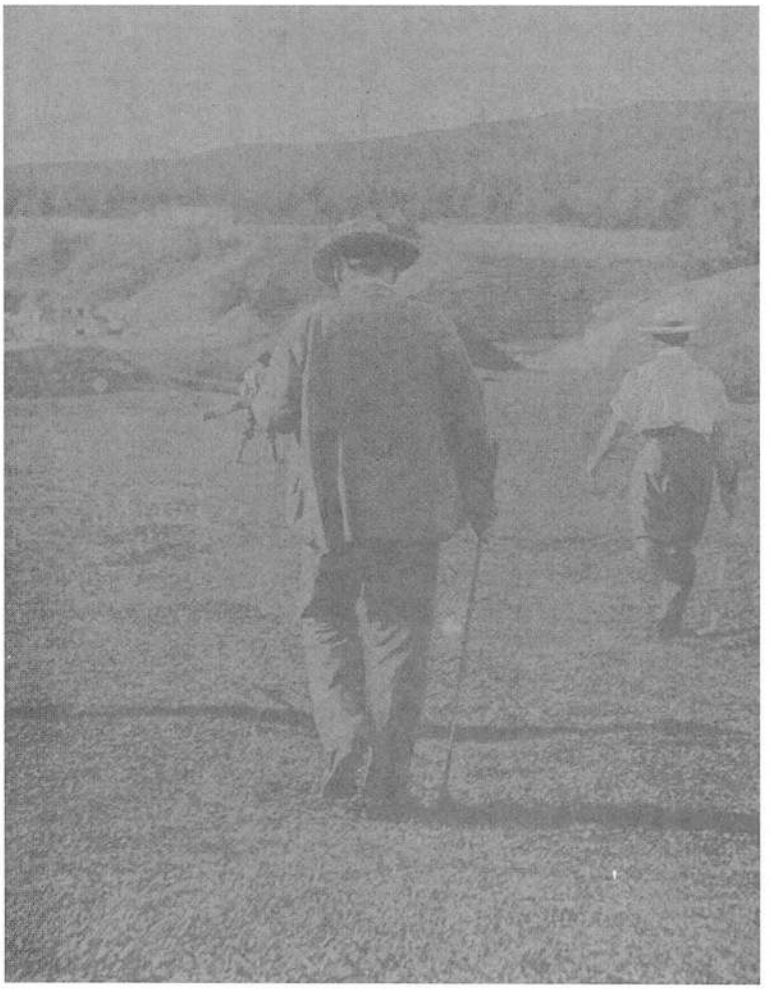
Although Harlan's interest in golf was intense, and media attention to his playing was also intense, there are no reports that his consuming hobby interfered seriously with his day job, although there were small inroads and close calls, as this 1899 report indicates:

> Sometimes Mr. Harlan overstays his time at the links. Then his man drives out to the club for him and takes him straight to the Supreme Court Chambers, the Justice meanwhile reading his morning mail as he drives into town. On one or two occasions Mr. Harlan has arrived at the Capitol so late that he has barely had time to rush into the robing-room, throw his black silk gown over his golf suit in time to join the stately procession of the

> Justices as they cross the main corridor of the Capitol and file with solemn dignity into the courtroom.[33]

Similarly, the April 22, 1902 *Washington Post* reported that, "Justice Harlan, of the Supreme Court, arrived at the Capitol yesterday just in time to don his silk robe and fall in the procession of justices on their way to the courtroom. These are the mornings when Justice Harlan likes to make a tour of eighteen holes before he goes to court."[34] In the same vein, both news reports and Harlan's summertime personal correspondence suggest that his love of golf trumped his good intentions to catch up on Court work during summer recesses. He seems to have completed opinions he had to write in decided cases,[35] but beyond that, not much.[36] As he wrote to Justice Day in September 1904, "I cannot say that I have given any material time to study. I have lived constantly in the open air, working on my place here [Murray Bay] or playing golf."[37] And in July 1906, "Of course I allow nothing to interfere with my golf."[38]

There was, however, at least one report that Harlan mixed golf friendship with Court business in a way that may have been acceptable then but would not pass muster today. The story had him signaling to his "golf friend, Solicitor-General [John K.] Richards," the outcome in *Downes v. Bidwell*, a 1901 customs case in which Richards represented the government.[39]



Richard Harlan eventually published a short memoir about teaching his father how to play golf and encouraging him to learn the game. He is pictured here golfing at Murray Bay with Harlan and his brother.

And so perhaps it is a good thing that Harlan was never confronted with a golf case: it might have taxed his self-restraint or undermined his dignity.[40] It is suggestive of the bar's appreciation of Harlan's appreciation of golf that golf became a tool of argument before the Court not long after he took up the game. A brief filed in *Reloj Cattle Co. v. United States*[41] on February 15, 1901 contained the first recorded golf analogy presented to the Court. Counsel for Reloj Cattle challenged the government's evidence regarding the location and existence of a land grant as follows: "A hundred people may search for a lost golf ball, but what is their evidence worth as against that of one man who actually finds the ball?"[42] It was to no avail. The Court unanimously affirmed judgment for the United States.

As Harlan advanced in years, his vigorous pursuit of golf became entwined with speculation about his inclination and capacity to continue serving on the Court. Thus, for example, in 1903, the *Albany Law Journal* reported that Harlan had reached the age (seventy) at which he could retire from the Court with a full pension, but then went on to observe that "he betrays few signs of dotage. In fact, he is the picture of a hale and vigorous old man. To see him . . . as he makes his way to the golf links, one would very likely put him down mentally as not a year over fifty-five."[43] And five years later, when Harlan reached thirty years' service on the Court, *Law Notes* paired a report on "[t]he imperishable rumor that Judge Harlan is about to resign" with the observation that "[h]e is seventy-four years old, but is still hale and hearty, and frequently plays golf as a recreation."[44] And in 1910, the year before Harlan's death, the *New York Times* doubted he would retire, because "he is still in vigorous health, and puts in his spare afternoons tramping sturdily around the golf links. . . ."[45] Thus was begun golf's long service as a bellwether of continuing service by senior Justices.[46]

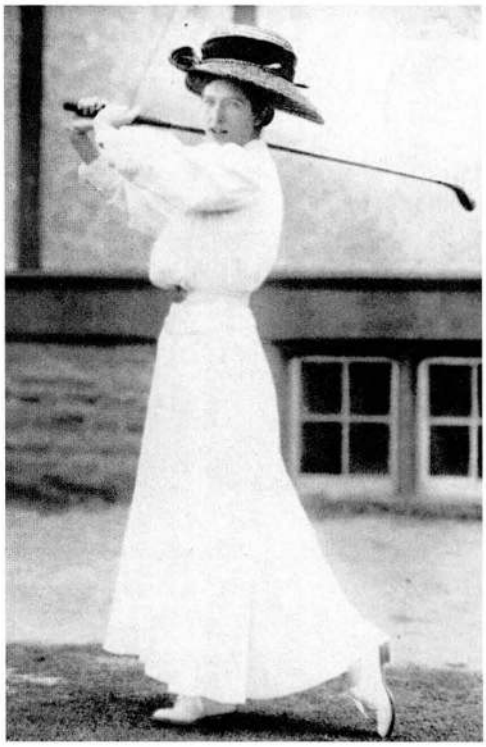
The Golfing Court

At the opening of the Court's Term in October 1897, John Marshall Harlan was the lone golfing Justice. I have found no evidence that anyone else who was on the Court when Harlan returned from Murray Bay with his clubs for the 1897 Term had ever played the game—not Stephen J. Field (1863–1897), Horace Gray (1882–1902), Melville W. Fuller (1888–1910), David J. Brewer (1890–1910), Henry B. Brown (1891–1906), George Shiras, Jr. (1892–1903), Edward D. White (1894–1921), or Rufus W. Peckham (1896–1909). Moreover, of Harlan's eight 1897 colleagues, only a couple—Chief Justice Fuller and Justice Brewer—would eventually pick it up.[47] Thereafter, however, everyone who joined the Court during Harlan's tenure played,[48] except for Oliver Wendell Holmes, who had no interest in sports of any sort.[49]

First came Joseph McKenna, President William McKinley's only Supreme Court appointee, who joined the Court in 1898. The limited available evidence can be read to support an inference that it was Harlan who introduced McKenna to golf. In the summer of 1899, the *New York Times* reported that "Justice McKenna plays well, it is admitted by Justice Harlan, 'for a beginner.'"[50] The same story implied that at that time Harlan and McKenna were the only golfers:

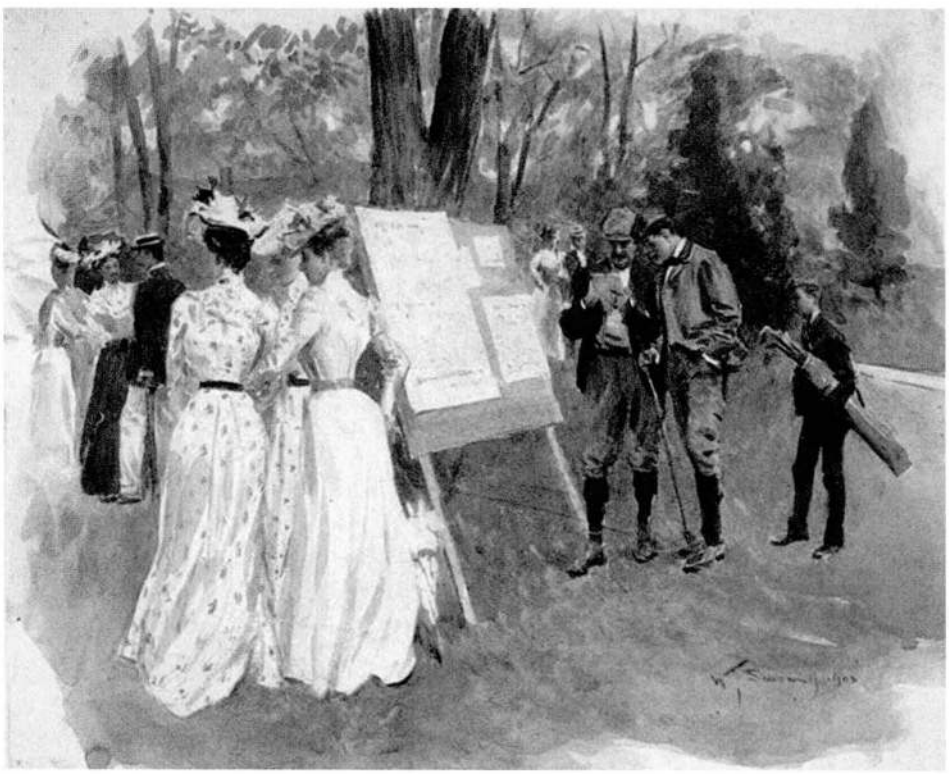
> The other Supreme Court Justices as yet content themselves with exercise not much more violent than the daily walks they take between their homes and the Capitol, American conservatism about sport being quite different from that English reverence for outdoor sports.[51]

And a 1901 *Washington Post* story reported that "Justice McKenna, of the Supreme Court, has caught the enthusiasm [for golf], which inspires Justice Harlan, and is developing into a fine player."[52] Plainly Harlan and McKenna were compatible—McKenna's



"principal source of diversion was golf which he frequently played in the company of Justice Harlan at the aristocratic Chevy Chase Country Club"[53]—and over time his game improved relative to Harlan's. In 1907, Harlan "celebrated the thirtieth anniversary of his appointment to the United States Supreme Court by playing a hotly contested game of golf with Justice McKenna, in which he held his own, notwithstanding his seventy-five years."[54] By 1910, the *Montgomery Advertiser* was reporting that "Justice McKenna is a golf player and says that he can beat Justice Harlan on the links."[55]

Next came William R. Day, an avid sportsman, in 1903. President Theodore Roosevelt had appointed Holmes (the non-sportsman) to the Court in 1902 and then elevated Day from the U.S. Court of Appeals for the Sixth Circuit the following year. News reports connecting Day with sports tended to dwell on his intense interest in baseball.[56] But that does



Golf became fashionable in America at the turn of the nineteenth century. Above, Katherine Hartley, U.S. women's amateur golf champion, is shown posing for the camera in 1908. Below, members of Washington society play golf at an area club. Concerns that golf was too frivolous a pastime for Washington men to undertake—particularly on Sundays—did not hold sway.

not mean that he neglected golf. Indeed, by the late spring of 1904, he and Harlan were corresponding about the prospect of golfing together at Harlan's Murray Bay summer retreat.[57] And correspondence between Day and Vice President Charles W. Fairbanks in the summer of 1906 suggests that it was Day who taught the game to Fairbanks.[58] Day did not, however, become a resident member of Harlan's club—the Chevy Chase Club—until 1914, which may explain the dearth of Washington-area media coverage of Day and Harlan playing together.[59]

Roosevelt's third and last appointment to the Court was William Henry Moody, in 1906. Like Day, Moody was more prominently connected with baseball than with golf, but he did play.[60] Sadly, it was not for long. Moody suffered from increasingly severe rheumatism, the upshot of which was that he retired from the Court after less than four years' service and passed away in 1917 at the age of sixty-three.

Although Harlan clearly played a great deal of golf with McKenna and at least occasionally with Day or Brewer—and surely relished the rising popularity of his beloved sport on the Court—his favorite golf partner was not a Supreme Court colleague. It was William Howard Taft, with whom he played in Washington, as well as at Murray Bay, from the late 1890s onward.[61] And so it was fitting, at least from a golfing perspective, that by the time Harlan's number-one golf buddy took the presidential oath of office on March 4, 1909, the Court was majority-golfer—Harlan, Brewer, McKenna, Day, and Moody—and thus in all likelihood well prepared to accept the Taft Golf Court that was soon to come.[62]

Justice Harlan and the Game of Golf

By Richard D. Harlan

Note: The article reproduced here—Richard Harlan's story about teaching his father, the Supreme Court Justice, to play golf during their summer vacation in 1897—first appeared on pages 626 to 635 in the November 1917 issue of *Scribner's Magazine*, although it seems perfectly suited to fill a gap in Malvina Shanklin Harlan's 1915 autobiography.[63] The text is from the original. The footnotes are mine.—*Ross Davies*

It was in the summer of 1897, shortly after he had passed his sixty-fourth birthday, that Justice Harlan took up the royal and ancient game of golf, of which he soon became a devotee.

From early manhood walking had been his only outdoor recreation. It had been his daily habit to walk from his residence to the court, a distance of two miles or more, and usually he would return on foot after the adjournment in the afternoon. He was fond of occasional tramps, and on holidays and not infrequently on Sunday afternoons he was to be seen with a friend or some of his children making his way through the fields and woods of the countryside around Washington. But he had taken no other form of physical exercise and had never indulged in any sort of game, except chess and an occasional rubber of old-fashioned whist.

While he took a keen interest in current events both at home and abroad, and in a general way followed the world's progress, his chief mental diversion had been found in books of history and biography. He was a diligent reader of the lives of the great English statesmen and judges and of the great men of his own country. It is true also, as has many times been said of him, that it was his nightly habit, after retiring, to light the candles near the head of his bed, and then to read his Bible until he was ready to fall asleep. He was a constant reader of the Scriptures, and he particularly enjoyed the Psalms.

Perhaps the greatest relief to him from the tedium and pressure of his judicial labors was to meet his law students at The George Washington University, where, for more than

twenty years, and to very large classes, he lectured twice a week (often without notes) on the Constitution and constitutional law. For an even longer period he conducted a men's Bible class at the New York Avenue Presbyterian Church in Washington, of which he was one of the ruling elders. This contact with young men was a source of great satisfaction and pleasure to him.

In the fulfillment of his judicial duties he was a hard taskmaster for himself. During the long years of his service in the Supreme Court of the United States he had usually been at his desk until midnight and frequently until one or two o'clock in the morning. At times he would reverse his schedule and, retiring at about eleven o'clock, would get up before daylight to continue the study of his cases or work at his opinions until starting for the Capitol just in time for the opening of the court at the noon hour.

In that summer of 1897 he had sent his family to Murray Bay, the Canadian resort on the lower Saint Lawrence, eighty miles below Quebec, which from that time on and until his death was his summer residence, while he himself, for the month of June, went down to the summer law school of the University of Virginia to deliver a course of lectures on the Constitution. For the rest of that summer he had laid out his usual vacation tasks, having sent on to Murray Bay the records and briefs in a number of cases, in order, as was his custom, to work at them during the summer and to have his opinions ready when the court resumed its sessions in October.

In spite of the rigor of his court work, his physical strength had shown no signs of abatement; but at that time his family had reasonable grounds for fearing that the continuation of his intense labors in these different ways might within the next few years somewhat impair his vigor unless he could be persuaded to give himself more diversion, and particularly in the open air. Very fortunately, one of his sons, early that first summer at Murray Bay, had just taken up golf—the sport was then comparatively new in this country. At once he saw that it was the very game for his father. He therefore wrote several letters to him, at the University of Virginia, in which he dwelt upon the importance of an outdoor diversion for a man of his years, his sedentary habits and exacting labors. He described "this new game of golf"; he expressed the opinion that it would afford him a much-needed recreation, as old age was drawing on, besides being a form of exercise in which he would find no small pleasure and interest; and he urged him to buy a set of clubs and suitable clothes and bring them up with him to Murray Bay.

Those members of his family who specially wished him to take up golf were confident that he would become a good player. He had what sportsmen call "a good eye." For example, he had always been able to defeat his boys at such a game as quoits. He was a good shot with the rifle. Often, in the shooting-gallery improvised at the annual outing given by the lawyers of the District of Columbia, at Marshall Hall on the Potomac, he had been know to hit the bull's-eye nine times out of ten.

But apparently his son's enthusiasm for golf had as yet made no impression on him, for when he wrote from the University of Virginia in reply to his son's letters he did not even refer to what had been their chief theme.

When he arrived at Murray Bay in July he found that the place had gone golf-mad and that the entire summer colony was absorbed in it, either in actually playing it or in forming a gallery to watch the game of the more expert of the Canadian and American players. His own sons were among the most enthusiastic of the beginners at "this new game of golf." The result was that his summer home was somewhat deserted during the day, and during the evening there was much golf talk among his family and the friends who dropped in. All of this left him somewhat out of the running, so to speak, and this was unusual, for he had always been the centre of the family interests.

The concerted efforts in the family to interest him in the game made little or no progress for a week or two. To all of the arguments in favor of a form of exercise so suitable for elderly men, and to the assurances we gave him that he would not fail to find it an interesting and beneficial diversion, his invariable reply was:

"It would *never* do for a judge to be seen playing a game of that kind."

That dictum represented the attitude toward sport that was then generally taken by men of his own and the other learned professions. But it had nothing in it of the austere, Puritan objection to sports as such. It was what might be called the American view, which, up to that time, had characterized our strenuous national life.

For example, up to twenty-five years ago, no prominent senator or representative would have dared, in the course of a great debate in Congress, to snatch an afternoon off in order to take part in a golf match, or would even have dreamed of doing so—although that was the very thing such a leader of the British Parliament as Mr. Balfour often did at that time, without impairing in the least his prestige or reputation as a serious-minded politician.[64]

When his oft-repeated objection as to the propriety of "a judge playing a game of this kind" showed that the justice was apparently adamant in his feeling that it would be beneath the dignity of a professional man to be "wasting his time" by indulging in any outdoor sport, one of his sons, with a carefully feigned nonchalance, casually remarked one day that he had been "teaching Chief Judge Andrews of the New York Court of Appeals to play golf," and that he had developed "quite a good game."[65]

That far-from-innocent passing remark evidently arrested the justice's attention, for, after a few moments of eloquent silence (during which, as will appear later on in this story, he began to be attracted by the idea of beating his fellow jurist at "this new game"), he said that if he played at all he would "only play very early in the morning—long before any one else was on the links." His son replied that it made no difference at what hour he played, and that after a few days he intended to give him his first lesson. The justice did not "know about that," and would "make no promises." There the matter was allowed to rest, and we all waited for the fruitful seed of rivalry to germinate.

A day or two thereafter his curiosity as to "this new game" tempted him to walk round the links and watch his sons play. He was probably struck by the absurd disparity between the tiny ball and the six-foot-four enthusiast who was trying so hard and ineffectually to make a good shot. At all events, after observing several very poor drives, the justice remarked rather severely that the game did not "seem to be worthy of the attention of a grown-up, serious-minded man."

The criticism must have somewhat nettled his son, for he turned on his father rather savagely and said that it was very unfair and even unjudicial to condemn a game so sweepingly without first trying it himself; and at the next tee we forced a club into his hands and insisted upon his making "one drive, anyway."

The principle embodied in the ancient legal maxim, "*Audi alteram partem*,"[66] must have appealed to his judicial conscience, for he consented to "try one shot." He missed the ball entirely! Whereupon, with a gesture of mingled disgust and anger, he threw the club on the ground, exclaiming that the game was "even sillier" than he had "supposed." And at that moment it looked as if his objections to taking it up might prove to be insurmountable.

Nevertheless, a day or two afterward he was seen in an out-of-the-way field secretly trying a few shots, in the company of a sympathetic and close-mouthed clergyman of his acquaintance. And finally he consented to allow the writer to give him his first regular lesson; and an arrangement was made with a small French-Canadian caddy to meet them on the links at six o'clock the next morning.

Justices Joseph McKenna (pictured) and William R. Day were also early golf enthusiasts.

The night before that first lesson, in a conversation with Senator Newlands, of Nevada,[67] the justice was overheard saying, rather solemnly:

"I observe that my parson son, Richard, is playing this new game of golf. I suppose it's all right, here in Murray Bay, during his vacation; but I hope he will not keep it up after returning to Rochester. I fear that his congregation would not like to see their minister playing a game of that kind." The old American idea as to the propriety of a professional man indulging in a sport was dying very hard in his mind.

Six o'clock the next morning saw the justice and his son and his caddy on the links, and he felt that for two hours he could make a

thorough trial of this newfangled sport without risk of discovery.

After being given a few instructions as to his stance and the method of holding his club and approaching the ball, he took his position for the drive. He looked rather scornfully at the tiny white object perched so invitingly on the top of the high tee that had been arranged for him. Then, quickly drawing back his powerful arms, he swung the club through with a mighty effort, fully expecting, as he afterward confessed, to "knock the ball to thunder." To his amazement, he missed it altogether!

Again the golfer's everlasting chant, "Keep your eye on the ball," was repeated to him. He was, first, to look at the place where the ball *had been*, and *then* he could look up to see where it had gone to. But his second effort was almost as complete a failure as his first; for the breath of his powerful swing only caused the ball to slip off the tee for a foot or two.

In his angry surprise and chagrin, his great dome of a forehead turned to a bright scarlet, and he sternly commanded his amateur teacher to "put the ball up again." Once more the golfer's orthodox "Don'ts" were repeated to him. He was *not* to take his eye off the ball; he was "*not* to try to knock the cover off the ball," as he had been doing, but was simply to bring his arms through and let their weight "do the rest." His third attempt was a complete success. The ball went like a rifle-shot, at an angle of about 25°, to a distance of perhaps 150 yards—a pretty fair drive for ordinary players. Turning round, with a delightfully boyish look of glee upon his face, he exclaimed: "Oh, Richard, this is a *great* game!"[68]

At that thrilling moment the old American idea as to the propriety of sport in the life of a professional man had received its death-blow in his mind, and from that delightful hour to the end of his life he was a confirmed golfer.

For a week or two he continued his secret, early morning lessons. He improved so rapidly and became so enthusiastic that a foursome match was suggested, consisting of himself and Judge William Howard Taft, as representing Uncle Sam, against Chief Judge Andrews and the writer, as representing the Empire State. By that time the golfing fever had so taken hold of him, and his former ideas as to the propriety of "a judge playing a game of that kind" had been so completely thrown to the winds, that he readily agreed to play the foursome during the regular hours.

The rumor of the great match having spread through the colony of summer visitors, quite a large gallery followed the contestants around the links. "Charley" Taft, now a redoubtable member of the Yale football eleven, acted as caddy for his distinguished and genial father. At the start the little lad was quite confident that Uncle Sam would win; but toward the end he followed the match with almost tearful anxiety, for the Empire State won by two or three holes.

On the way back to our cottage the justice was very silent. Evidently he was playing the match over in his mind and was wondering just how it happened that he and Judge Taft had lost it. Meaning to have a little quiet fun out of the situation, the writer determined to make no comments on the match, but to wait and see what his father would say and do next; and, hurrying into the cottage in advance, he enlisted the other members of the household in a conspiracy of silence. Accordingly, no questions were asked as to the result of the great match, and the justice, like "Tar Baby" in Uncle Remus's story, "kep' on sayin' nuffin," while the writer, like the Bre'r Fox, "lay low" and waited for developments.[69] We might have been returning from the most commonplace tramp across the Murray Bay hills.

During supper that evening no one even mentioned golf, and the justice did not open his mouth upon any topic—which was unusual, for he was fond of table-talk. After supper he sat in his favorite corner near the blazing log fire, silent and very thoughtful. At about half-past eight he rose from his chimney-corner and said, "I think I will go to bed," and, bidding us

all "good night," he slowly climbed the stairs to his bedroom.

The next morning we two were taking an early breakfast alone. Neither of us had even so much as mentioned golf since leaving the club-house the day before, and I was waiting to hear what he would say. Finally, he broke his long silence on the subject, and, just as if only one topic had been in our minds ever since the close of the match and he were only continuing a discussion that had been going on all night, he casually remarked that he "*didn't think much of Taft's game!*"

In after years the justice was in the habit of saying that "Golf is not a game, but a disease"; and from that somewhat disparaging remark about the other fellow's game it was then evident that his own had already become a chronic case.

Hiding a smile with some difficulty, the writer admitted that Judge Taft had certainly been "clean off his game" the day before, and that he had never seen him play so badly—for the ex-President,[70] even then as a beginner, was a very dangerous antagonist; possibly "Charley's" ill-concealed filial anxiety had "queered him." To that explanation, slowly nodding his head up and down, with an air of having reached a final and thoroughly judicial conclusion, the justice replied:

"Well, I think *I* can learn this game; but *Andrews* never will!"

From that time on my father's interest in the game increased apace. Especially during that first summer, he practised his strokes at all hours and in all places, whether suitable or not. For him, the sitting-room rug was a good imitation of the putting green and a salt-cellar an excellent counterfeit of the inviting but elusive hole. But woe betide the chandelier, or the passer-by in the rear, when at night he practised some new idea as to stance or swing which he had gotten from Harry Vardon[71] or Travers,[72] and the numerous other books by famous golfers which he read with great avidity at that period.

A week or two after he had thus tasted blood in his first real match game, he saw one of his daughters-in-law knitting a fancy red-and-black waistcoat, and he asked her what it was. Being told that it was a golf waistcoat for her husband, he asked her to let him try it on—which he immediately proceeded to do. It was never seen again except upon his portly form! Not only did he thus commandeer another man's waistcoat, but he also bought a red coat to match it. He balked, however, at the knickerbockers then in vogue even for elderly men; but he compromised by putting on leggings, which gave him a very trim, sportsmanlike appearance.

Another anecdote is perhaps worth repeating, as additional evidence that a large amount of a very lovable kind of "human nature" went into the make-up of his character.

At the close of his first season at Murray Bay he played a match with a distinguished French-Canadian judge, and somewhat to his surprise he was badly beaten. Some friend of the Quebec jurist had evidently seen the match and been interested in its spicy international aspect, for several days afterward there appeared in one of the Montreal papers a full and rather amusing account of it, in which special emphasis was laid on the fact that the Canadian jurist had worsted "the United States Supreme Court at the ancient and royal game of golf," and the justice had to stand quite a bit of good-humored chaffing on the subject, at the hands of his boys and his Canadian and American friends at Murray Bay. Of course he took it most good-naturedly, but it was evident to his family that his growing pride as a golfer and his pride as an American had both received a rude shock, and we boys had premonitions then of a challenge from him for a return match at the very opening of the next summer.

Thanks to the opportunities for practice snatched at intervals during the open Washington winters at the Chevy Chase Country Club (which he joined immediately upon his return that autumn), his game had greatly

improved by the following summer, and as soon as the Quebec jurist arrived at Murray Bay he was served with a good-humored, formal challenge to a return match in the "Canadian-American Champion Series." On that occasion the justice, to his great delight, was decidedly victorious.

For several days afterward it was observed that he carefully examined the sporting columns of that same Montreal paper—the part of a newspaper that he had never been known so much as to glance at. Finally, pointing accusingly at the paper in his hands, he said to the writer, somewhat quizzically (his very words are here quoted substantially as he uttered them):

"Last year, when Judge B., who had played golf all his life, beat *me*, that Montreal paper took nearly a half-column to tell its readers how the French-Canadian jurist had downed the Supreme Court of the United States; but I wish simply to call your attention to the fact that, *this* year, when the American judge was even more victorious than his opponent had been last year, this same enterprising Canadian newspaper doesn't even give a line to the return match."

It was a touch of "human nature" in a golfer that bridged all the years between father and son.

By the end of his second or third year on the links his descent of the golfer's Avernus[73] had become so complete that, quite as a matter of course, he accepted an election for one or two years to the presidency of the Murray Bay Golf Club, and for twelve or more years, during the happy summers spent in the bracing air of the lower Saint Lawrence region, he rarely missed a day on the links. In the first two or three summers he often played twice a day, making his thirty-six holes. To him an ordinary rain was no obstacle at all; he would say that it was "only a Scotch mist," and that it could easily be negotiated with the help of an umbrella, which he always carried in his golf-bag, as if it were one of his clubs. After making his stroke he would hoist the umbrella and, blissfully oblivious of even a sharp shower, he would follow up his ball with a stately and springy step, full of high hopes for his next stroke. And when he returned to the cottage he would tell us how he had made one hole in four strokes and a certain very difficult hole in five, and another, a short and very "sporty" hole, in three; and what hard luck he had on another, "perfectly simple hole," etc., etc.

Eventually he developed a very accurate and effective game. Many a better golfer was quite often beaten by him because of his steady playing through the fair green—his safer though shorter shots more than making up for the longer but erratic shots of his more brilliant opponent. And on the putting-green he won many a hole with his deadly eight and ten foot putts, which, standing erect like a flagstaff, he generally made with one hand.

He became such a familiar and welcome figure on the Murray Bay links, and was so closely associated with the development of the club, that when, in later years, the course was rearranged and names given to the holes, one of his favorites was named "The Justice," in his honor, another hole being called "The President," in honor of his partner in that first four-some match of "Uncle Sam *vs.* the Empire State."

So contagious was his pleasure in the game and such was his genial *camaraderie* that he became a much-sought-after companion on the links, both at Murray Bay and at Chevy Chase. Younger men were specially keen to try conclusions with "the justice."

The writer remembers one instance where the much younger golfer (a certain Mr. S.) came home from the links "a sadder and a wiser man." This gentleman was the writer's guest at Murray Bay about the summer of 1900, by which time the justice was among the best of the group listed in golf-clubs as "Class C."

Mr. S. was inclined to take his own game rather seriously. Though at the time he was on the shady side of fifty-five and was at least ten

years younger than the justice, he never admitted his age, preferring to be classed with the "boys" in the forties. He confessed to the writer that he would like to see what *he* could do against "the justice." Slyly encouraged thereto by the writer, he sent him a respectful challenge, which was gleefully accepted. Upon his return from the links, when asked by the writer how the match had turned out, Mr. S. exclaimed:

"He's a wonder! Why, he beat me seven up, with six to play. I felt like that Texan whose house and barns and chickens and wife had been swept away by a tornado; it was 'so d—-d complete' that I had to laugh."

The next morning Mr. S. had a caller in the person of Jackson, the colored messenger assigned to the justice by the marshal of the court. Jackson had become so much attached to the family, and they to him, and had so identified himself with the justice and all that concerned him, that, in speaking to or of the justice, he never used the pronouns of the second or third persons, but always said "we" and "our." The following dialogue then ensued:

"How are you feeling this morning, Mr. S.?"

"Oh, I'm feeling very well, Jackson. Why?"

"Well, Mr. S., we were just wondering how you felt this morning, after the game; for we have made up our minds that, after this season, we are only going to play with the *young* men, with the men of our class."

And this double shot from the faithful henchman of a man of sixty-seven, who was also a novice! Mr. S., however, was a good enough "sport" to tell this good story on

Harlan (right) and Lord Gerald Fitzgibbon, a prominent Irish judge, were photographed in 1899 during a visit Fitzgibbon paid to Canada.

himself all over Rochester. He is probably still telling it.

The writer can vouch for the truth of a certain other story about the justice which even now, every once in a while some paragrapher sends on its fresh rounds through the newspapers.

Among his favorite companions on the Chevy Chase links was a prominent Episcopalian clergyman in Washington. The reverend doctor had just missed his drive completely. Though greatly surprised and disgusted, not a word escaped his lips. Whereupon the justice (quoting unconsciously from one of John Kendrick Bangs's delightful golf tales, which he had recently read[74]) remarked:

"Doctor Sterrett, the things you didn't say were something awful. That was the most profane silence I ever heard!"[75]

Often, during the mild Washington winters, when he was troubled by a knotty point in some case before the court, he would go out very early in the morning to Chevy Chase, for a short singleton on the links, his small negro caddy being his only companion; and then returning home, with a freshened mind, he would successfully attack the legal problem that had perplexed him. And as the spring approached he would begin to look forward to the good times he meant to have, during the next summer, on the wind-swept links at Murray Bay, drinking in the glorious views of the majestic Saint Lawrence between strokes, and accumulating new strength of body and clearness of mind for his arduous work on the bench.

There can be no doubt that "this game of golf," at which he shied so decidedly when first he was urged and tempted to try it, added not a few years to his life. It certainly kept him physically and mentally vigorous to the very end of his days.

A telegram of congratulation that was sent to him by a fellow golfer on his seventieth birthday will make an appropriate finis to this story:

"Many happy returns of the day,
Seventy years up, and many more to play."

And he did "play" eight years more—keenly enjoying his game up to almost the very last, when the curtain dropped upon his earthly life.[76]

ENDNOTES

[†]Thanks to Curtis Gannon, Paul Haas, and Allison Hayward. Copyright © 2010 Ross E. Davies.

[1]Charles Page Smith, **James Wilson: Founding Father, 1742–1798**, at 18 (1956).

[2]*See* The Bruntsfield Links, http://www.bruntsfieldlinks.co.uk/ (last visited May 23, 2010).

[3]Letter from Thomas Young to James Wilson, Jan. 24/26, 1785, James A. Montgomery Collection, Historical Society of Pennsylvania; *see also* Burton Alva Konkle, **James Wilson and The Constitution** 8 (1907); Smith, *supra* note 1, at 395 n.8 (Smith incorrectly gives October 6, 1783 as the date of the letter).

[4]*See* 2 **The Documentary History of the Supreme Court of the United States, 1789–1800**, at 71, 76, 293, 483–84, 496 (Maeva Marcus ed., 1988).

[5]*See* Ross E. Davies, *Founders' Golf* (forthcoming).

[6]Robert Browning, **A History of Golf** 116–17 (1955); *see also, e.g.*, Herbert Warren Wind, **The Story of American Golf** 16–17 (3d ed. 1975) (hereafter Wind); H.B. Martin, **Fifty Years of American Golf** 49–50 (1936; 1966 prtg.) (hereafter Martin).

[7]George B. Kirsch, **Golf in America** 3 (2009) (hereafter Kirsch).

[8]One sign of an early interest in golf among lawyers is the game's frequent appearances in an entertaining nineteenth-century law magazine, the *Green Bag*. *See, e.g.*, "See the Law Courts in Edinburgh," 1 *Green Bag* 79 (1889); "London Legal Letter," 3 *Green Bag* 435 (1891); "The Story of the Parnell Commission," 6 *Green Bag* 362, 364 (1894); Irving Browne, "The Lawyer's Easy Chair," 8 *Green Bag* 345 (1896); "Editorial Department," 9 *Green Bag* 286, 416, 464, 508 (1897); "Editorial Department," 10 *Green Bag* 411 (1898); "Editorial Department," 11 *Green Bag* 290 (1899); "Editorial Department," 12 *Green Bag* 434 (1900); Charles C. Soule, "The First Editor of 'The Green Bag'", 13 *Green Bag* 551, 552 (1901); "Editorial Department," 16 *Green Bag* 115 (1904).

[9]C. Turner, "Golf: The Woman's Championship," *Outing, an Illustrated Monthly Magazine of Recreation* 193 (1896); "Personals," *The Independent*, Oct. 29, 1896, at 9; Wind, *supra* note 6, at 38, 582.

[10]David L. Hudson, Jr., Women in Golf: The Players, the History, and the Future of the Sport 11–12 (2007); Kirsch, supra note 7, at 54; Grahame L. Jones, "These Kids Today," *L. A. Times*, Sept. 16, 2006, at 8.

[11]"Beautiful Golf Links Draw Army of Players," *Wash. Post*, June 3, 1906, at S2; Robert L.A. Adams and John F.

Rooney, Jr., "Evolution of American Golf Facilities," 75 *Geographical Rev.* 419 (1985).

[12]Kirsch, *supra* note 7, at 8–10, 21–23.

[13]Albert Halstead, "The President at Work—A Character Sketch," *The Independent*, Sept. 5, 1901. It has been reported that McKinley did in fact play "a few rounds" of golf in 1897 at the urging of Vice President Garret Hobart, but "gave it up, because of the walking that it required." Martin, *supra* note 6, at 262; *but see* "National Capital Topics," *N.Y. Times*, June 11, 1899, at 17 (reporting that McKinley showed some curiosity about golf, but opted not to play).

[14]Gustav Kobbé, "The Country Club and Its Influence upon American Social Life," *Outlook*, June 1, 1901; *see also* "The Sport of Presidents," *Chi. Daily Trib.*, June 28, 1902, at 12 (noting—after the active Theodore Roosevelt succeeded McKinley as President—that "[i]t is not long since people were shocked to read of a justice of the supreme court and a senator profanely batting a little ball around a golf course."); *see* Linda Przybyszewski, **The Republic According to John Marshall Harlan** ch. 7 (1999) (discussing changing conceptions of manhood in American society and Harlan's conception of it in particular); *cf.* Harold H. Burton, "John Marshall—The Man," 104 *U. Pa. L. Rev.* 3 (1955) (describing the ever-extraordinary Chief Justice: "A champion at quoits, and generally a leader in athletic contests, he was nicknamed 'Silver Heels' because of the white yarn that his mother had knitted into the heels of the woolen stockings in which he won many foot races.").

[15]"Nestor of the High Tribunal," *Wash. Post*, Apr. 16, 1905, at E7 ("Judge Harlan is a famous golfer, unquestionably the greatest golfer[] of the American bench, now or heretofore.").

[16]Malvina Shanklin Harlan, **Some Memories of a Long Life, 1854–1911** at 152 (1915; 2002 prtg.) (hereafter Harlan).

[17]*Id.*

[18]*See* Ruth Bader Ginsburg, "Foreword," *in* Harlan, *supra* note 16, at viii, xvii; 26 *J. Sup. Ct. Hist.* 109–211 (2001).

[19]Richard was not the only family member to encourage the Justice's golf habit. An 1899 story in the *Atlanta Constitution* reported that "five days out of the week," after an early morning walk to the Chevy Chase Club, "Justice Harlan and his daughter play golf until about 7 o'clock." "Justice Harlan as a Golf Player," Atlanta Const., June 3, 1899, at 6.

[20]Richard D. Harlan, "Justice Harlan and the Game of Golf," 52 *Scribner's* 626 (1917); *see also* Tinsley E. Yarbrough, **Judicial Enigma: The First Justice Harlan** 207, 265 n.8 (1995).

[21]*See* "Taft's Singularly Progressive Career," *Boston Daily Globe*, June 19, 1908, at 7.

[22]"Athletic Justices," *[Baltimore] Sun*, Oct. 7. 1897, at 2.

[23]"East May Get Place in Supreme Court," *N.Y. Times*, Apr. 7, 1910, at 7; "Young Men in Public Life and Some Old Ones," *Atlanta Const.*, June 5, 1903, at 6; "Justice Harlan as a Golf Player," *Atlanta Const.*, June 3, 1899, at 6.

[24]*See, e.g.*, "Justice Harlan Plays Golf," *Chi. Daily Trib.*, June 5, 1900, at 5 ("I have been holding court in Cleveland and took advantage of the nearness to Chicago to run up here for a few days . . . and am going out to show my friend [Robert Todd] Lincoln how we play golf in Washington.").

[25]*See, e.g.*, "Harlan's Birthday Golf: Down in 75 and Was 75 Years Old Yesterday," *N.Y. Times*, June 2, 1908, at 1; *see also, e.g.*, "Justice Harlan at Golf: Celebrates 30th Anniversary of His Appointment to Supreme Bench by Playing Justice McKenna," *Boston Daily Globe*, Nov. 30, 1907, at 14.

[26]*See, e.g.*, "Supreme Court Justices at Play," *Trenton Evening Times*, Oct. 25, 1910, at 9 (Deputy Clerk of the Court James D. Maher declines early morning round with Harlan); "Our Supreme Court as Human Beings," *Sunday [Portland] Oregonian*, June 5, 1910, § 6, at 4 (cow picks up ball); "Snapshots of Secretary Taft," *Pensacola Journal*, Sept. 8, 1907, at 2 ("'Can you beat Mr. Taft at golf, Judge Harlan?' he was asked the other day. 'Oh, no, although he weighs a ton or more, he is twenty-five years younger than I,' replied the justice."); "Gossip from Washington," *Salt Lake Herald*, May 17, 1903, at 6 (hole in one).

[27]20 *Green Bag* 384 (1908); *see also, e.g.*, Frederic J. Haskin, "Personal Stories," *Wash. Herald*, Apr. 11, 1907, at 7.

[28]R. Douglas Francis, "Blake (Dominick) Edward (1833–1912)," **Oxford Dictionary of National Biography** (Oxford University Press, 2004), *available at* http://www.oxforddnb.com/public/index.html (last visited May 23, 2010).

[29]Roughly: "What they do, they do with a will."

[30]"Speech of Sir Edward Blake," *in* **Dinner Given by the Bar of the Supreme Court of the United States to Mr. Justice John Marshall Harlan in Recognition of the Completion of Twenty-five Years of Distinguished Service on the Bench** 49, 55–56 (Dec. 9, 1902).

[31]"Young Men in Public Life and Some Old Ones," *Atlanta Const.*, June 5, 1903, at 6; "Justice Harlan at 70," *Wash. Post*, June 2, 1903, at 13; Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** 160 (1992).

[32]129 S. Ct. 1800, 1827 (2009) (Stevens, J. dissenting); *see also* "Legal Notes," 63 *Alb. L.J.* 124, 126 (Mar. 1901) ("It was at one of the [Court's] lunch symposiums, it is said, that Justice Harlan made the remark that golf was the most blasphemous game ever invented."). Many years ago, the *Green Bag* proposed a partial solution of a sort: "A law should declare it perfectly proper for a clergyman to say something besides 'Fudge' when he hits at a golf ball and plows up a ton of earth." "Items of Needed Legislation," 18 *Green Bag* 704 (1906).

[33]"Judge Harlan's Recreation," *New Haven Evening Register*, Dec. 29, 1899, at 16; *but see* "National Capital Topics," *N.Y. Times*, June 11, 1899, at 17 (Harlan "combined business with pleasure, for he would take along his decisions and read and correct them while making the journey to and from the [Chevy Chase] club.").

[34]"Capitol Chat," *Wash. Post*, Apr. 22, 1902, at 6.

[35]*See, e.g.*, Letter from John M. Harlan to William R. Day, June 14, 1904, in Box 20, Papers of William R. Day, Library of Congress, Manuscript Division (hereafter Day Papers); letter from John M. Harlan to William R. Day, July 10, 1906, in Box 21, Day Papers.

[36]*See, e.g.*, "Notes," 37 *Am. L. Rev.* 724, 757 (1903) ("It is said that Mr. Justice Harlan, of the Supreme Court of the United States, took a box of papers with him to his country home to study during his summer vacation. He did not do any studying. His cheerful excuse was that golf was not a game, but a disease, and that he had caught it.").

[37]Letter from John M. Harlan to William R. Day, Sept. 20, 1904, in Box 20, Day Papers, *supra* note 35.

[38]Letter from John M. Harlan to William R. Day, July 10, 1906, in Box 21, Day Papers, *supra* note 35.

[39]182 U.S. 244, 247 (1901); "The 'Tip' of a Calf's Tail," *Law Notes*, July 1901, at 80.

[40]*Cf. Flood v. Kuhn*, 407 U.S. 258, 260–64 (1972) (Blackmun, J.). The Court did not decide a golf case until *Landress v. Phoenix Mutual Life Insurance Co.* in 1934. 291 U.S. 491 (1934).

[41]184 U.S. 624 (1902).

[42]Statement of the Case, Points and Authorities, Brief and Argument for Appellant 17, *Reloj Cattle Co. v. United States*, No. 204, OT1900 (filed Feb. 15, 1900).

[43]"Current Topics," 65 *Alb. L.J.* 201, 202 (Mar. 1901).

[44]"Justice Harlan Has Served Thirty Years," *Law Notes*, Jan. 1908, at 196; *see also, e.g.*, "Look for Change in Supreme Court," *Chi. Daily Trib.*, Feb. 15, 1907, at 1 (Harlan was unlikely to step down because "[h]e is as good on the golf field as he is on the bench").

[45]"East May Get Place in Supreme Court," *N.Y. Times*, Apr. 7, 1910, at 7.

[46]*See, e.g.*, Tony Mauro, "Coming of Age: Slowing Down? Hardly. Justice John Paul Stevens Is Playing a Lead Role This Term," *Legal Times*, Mar. 9, 2009, at 1.

[47]"Dominant Figure Removed by Death," *Wash. Times*, July 4, 1910, at 2 (Fuller "was occasionally a visitor at the Chevy Chase or Metropolitan Club. At the former he sometimes took a turn upon the links, although not so ardent a devotee of golf as Mr. Justice Harlan."); "Bishop on the Links," *Wash. Post*, Sept. 29, 1907, at 2 ("[T]he Bishop of London was carried off to the Chevy Chase Club, seven miles away from Washington, to try his skill at golf with Justice Brewer, of the United States Supreme Court . . ."). The *Philadelphia Inquirer* reported that White was among the "famous golfers" who were members of the Chevy Chase Club, but I have found no reports of White actually playing. "Golf Down South Is All the Rage," *Phila. Inquirer*, Mar. 2, 1913, at 3; *see also* "Dull Cares of State Forgotten on the Golf Links," *Wash. Times*, Mar. 15, 1903, at 7 ("Justice White . . . acknowledges that he is 'always an interested spectator,' but who can tell when he, too, may fall by the wayside and emulate the example of his brother legal luminaries [Harlan and McKenna]?").

[48]*See* Ross E. Davies, *Golf and Fitness . . . for Office* (forthcoming).

[49]Holmes "did not participate in athletics and did not mention any regular forms of exercise in his correspondence." G. Edward White, **Justice Oliver Wendell Holmes, Jr.** 122 (2006); *see also* **The Making of the New Deal: The Insiders Speak** 34 (Katie Louchheim ed., 1983) (quoting Donald Hiss, one of Holmes' secretaries: "There was nothing that did not interest him except athletics.").

[50]"National Capital Topics," *N.Y. Times*, June 11, 1899, at 17.

[51]*Id.*; *see also, e.g.*, "Supreme Court Golf," *N.Y. Times*, Nov. 30, 1907, at 7.

[52]"Capitol Chat," *Wash. Post*, Jan. 20, 1901, at 16.

[53]Matthew McDevitt, **Joseph McKenna, Associate Justice of the United States** 227 (1946) (citing *Illustrated Sunday Magazine*, May 21, 1916).

[54]"Thirty Years in Supreme Court: Justice Harlan Celebrates Anniversary by Playing Golf," *N.Y. Daily Trib.*, Nov. 30, 1907, at 6.

[55]"Uncle Sam's Highest Court and Men Who Compose It," *Montgomery Advertiser*, Jan. 30, 1910, at 5.

[56]*See* Ross E. Davies, "A Crank on the Court: The Passion of Justice William R. Day," 38 *Baseball Res. J.* 94 (2009).

[57]Letter from John M. Harlan to William R. Day, June 14, 1904, in Box 20, Day Papers, *supra* note 35 ("By the time you get here, I will be able to hold my own with you under a handicap of one stroke a hole.").

[58]Letters from Charles W. Fairbanks to William R. Day, Aug. 16 and 26, 1906, in Box 21, Day Papers, *supra* note 35 ("Mr. Justice Day was responsible, for it was he who had led me from the gently paths of meditation to the all-absorbing 'links.'").

[59]Letter from William R. Day to James H. Hayden, Mar. 27, 1914, in Box 3, Day Papers, *supra* note 35.

[60]*See* "Ex-Justice Moody Dies at His Home," *N.Y. Times*, July 2, 1917, at 9 (golf); "Forgot Court for Baseball Talk," *Phila. Inquirer*, Dec. 12, 1908, at 10; "'What Is Your Ideal Vacation?' Answered by Prominent Washington Men," *Wash. Times*, June 26, 1904, at 5 (sailing).

[61]*See, e.g.*, Frederic J. Haskin, "President Taft's Birthday," *Fort Worth Star-Telegram*, Sept. 15, 1910, at 6; "Taft Vigor Due to Outdoor Life and Wholesome Habits," *Chi. Daily Trib.*, June 19, 1908, at 20; "Athletes Run Government," *Boston Daily Globe*, July 16, 1905, mag. sec. at 5.

[62]*Cf., e.g.*, "Mr. Taft and Two of His Golf Cabinet," *Atlanta Const.*, Mar. 7, 1909, at B1; "A Review of the World," 46

Current Literature 347, 358–60 (1909); "A Session of the Golf Cabinet," *Puck*, Jan. 6, 1909, at 6.

[63] *See supra* notes 16–20 and accompanying text.

[64] Arthur James Balfour was a prominent British politician of the late nineteenth and early twentieth centuries. While a Member of Parliament (1874–1922), he held numerous offices, including Prime Minister (1902–1905) and Foreign Secretary (1916–1919). Mention of his name here would have seemed especially appropriate to a reader of *Scribner's Magazine* in November 1917 because Balfour was very much in the news at that time, having just issued what is known to history as the Balfour Declaration (November 2, 1917): "His Majesty's government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country." *See, e.g.*, "Zionists Get Text of Britain's Pledge," *N.Y. Times*, Nov. 14, 1917, at 3.

[65] Charles Andrews served on the New York Court of Appeals from 1870 to 1897, and as Chief Judge from 1881 to 1882 and 1893 to 1897. "In Memoriam: Minute of the Court of Appeals in reference to the Death of Charles Andrews," 224 *N.Y.* [unpaginated insert between pages 733 and 735] (1919).

[66] Roughly: "Hear the other side" or "No one should be condemned unheard." Bryan A. Garner, ed., **Black's Law Dictionary** 1706 (8th ed. 2004).

[67] Francis G. Newlands of Nevada served in the U.S. House of Representatives from 1893 to 1903 and in the Senate from 1903 to 1918. See Newlands, "Francis Griffith (1846–1917)," in **Biographical Directory of the United States Congress: 1774-Present**, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000069 (last visited May 23, 2010).

[68] Long before Richard's memoir was published in 1917, this episode had morphed into the kind of myth of superhuman excellence with which admired celebrities are sometimes burdened. By 1908 at the latest, Harlan's initial struggles to drive the ball had been journalistically papered over, and it was with his first casual swing of a club that "the almost startled justice saw the little white sphere sail gracefully away for 150 yards." "How Harlan Learned Golf," *Boston Daily Globe*, Mar. 22, 1908, at 11. And it had become the famous and powerful Senator Francis G. Newlands, rather than the not-so-famous and not-so-powerful Richard Harlan, who induced Justice Harlan to swing the club in the first place. *Id.*

[69] *See* "The Wonderful Tar-Baby Story," *in* Joel Chandler Harris, **Uncle Remus: His Songs and His Sayings** 7, 9 (rev. ed. 1895).

[70] This is a clumsy reference. In 1917 (when this article was written) Taft was indeed an ex-President, but in 1897 (when the action in the article is taking place) he was a judge on the United States Court of Appeals for the Sixth Circuit.

[71] Harry Vardon, from the Bailiwick of Jersey (a British Crown dependency in the English Channel), was an early popularizer of golf in America. He won many golf competitions, including the U.S. Open in 1900 and several British Opens. He was most famous in the U.S., however, for his loss to Francis Ouimet in the 1913 U.S. Open. *See generally* Mark Frost, **The Greatest Game Ever Played: Harry Vardon, Francis Ouimet, and the Birth of Modern Golf** (2002).

[72] Jerry Travers was a successful American amateur in the early 1900s, winning the U.S. Amateur Championship in 1907, 1908, 1912, and 1913, and the U.S. Open (as an amateur) in 1915. But he did not come out with his first golf book until 1913, two years after Justice Harlan's death, which, when combined with the reference to "other books" in the text above, makes it unlikely that "Travers" is the correct name here. *See* Wind, *supra* note 6, at 54–61; Jerome D. Travers, **Travers' Golf Book** v (1913).

Perhaps Richard Harlan meant Walter J. Travis, another early contributor to the growth of American golf. Born in Australia and a naturalized U.S. citizen, Travis was, like Travers, a successful amateur (he won U.S. Amateur Championships in 1900, 1901, and 1903, and the British Amateur in 1904). In addition, he was an early and prolific contributor to golf literature. He wrote two influential books—**Practical Golf** (1901) and **The Art of Putting** (1904)—and numerous articles, and he founded the *American Golfer* magazine in 1908. *See* Wind, *supra* note 6, at 43–53. In a 1904 article on a golfing dispute, the *New York Sun* reported that it had been "laid . . . before Walter J. Travis, the supreme court of golfing law." "Golf," *The [New York] Sun*, Oct. 31, 1904, at 8.

[73] *Cf. facilis est descensus Averni*, roughly: "easy is the descent to Hades." When this article was slated to be a chapter in Malvina Shanklin Harlan's **Some Memories of a Long Life**, the working title was "Facile Descensus Golf-erni." *See* Malvina Shanklin Harlan, "Some Memories of a Long Life 1854–1911" (unpaginated typescript 1915), *on* Reel 16, John Marshall Harlan Papers, Library of Congress, Manuscript Division, Washington, DC ("Note.—The above mentioned story forms a separate and independent chapter of these 'Reminiscences'—see Facile Descensus Golf-erni.")

[74] This might be a reference to "Golf in Hades." *See* John Kendrick Bangs, **The Enchanted Typewriter** 157, 170 (1899).

[75] "Doctor Sterrett" was probably James MacBride Sterrett, who was, like Justice Harlan, an avid golfer, a member of the Chevy Chase Country Club, and a member of the faculty at George Washington University. "Washington Rector Takes His Own Life," *N.Y. Times*, June 1, 1923, at 8; *see also* "John Marshall Harlan," 17 *Va. L. Register*

497, 503 (1911); Marshall Brown, **Wit and Humor of Bench and Bar** 126 (1899).

[76]At least one of Justice Harlan's colleagues on the Supreme Court approved of the son's decision to publish his recollections. Richard Harlan passed a pre-publication draft of the article to Justice Day, who responded via letter on March 20, 1917:

My Dear Dr. Harlan:

> I have read with great interest and pleasure your proposed sketch of "Justice Harlan and the Game of Golf". It seems to me to present an interesting and attractive picture of what his friends thought to be a very human side of Justice Harlan's character, and I think it will be greatly enjoyed by all who read it. I find nothing in it which can detract from his well-known character and standing in the more serious affairs of life.

Letter from William R. Day to Richard D. Harlan, Mar. 17, 1917, in Box 4, Day Papers, *supra* note 35.

Joining the Court: Pierce Butler

DAVID SCHROEDER

In a four-year span beginning in the summer of 1921, five new members took their seats on the Supreme Court, and three of those men—the middle three—arrived on the Bench within four months of each other. The first of the five was William Howard Taft, who, upon the death of Edward Douglass White, was named Chief Justice of the United States by President Warren G. Harding. Minnesota corporate lawyer Pierce Butler wrote Taft a genial letter, extending his congratulations and best wishes. "I felicitate you because it is an honor to any man to be chosen to that, the most exalted position in the world, and because no one who is qualified to discharge the duties of the office can fail to rejoice in attaining it. But the country is to be congratulated much more than you are."[1]

Years earlier, former President Taft and attorney Butler both had been involved in the Grand Trunk Railroad arbitration, Taft as one of three arbitrators and Butler as one of two counsel for the Canadian government. During the proceedings, each man sized up the other professionally, and each was favorably impressed; the men developed a cordial personal relationship, staying at the same hotel and dining together several nights a week. As President, Taft had relished appointing men to the Supreme Court, and as Chief Justice he felt free to offer Harding and Attorney General Harry Daugherty advice on whom they should consider for a number of imminent vacancies. As the Court paused for its 1922 summer recess, the Chief believed it was not inconceivable that four seats might become vacant within a year or two. Oliver Wendell Holmes, Jr., was eighty-one and weakening physically. Joseph McKenna was seventy-nine and ailing mentally. At seventy-three, William Rufus Day had been quite ill earlier in the year and planned to retire soon. Mahlon Pitney was only sixty-four, but he had suffered a stroke the previous year. In addition to the possibility of those vacancies came an actual and unexpected vacancy: John Hessin Clarke resigned to devote his energies to encouraging America's entry into the League of Nations and "to read many books; to travel; and to serve my neighbors and some public causes."[2] Taft weighed in on Clarke's resignation and replacement.

> If this is true [Taft told Harding], and you have appointed Senator [George] Sutherland, I have no doubt he will be

> promptly confirmed, and I congratulate you on the strength he will give to the Court. Clarke was a good fellow, but I differed with him a good deal in respect to his constitutional views, and I do not think he has been happy on the Court. He lost his sister during this last year, who was his only relative, and it has seriously affected his peace of mind. I think, too, he is not in good health, nor do I think that the work on the Court was pleasing to him. It seems a curious circumstance, though I could explain it, that he and McReynolds are bitter enemies, due largely to McReynolds' overbearing and insulting attitude toward Clarke.[3]

Sutherland's appointment was anticipated: he had expressed to Harding his wish for a Court appointment, and Harding had all but promised him the first open seat.[4]

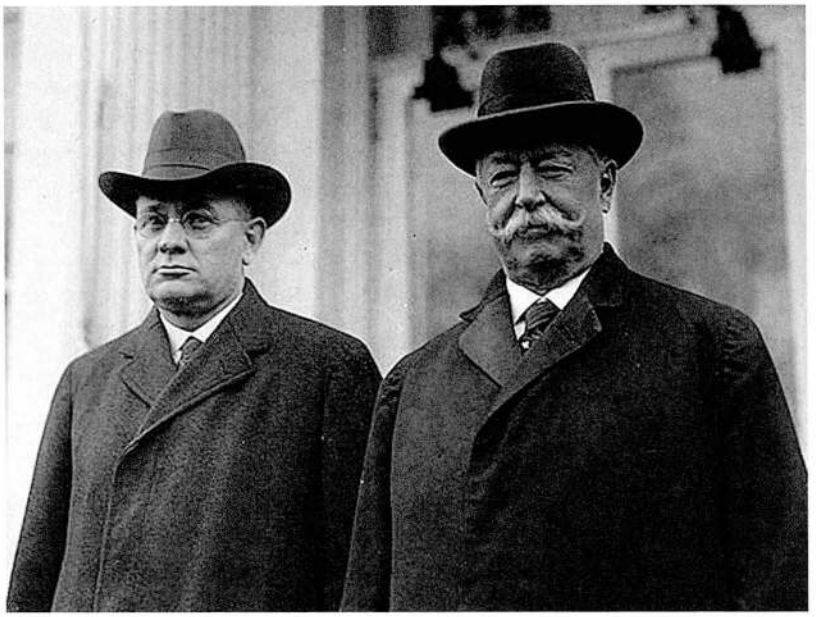
With Sutherland on the Bench and Day's retirement imminent, Harding and Harry Daugherty were bombarded with suggestions. Very early, Harding had voiced his desire to appoint a Democrat; a second criterion, that the nominee be a Catholic, seemed reasonable since the only representatives of that faith were the late Chief Justice and McKenna, whose seat many expected to be vacant soon. Taft and his alter ego Justice Willis Van Devanter saw John W. Davis, a Democrat and Solicitor General in the Wilson administration, as the best candidate. Charles Hilles, personal secretary to President Taft and Republican party insider during the 1920s, suggested Victor Dowling (a member of the Appellate Division of the New York Supreme Court) and Martin Manton (a U.S. Circuit Court judge), both of whom met both criteria. Taft liked Dowling personally but thought he lacked the gravitas expected of a Justice, and Taft and others had grave reservations concerning Manton's ethics and judicial ability.

By the first week of October, Davis, who remained Taft's first choice, had not committed to accepting the nomination if it were offered. Taft began to look for another choice, given the distinct possibility that Davis would refuse to serve and Taft's perceived need to derail Manton's attempts to be nominated. Van Devanter mentioned Pierce Butler's name to Taft, and the Chief saw in the Catholic Democrat Butler a way to block Manton. Van Devanter and Butler had become acquainted and then good friends when the former sat on the bench of the Eighth Circuit and the latter argued cases before that court. By the early 1920s, bighearted Van Devanter had grown quite fond of Butler, telling him candidly, "I am glad to be your friend."[5]

Van Devanter wrote his trusted friend Judge Walter H. Sanborn of the Eighth Circuit to sound him out regarding Butler:

> Please be good enough to let me take up the following matter with you in a confidential way. By so doing we may be able to work out some public good, and, in any event, it will not do any harm. . . . Personally I am also disposed to think that Pierce Butler, of your city, would be an excellent appointee. He is a democrat, and . . . he is a Catholic. You know him well, both as a man and a lawyer, and have known him during all his professional career. Won't you tell me just what you think of him for the place? He probably knows nothing about the mention of his name, and it is just as well that he should not know. . . . I may add confidentially that the Chief Justice and I are quite agreed in opinion respecting both Davis and Butler. But it has seemed to me that, while you do not know Davis well, you do know Butler thoroughly well, and that I would like to have your opinion of him and your suggestions generally in this important matter.[6]

Sanborn replied several days later with a ringing endorsement. "I have to say that I cannot think of anyone better qualified for such a place by character, ability, learning,

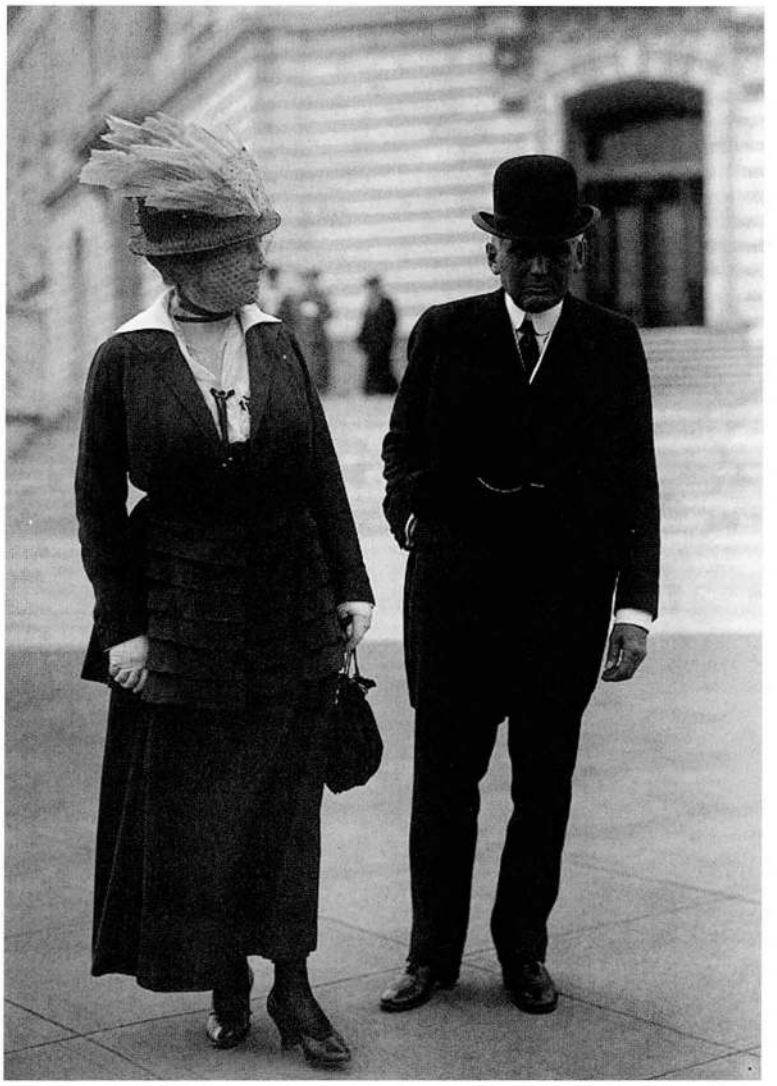


In 1922, Justice Willis Van Devanter recommended Pierce Butler (left) to Chief Justice William Howard Taft (right) for the next vacancy on the Court. Van Devanter and Butler had become good friends when the former sat on the bench of the Eighth Circuit and the latter argued cases before that court.

judgment and temperament, than he." In all respects, Sanborn wrote, Butler possessed the requisite qualities of a Supreme Court Justice: character—"above reproach"; intellect—"clear, calm, analytic and unusually powerful"; work ethic—"indefatigable"; judgment—"well endowed with the saving gift of common sense"; disposition—"even, calm and judicial." In short, Sanborn considered Butler "one of the few great men of my acquaintance."[7]

Max Pam, a Chicago lawyer and confidant of Taft, went to St. Paul to determine Butler's willingness to serve on the Supreme Court. In Butler's absence—he was in Toronto on a railroad valuation case—Pam met with Butler's oldest son, Pierce, Jr., who communicated the details of the meeting to his father. Butler quickly wrote Taft a three-page letter, expressing "complete surprise" and that he was "quite overwhelm[ed]," assuring Taft that he "did nothing directly or indirectly to suggest the thought to anyone or in any way to inspire the suggestion."[8] However, given that his name had received some attention, Butler eagerly began to promote himself to Taft. Butler stated he wanted Harding to have "full information" on him, but he noted that, since "I have not been in public life the sources of information such as the President should like to have (if, as Mr. Pam says, he is considering me) are comparatively few." Butler asked Taft for "information and friendly advice," and he told the Chief he had asked Pierce, Jr., and Butler's law partner William Mitchell to "remain inactive" on the subject. In response, Taft said he would be delighted if Butler joined the Court and that was "quite within the bounds of possibility."

At the same time Taft wrote Butler, Minnesota Senator Frank Kellogg telegraphed Harding and, apparently not thinking of Butler as a possibility, suggested Judge Francis E. Baker, "the best qualified and most available man I know.... He would be a splendid judge." But once Kellogg heard Butler was being considered, he—in a second telegraph of the same day—endorsed him enthusiastically: in the Midwest, "I consider Pierce Butler the very best man you could appoint. He is an



Minnesota Senator Frank Kellogg (pictured, with his wife) also endorsed Butler but asked President Warren Harding to hold off on nominating the conservative Democrat until after the next election, for fear the endorsement would hurt Kellogg's re-election bid. (Kellogg was defeated by a liberal opponent.)

exceedingly able lawyer; a man of high character and standing; young and vigorous and would be a great addition." In a third telegram to Harding that same day, Kellogg qualified his recommendation of Butler, suggesting Cordenio A. Severance, "the most eminent lawyer in the Northwest and the best qualified man I know for the position and is the right age," unless the President was looking for a Democrat. Five days later Kellogg telegraphed Harding again, and, qualifying his previous note, said Severance would "heartily endorse Butler and call on you" to speak about the matter.[9] Kellogg ended the flurry of correspondence with a strong endorsement of Butler, and he mused in a postscript that the appointment of a Democrat should not hurt Kellogg in the coming election, "but the Lord only knows what will hurt a man, and if you can it would be a good plan to hold up the appointment until after election."[10]

As the calendar turned to November, Butler wrote a remarkable letter to Pierce, Jr. The letter is quite extraordinary because of its candor, and it is an excellent example of Butler's stream of consciousness style of writing.[11]

Butler recapped events as he knew them and then turned to the difficult task of promoting himself without being seen to do so.

> [The President] does not know who such friends of mine [who could provide helpful information] are nor does K[ellogg] and S[everance] and anyone else besides you and Mitchell, except to a limited extent.... The problem of much difficulty is due to the fact that my friends who would want to help know nothing of the situation. I cannot and am not at all inclined to tell them. I will not ask anyone to do anything to promote the matter and I think you should avoid doing so. Yet I feel that there are some who would think that they ought to be told what is going on at least. So there you are. A dilemma in a sense.

Then Butler conceived a bit of intrigue, both revealing how appealing the idea of a spot on the Supreme Court had become and steeling himself that the appointment might go to another.

> If you call on the Chief or Vandevanter [*sic*] or both do so as soon as convenient. I think calls on Justices are only made at their residences, and that callers are never received at the Capitol.... They do their work at home. It would seem certain that ~~either~~ both will receive you cordially. I think I would call on Chief first. Possibly it would be best to 'phone his residence to ask whether he will receive you, and if so, when. His secretary will answer 'phone and you will tell him—if you are asked—that your call is merely personal and social. You will not ask anything of either. Merely call to pay your respects and mine and let the situation be developed for you. If asked directly or indirectly to tell what is going on speak without any reservation as to facts, and observe most carefully exactly what is said. Effort may be made to impart what you are wanted to know or understand without very definite statement, you know—naturally there will be some,—there may be much—reserve.... [M]ake it perfectly plain that you have not come to Washington to see them and also that I am not initiating any activity on your part or on the part of anyone else.... [T]he appointment of someone else will not be a calamity to me or to you or any of our family.... You cannot under any circumstances quote a Justice and for the reason that such a [thing] is very objectionable. They may not want to see you, or seeing you, will not talk freely—

Butler concluded by recommending that Pierce, Jr., "[s]ee Severance first at Washington and take his advice about seeing Justices. He will be able to guide you. Would follow his views as to that—" There is no record that Pierce, Jr., spoke to Severance, Taft, or Van Devanter.

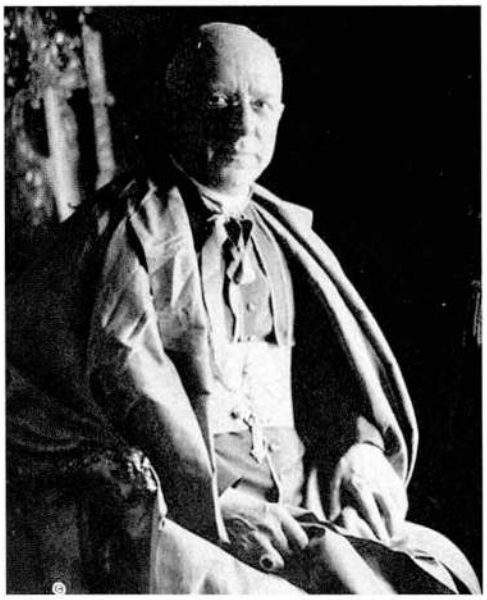
Taft also busied himself advancing Butler's prospects, writing Harding October 30 that "he would make a great Justice of our Court" and enclosing Sanborn's zealous letter from October 14.[12] And Taft encouraged Butler to ask Pierce, Jr., and Mitchell to solicit letters on Butler's behalf. "[L]etters written directly to the President on the subject, especially by such a man as Governor Preuss [*sic*], and by people whom the President is likely to know, like the Archbishop of your Diocese, and the head of the University of Minnesota, would be of utmost value, and the sooner they are sent, the better." Taft also wondered if members of the Interstate Commerce Commission (ICC) would plug Butler's expertise in railroad valuation. "Let me hear from you about this, for I am deeply interested. I have seen a letter from John Davis, saying that he will not accept...."[13] Van Devanter, too,

thought generating more communication on Butler's behalf was necessary. He wrote Sanborn that "the absence of any real effort for him may tend to produce a mistaken impression of his worth."[14]

Pierce, Jr., and Mitchell looked after Butler's interests while he was in Toronto. Butler reported to Taft that support was coming, or would come, from Minnesota Senator Knute Nelson, Governor J.A.O. Preus, Sanborn, Chief Justice Calvin Brown of the Minnesota supreme court, and President Lotus Coffman of the University of Minnesota, and Butler anticipated "the favorable interest and desire to help" on the part of St. Paul's Archbishop Austin Dowling. Butler was weighing his prospects and felt his chances were good: "We are not hearing of others having the combination of qualifications that the President is understood to have in mind now, prominently mentioned, but possibly there are some."[15] Taft's five-page response said nothing to discourage Butler, but neither did it confirm his hopes that the nomination was forthcoming soon. Taft expressed concern that Manton seemed yet to be a viable candidate, and he vented his disdain for Manton and that his Catholicism was becoming a subterfuge to keep his aspirations alive. "[P]oliticians . . . are quite willing to piece out a man's indifferent qualifications for our Bench by the plea that we need a Catholic or a Jew, and that therefore we should take one or the other, with mediocre qualifications, just because he is one or the other." Taft blamed a conspiracy for relentlessly pushing the President to consider Manton, and he held the Catholic Church partly culpable. "Archbishop [Patrick] Hayes [of New York] should be ashamed of himself for pressing Manton. Probably he does not know how unfit he is, and the Church should be saved from responsibility for his promotion to the Bench." Fortunately, Taft said, Butler—"so eminently qualified for the place"—would, as a Catholic, neutralize Manton's momentum.[16]

Butler wrote Archbishop Dowling on November 4 that he had been told, "by one whose name I am not at liberty to write, that a personal letter from you direct to the President is desirable as soon as possible. I understand that your approval and estimate of my qualities as a man lawyer and citizen is deemed important and desirable." Butler also mentioned that he understood the President would "highly appreciate" the advice of Bishop Thomas Shahan, Rector of the Catholic University of America.[17] Pierce, Jr., also wrote Dowling in early November, requesting that he write Harding. He stated that, despite Manton's "want of qualifications," the President might nominate him because it would be "good politics." Pierce, Jr., suggested that "our people are more interested in the quality of the Court . . . [and it] would be well if the President were made to realize that,—that to hope to gain the support he seeks by such a sop is poor politics, and a stimulus to resentment."[18] Dowling's willingness to help Butler was not in doubt, but—at least when compared with the late Archbishop John Ireland—there was less certainty regarding his understanding of how to accomplish it. Walter Sanborn surmised that Dowling "does not know how to do the very helpful things which Archbishop Ireland could quietly bring about with silence and certainty," but Sanborn was hopeful that those in favor of Butler's appointment "will teach him how to write a letter." When Dowling did write Harding, he was effusive in his praise of Butler, "a big, wholesome, capable man without fear and without bias in whom we, who know him, have the fullest confidence and whom we endorse without the slightest reservation."

> As a lawyer he is particularly expert—as others better equiped [*sic*] to do so than I will tell you—in the intricacies of Railroad evaluation; as a citizen he has interested himself in the equally important matter of public education and no member of the Board of Regents of our State University has had a stronger or more beneficent influence than he has had.



Butler wrote to the Archbishop of his diocese, Austin Dowling (pictured), asking him to send a letter of endorsement to President Harding. Butler hoped to stave off a rival candidate named Martin Manton, a circuit judge who was, like Butler, a Roman Catholic. The only Catholic on the Court in 1922 was Joseph McKenna, and his retirement was imminent.

> I . . . know from experience how wise his counsel is and how sane and tolerant his outlook, how informed and unerring his judgment. Sincerely religious and courageous in the profession of his convictions he has gone his way without offense and enjoys the esteem and confidence of the whole community.[19]

Bishop Shahan's letter, which reached Harding in mid-November, was a bit more vague and restrained than Dowling's, calling Butler "a representative Catholic man [who] enjoys the esteem of the Catholic people of Minnesota" and affirming Dowling's regard for Butler.[20]

Van Devanter remained optimistic that the place would go to Butler, telling Sanborn that "at this writing the indications are, and they are strong, that Pierce Butler will be selected to succeed Justice Day. . . . Things have been turning in Mr. Butler's direction, and his friends seem to have acted with discretion."[21] And Butler himself continued to act prudently, looking for possible sources of support and avoiding potential critics. To Taft's suggestion that Butler look to members of the ICC for endorsement, Butler told Pierce, Jr., that was unlikely, because "most of them differed from us in RR valuation." In fact, Butler said, "I feel that there is some danger that opposition may arise from some of them."[22] "The less that my railroad work is emphasized the better." Butler began to consider newspaper coverage should he be appointed, and he hinted that Pierce, Jr., should find "a Twin City newspaper man of prominence whom Mitchell or you could trust now and who would take an interest in getting the right kind of 'stuff' out when the time comes, if it does come."[23] A week later, Butler identified Fred Snyder and Bill McNally as men who "practically control The Mpls Tribune. McN is (of any who ought to be) personally very friendly. If you could see him or Snyder or both so as to get good stuff in 'if and when'. It might help."[24] Even before Butler was nominated, Pierce, Jr., reported to his father in Toronto that the *Minneapolis Star*, "the Socialist paper of Van Lear former Socialist mayor of Minneapolis," indicated a number of disgruntled University of Minnesota professors planned to protest Butler's appointment.[25]

Given the rather intense politicking to keep Butler's name at or at least near the top of the President's mental list of possible nominees, the tenor and date of a letter Pierce, Jr., wrote to Butler's brother Cooley are somewhat perplexing. "Confidentially," Pierce, Jr., wrote his uncle, "the President is seriously considering appointing father to the U.S. Supreme Court and may so announce next week. It . . . is a dignity far in excess of a position in the Cabinet. It is a life job and by many lawyers is regarded as of more responsibility and worth than that of President." Pierce, Jr., expressed concern that his father could not afford to serve on the Court and for that reason might decline the President's offer. "It would of course entail a great sacrifice in father's income,—the salary being 12000 per year," Pierce, Jr.,

confided in his uncle. "Father spends more than that now and could not live on twice that sum. He would have to entertain considerably,—ambassadors and such,—and that would increase the drain. His savings are almost all invested with Leo [Butler] and if Leo gets on O.K. [in the family construction business] his income would be about 25000." Pierce, Jr., calculated that a compromise might produce the best result: "Of course, he could resign after 4 or 5 years, and would then have a position at the bar similar only to that held by C.E. Hughes. . . ." The son encouraged Cooley to write Butler, because "[t]he advice of his brothers, and their affectionate counsel and support, he always values above that of any other men."[26]

Finally, neither did the Chief Justice leave anything to chance. On November 17, Taft wrote Harding, "I have secured, from the best source possible, facts as to Pierce Butler's record as a Democrat, and also what his professional relations have been, and I enclose them . . . for your consideration and possible use or reference." Taft's "best source possible" was none other than Pierce Butler himself.[27]

On November 23, 1922, Butler's long wait was over. The following day, Butler telegraphed the President with his response:

> Have been informed that you have nominated me associate justice of the Supreme Court and beg leave to say that I intend to accept the office. I fully appreciate the great honor conferred upon me and hope to be given and long retain the power to meet the great responsibilities involved. With highest appreciation I beg leave to extend my best wishes for all good things to you and yours.[28]

Justice Van Devanter had been among the first, if not the first, to float Butler's name for consideration for appointment, and he was among the first to congratulate Butler on his appointment. "It is a long time since anything has been so gratifying to me as was your nomination by the President today. For several weeks I have been striving and hoping for this result in a very modest way—not as a matter of friendship for you, but to promote the public good and maintain the high reputation and traditions of the greatest institution established by the Constitution."[29] Taft was no less pleased—"I am delighted that that which I anticipated has come about"—but, ever the politician and tactician, he anticipated "there may be some opposition to the confirmation by Borah, La Follette, Ladd or Norris" and suggested that Butler's friends see "that your fitness and judicial qualities and wide and honorable service at the Bar . . . be brought to the attention of as many members of the Senate as possible."[30] The month behind Butler had been filled with consulting and letter-writing and expectations; the month ahead brought more of the same.

Editorials in the *Minneapolis Journal* and *Minneapolis Tribune* were favorable and congratulatory to Butler and the state. Both noted that the Midwest had been underrepresented on the Court, and Butler's nomination produced "a better geographical balance." The *Tribune* noted that the Supreme Court is, at least theoretically, a nonpartisan body, but the *Journal* applauded that Butler's appointment was "designed . . . to reinforce [*sic*] the Democratic minority, now composed of the Wilson appointees, Justices Pitney, McReynolds, and Brandeis. . . . The political balance is much more important than the sectional one." The *Journal* noted Butler's winning characteristics—his "fine legal attainments and sound judicial temperament"—and his "experience in railroad law . . . [which] should prove of great value to the Supreme Court." Finally, the *Journal* commended Butler on his work as a regent at the University of Minnesota: "A partisan when partisanship was proper, [Butler] always put public weal before every other consideration."[31]

The *Minneapolis Star* ran a blistering, page-one attack against Butler and his nomination. The article quoted an assortment of "progressives, liberal lawyers, progressive

republicans, farmer-labor party leaders and independent democrats," all of whom had something scathing to say about Butler, the man who appointed him, and the Minnesota men who endorsed his appointment. Butler was vilified as "an implacable enemy of organized labor," "a pugnacious and aggressive defender of the so-called vested interests against human rights," and a man who, as a regent, "distinguished himself for suppression of academic freedom." Minnesota's Senator-elect Henrik Shipstead, a progressive who had defeated incumbent Frank Kellogg earlier that month, said, "I consider it very bad public policy to select our supreme court justices from that group of lawyers in this country who are in the employ of the big corporations and are usually found defending those corporations against the public interest." The article predicted the demise of the Republican party in Minnesota and a drive for a constitutional amendment to curtail the power of the Supreme Court. Albert Rankin, a retired Minnesota professor who several weeks previously had said he and other professors would oppose Butler's confirmation should he be nominated, changed his tune: "If we could get him out of the state by letting him be appointed to the supreme bench we agreed it would be a good thing for the university."[32] The *Star*'s editorial the following day saw in Butler's appointment a conspiracy to thwart the will of the voters and a calculated attempt to stem the tide of progressivism. In short, "Mr. Butler is known as one of the most pronounced reactionaries in the northwest."[33]

Papers outside Minnesota reacted with a bit more deliberation. In fact, neither the *Washington Post* nor the *Washington Star* editorialized on Harding's appointment, and *The New York Times* stirred in jabs at Wisconsin's Progressive Senator Robert La Follette with their praise of Butler. *The Times* called Butler a railroad lawyer—"like Abraham Lincoln"—and saw Butler's railroad work as an asset, making him "familiar with an important branch of the law." The paper also noted Butler's prosecution for the government against the meatpackers, something that "should rehabilitate him a little in Mr. La Follette's difficult esteem." Finally, it pleased *The Times* that a Republican had appointed a Democrat and that Butler was a Catholic, "worth mentioning only because certain belated bigots in various parts of the country [were] trying to proscribe many millions of our citizens on account of their race or their religion."[34]

In the following weeks, *The Nation* ran two pieces, each a bit more far-reaching in its criticisms. The editorial, "No Longer Supreme," took issue with Butler's appointment, but its attack was broader and more ominous than the obvious concern over Butler. In *The Nation*'s estimation, the Court would be "no longer supreme" if it continued to make "backward decisions" and if the President continued to appoint men whose character and learning the public no longer respected. And *The Nation* voiced the familiar lament that Harding likely would have opportunity to make three more appointments. The second piece, an article that called Butler a "Friend of Intolerance," was written by M.H. Hedges, at the time "connected" with the *Minneapolis Star*. Hedges identified a quality in Butler "that endears him to his friends and makes him not so much hated by, as hateful to, his victims—a kind of intellectual brutality." Hedges saw "an inquisitorial intolerance" in Butler, most evident in his work as a regent. "Is it likely," Hedges asked, "that the mere donning of judicial robes will change the inquisitorial zeal with which he has opposed the opinions of others, or change the intellectual habits of a lifetime formed in the service of corporations?"[35]

Writing for *The New Republic* in its December 13 edition, Abraham Harris rather complacently laid out Butler's experiences as an attorney, only hinting at criticisms of some of his clients. But Harris aimed hostile words at the person and character of Butler: "a veritable bully" in court, "aggressive to the point of being insulting, unscrupulous," "handl[ing] witnesses with a ruthlessness seldom seen";

"a reactionary of the most pronounced type"; "a professional flag-waver" during the war "and ready, figuratively, to shoot the radicals at sunrise without a trial." Harris concluded with a litany of charges against Butler as regent.[36] The magazine's editorial the following week continued Harris's tirade, calling Butler "a blind and bumptious bigot" as regent, a man "who would assuredly use a warped or doubtful interpretation of a phrase in the Constitution to prevent needed experiments in economics and government." Butler's appointment, "a piece of crass stupidity," portended the collapse of America's system of checks and balances and threatened to relegate the Court to being "a medium of obscurantism, immobility and implicit violence rather than that of enlightenment, progress and constructive consent."[37]

While the commentators were haranguing Butler, the Senate began its job of advising the President and consenting to his choice. Between November 23, when Harding sent in Butler's name, and November 28, when the Senate Judiciary Committee first recommended that the full Senate confirm Butler's nomination, three individuals contacted a number of Senators to try to create opposition to Butler. On Saturday, November 25, D.J. Leary wired Judiciary Committee Chairman Senator Nelson from Butte, Montana, and asked to appear before the committee. Leary claimed he knew "the real Pierce Butler and [could] show him [to be] a criminal conspirator [and] member of the infamous Butler-O'Brien gang who have encouraged and protected vice and prostituted justice in the city of St. Paul for more than twenty-five years." Leary wagered one thousand dollars that he could prove his charges, which he based on his belief that Butler had falsely prosecuted him in the early 1890s.[38] At the same time, an unnamed professor at the University of Minnesota wrote Senator Edwin Ladd of North Dakota, and Ladd gave the letter to the *St. Paul Pioneer Press*, where it was published that Sunday. The anonymous writer cited Butler's combative tactics in court, his domineering behavior as a university regent, and his less-than-progressive attitude toward the law.[39] The final complainant was Professor William Schaper, formerly at the University of Minnesota, who traveled to Washington that weekend to meet with two members of the Judiciary Committee—Nebraska's George Norris and Nelson—and progressive Senators he thought would be willing to listen to his concerns about Butler—Ladd, La Follette, and Iowa's Smith Brookhart. Schaper was encouraged that La Follette, and, to a lesser extent Brookhart and Norris, sympathized with his protest against Butler. The Regents of the University of Minnesota, responding to concerns expressed by the state's Commission of Public Safety, had terminated Schaper's service as professor of political science, questioning his patriotism and loyalty to America during World War I. While Schaper drafted specific charges against Butler—he accused Regent Butler of leading the charge to get him fired from the university—for presentation to the Judiciary Committee, La Follette tried to collect additional information about Butler.[40] With Butler's confirmation by the full Senate imminent, La Follette asked that Butler's nomination be removed from the list of 1,700 other names before the Senate, threatening that he would demand that each nomination be voted on separately if it were not.

La Follette's crusade against Pierce Butler was rooted in a number of distinct, albeit connected, factors. Results from the recent election—including, in Minnesota, the liberal Shipstead's defeat of the conservative Kellogg—re-energized and emboldened La Follette to push his progressive agenda in the Senate and perhaps encouraged him to expect more success in his legislative initiatives. La Follette saw in the election returns—or thought he saw in them—a growing sympathy for his views; since his views and Butler's were diametrically opposed, the Senator thought it was his duty to defeat the man whose views contradicted those expressed in the recent election.

One of La Follette's progressive ideas was a radical reshaping of the relationship between the legislative branch and the Supreme Court. In June 1922—before the election and well before there were rumblings that Butler would be named to the Court—La Follette addressed the annual convention of the American Federation of Labor (AFL). Part of his speech was an attack on the Supreme Court: "The actual ruler of the American people is the Supreme Court.... The law is what they say it is and not what the people through Congress enacts [*sic*]." Even the Constitution, he preached, is "what these nine men construe it to be. In fact, five of these nine men are actually the supreme rulers." La Follette asked the AFL delegates, "Shall the people rule through their elected representatives or shall they be ruled by a judicial oligarchy?" The Senator answered his own question, proposing the broad outlines of a constitutional amendment that would allow Congress to revote on pieces of legislation declared unconstitutional by the Supreme Court.[41]

But there was something personal, too, in La Follette's attack on Butler. The same Minnesota Commission of Public Safety who was at least partially responsible for Professor Schaper's troubles had vexed the Senator as well. In the fall of 1917, the Nonpartisan League held a Producers' and Consumers' Conference in St. Paul, and La Follette was invited to speak. Conference organizers intentionally excluded foreign policy—specifically discussion of the war—from the agenda; when League officials rejected La Follette's prepared remarks on maintaining free speech during wartime, the Senator spoke extemporaneously. La Follette had just begun his impromptu speech when he offered a brief editorial on the war. The Senator said, and local papers reported him saying, "I don't mean to say that we hadn't suffered grievances; we had—at the hands of Germany. Serious grievances!" But the Associated Press sent "We had no grievances against Germany" (plus other inaccuracies) over its wires. This gave Minnesotans who loathed the Nonpartisan League ammunition with which to attack it, and La Follette had given officials who detested him and his views an opening to excoriate him. The Commission of Public Safety began an investigation, and the committee's chair, Governor Joseph A.A. Burnquist, suggested that La Follette's arrest and trial under the state's espionage law were possibilities. The commission, as well as others in Minnesota and out, petitioned the Senate to expel La Follette, and Minnesota's Senator Kellogg introduced a resolution in the Senate to punish him. The Wisconsin Senator forgave neither the Commission of Public Safety nor Kellogg, and Butler and what he represented personified both.

In addition to La Follette's personal grudges and political maneuvering for power in the Senate, the Wisconsin Senator and Butler viewed the world from different perspectives. La Follette rued that the courts had become something not intended by the founders of the country: rather than aggressively insuring liberty and freely providing remedies for wrongs and injuries, the courts protected property interests. In La Follette's mind, Butler on the Supreme Court would multiply that misuse of the judiciary and further empower those who used their property against the common good. "A study of his record," La Follette said of the nominee, "leaves one with the conviction that the highest court in the land is being builded [*sic*] into a final citadel for special privilege in general, and special railroad privilege in particular." The selection of attorneys such as Butler, La Follette believed, would "do much to confirm and intensify the conviction in the public mind that our federal courts are becoming more and more the bulwark of special interests."[42]

Senator Nelson, the committee chair, received several somewhat unlikely endorsements from Butler's home state. After reading the professor's letter in the *St. Paul Pioneer Press*, A.O. Moreaux and O.E. Ferguson of Luverne wired the Senator to defend Butler's

Progressive Wisconsin Senator Robert LaFollette railed against Butler's nomination, condemning the corporate lawyer for his strong ties to the railroad companies he represented.

conduct in a case involving a Minnesota man named John Meints. Citizens in and around Luverne suspected Meints of contributing to a Nonpartisan League newspaper and generally accused him of disloyalty during the war. In the summer of 1918, several dozen men—the writers of the telegram and "thirty other business and professional men of Luverne and farmers of Rock County"—kidnapped Meints and took him to South Dakota to teach him a lesson about patriotism and make him an example to others not sufficiently zealous in

support of the war. Once the men crossed into South Dakota, they turned Meints over to others, who tarred and feathered him. Butler defended the thirty-plus Minnesotans, hired as their attorney "because he was recognized as the ablest lawyer in the Northwest." Moreaux and Ferguson called Butler "a gentleman of the highest type," and they and "all other men in Rock County who were good citizens during the war" deemed Butler "eminently worthy" of serving on the Court.[43] The trial court found the Minnesotans not guilty of tarring and feathering Meints and therefore not liable for damages; when Meints appealed, Butler counseled his clients to settle by paying damages, and the amount exceeded Meints' expectations. Another correspondent, Arthur Le Sueur, an associate of Nonpartisan Leaguer Arthur Townley, told the committee that "[w]hile I consider the crime which Mr. Butler's clients committed [against Meints] as grievous as murder, there was nothing in his conduct . . . which indicated 'a lack of devotion to law and order or a lack of moral integrity.'"[44] In another case, Le Sueur and Minneapolis lawyer Thomas Latimer represented the workers while Butler was counsel for the Minneapolis Steel and Machinery Company in a labor dispute; the workers' lawyers assured the committee that Butler's "conduct in protecting his clients' interests was in no wise short of the ethics of the profession to which he belongs," and "nothing done by him . . . carried any inference of unfitness for the judicial position to which he has been nominated."[45]

On December 2, Butler from St. Paul worried to Taft that "[n]ow—Saturday afternoon at four o'clock Washington time—it seems to me that the Senate will very likely not confirm during the present Congress. A friend in Washington phoned me an hour or two ago that the President today asked some of the leaders in the Senate to try to bring about a confirmation before Monday noon. . . . I hope this may be done."[46] Congress adjourned the following Monday, December 4, without the Senate taking action on Butler's nomination.

As Butler's friend and confidant, Taft wrote to provide encouragement for the "unpleasant hours" that lay ahead, denigrating Butler's critics as "vermin whom you have stepped on in the discharge of your duties" and noting that the attack on Butler's nomination was really an attack on Harding and the Court. As Chief Justice and strategist, Taft said Butler's friends should keep in contact with Chairman Nelson and also select a body of "leading men" from the Twin Cities, Chicago, and the Dakotas who would testify to Butler's "high standing at the Bar and . . . influence as a professional man and barrister," and the Chief noted that the good word of Minnesota's President Coffman would rebut the attacks by "those disloyal traitors" at the university. Taft expressed annoyance that "Uncle Knute" could be "a bit slow in pressing matters," but he seemed confident of Butler's confirmation, despite "the fuss that a few people can make for their own publicity under the rules of the Senate."[47]

Having done all he could to secure Butler's nomination, Taft turned his attention to filling the next vacancy. The bill permitting Justice Pitney to retire was awaiting the President's signature, ensuring the President his fourth appointment in less than two years. Mentally surveying the possibilities, Taft wished to dissuade Harding from considering a "Progressive" like Judge Learned Hand:

> He is an able Judge and a hard worker. I appointed him [District Judge] on Wickersham's recommendation, but he turned out to be a wild Roosevelt man and a Progressive, and though on the Bench, he went into the campaign. If promoted to our Bench, he would almost certainly herd with Brandeis and be a dissenter. I think it would be risking too much to appoint him.

Better, said Taft, to realize that the present attack on Butler was "part of the program [La Follette and Norris] are deliberately setting out

upon to attack you and the Court and the Constitution" and to respond accordingly:

> The more blatant they make it, the better I think it will be to unite the conservative elements of the country to resist their plotting against our present social order, and I hope you will feel that the best way to deal with them is to hit them between the eyes by the appointment of staunch friends of the Constitution who will do nothing to sap the pillars of our Government as they have weathered the storm of many assaults and vindicated the wisdom of our ancestors.[48]

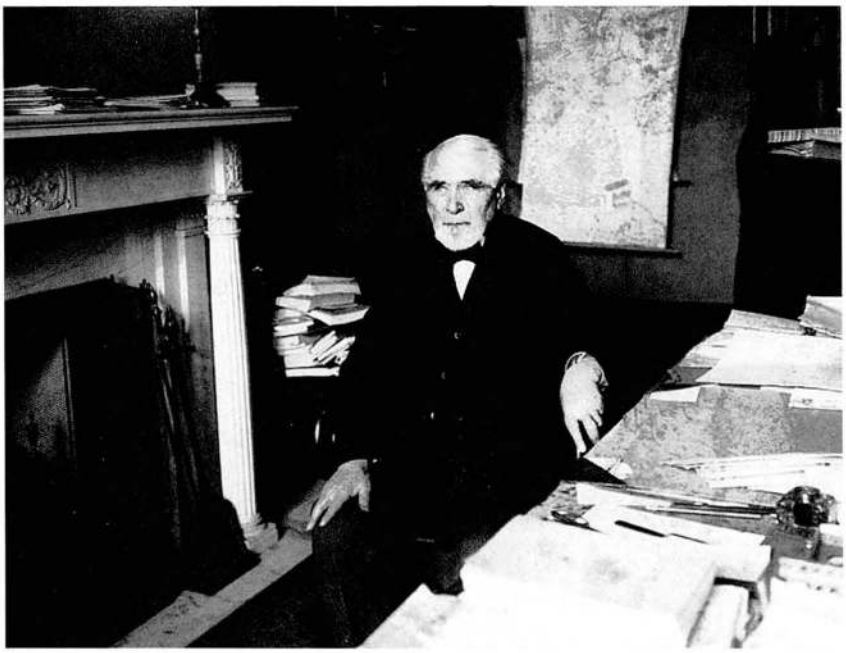
Like Taft, Learned Hand was sharing his thoughts on the makeup of the Supreme Court, and, while he was ambivalent toward Butler's nomination, he was critical of Harding's previous nomination:

> Dont [*sic*] be too hard on P. Butler. Whatever he may turn out to be, he certainly saved us Manton, and he will be welcome for that. I know whereof I speak and there is no shadow of doubt that till a few days before the appointment Manton had it. The [Catholic] hierarchy was solid behind him; the White House was flooded with telegrams.... How he got such a backing I dont [*sic*] know.... Now I think his [Butler's] way is clear.
>
> Yes, the S.C. is not pleasing to look at. Sutherland I believe is not much and will probably revert from any liberal tendencies he ever showed.[49]

President Harding resubmitted Butler's name on December 5, the same day Professor Schaper and Minnesota's Senator-elect Shipstead requested a hearing before the Judiciary Committee. On December 7, Shipstead filed four charges against Butler with the committee, and the committee was asked to call a half-dozen witnesses. Schaper and Shipstead stated that as a long-time lawyer for corporations, Butler could not objectively decide cases involving large companies. Because he had been counsel for railroads and utilities in particular, Butler would be disqualified from sitting on cases in those areas, and the public deserved to have a full Court hear those cases.[50] The final two charges impeached Butler's ethics and character: as attorney for the Twin City Rapid Transit Company, Butler was helping his client obstruct justice, and as regent Butler repeatedly behaved in ways that demonstrated his lack of a judicial temperament.[51]

Judiciary Committee Chairman Nelson created a subcommittee of three to hear Schaper and Shipstead's charges against Butler. Republican Albert Cummins of Iowa, Democrat Thomas Walsh of Montana, and Nelson first met in the afternoon of Friday, December 8, and Schaper and Shipstead were their first witnesses. Shipstead acknowledged that he did not know Butler personally and had no personal knowledge of the charges but was, he said, appearing before the subcommittee on behalf of others who wished to be heard. Walsh and Cummins were not troubled by the charges that Butler represented corporations or by his theories regarding railroad valuation; while Walsh and Cummins did not agree with Butler's ideas, they stated that should not preclude him from serving on the Supreme Court, especially since he would recuse himself from cases in which he had participated. Neither were the Senators overly concerned about Butler's actions on Minnesota's Board of Regents; they concluded Butler should not be held responsible if the full board participated in the decisions, nor should the Senate presume to second-guess the governing body of a university. But the subcommittee was willing to let Schaper air all his grievances against Butler, so Nelson scheduled another hearing for the following Wednesday, December 13.

The day after the subcommittee met for the first time, Butler wrote Taft a long letter



Senator Knute Nelson (pictured) presided over Butler's confirmation hearings as chairman of the Senate Judiciary Committee. He organized a special subcommittee to hear the testimony of a liberal professor of political science at the University of Minnesota who claimed he had been fired for his political views. Butler served as a member of the board of regents of the university from 1907 to 1924, and several liberal professors claimed he could not tolerate dissent. Nelson's committee unanimously recommended Butler's confirmation.

defending himself against Schaper and other disgruntled professors; his tone painted himself as a victim, and he did not betray any concern that the professors' charges would be fatal to his confirmation. Butler did express concern, however, with the National Association of Railroad Commissioners and that their "opposition might possibly influence against confirmation some of the senators." That aside, Butler's mental tally of Senators led him to anticipate confirmation, though "the opposition [might] be stubborn and cause considerable delay." Mitchell, Butler's counterpart, was in Washington and planned to remain there "until the matter is over. He represents me in all things."[52] If Butler felt persecuted by professors and others leveling charges against him, Taft's letter of response must have been the perfect salve. "You have the misfortune," Taft soothed, "of being appointed to the Bench at a time when there is a radical flare-back, and a movement to attack the Supreme Court and to attack Harding. To this extent you are the goat." Taft assured his friend that after confirmation, "the disagreeable effect of the demagogic attack will pass away, as a bad smell does in the open air." Taft blamed La Follette, "a master of dirty publicity," for the attack on Butler, and he regretted that the nominee was not allowed to appear before the committee, when "everybody that has any grievance against [the nominee] may go there and be heard, if he can only get some lout-mouthed [*sic*] Senator to demand it."[53]

Butler also received a playful boost from fellow Minnesotan and longtime friend Elmer Adams. "I thought I would delay until you were a real judge before congratulating you," Adams wrote. Taking a swipe at another Minnesotan—Butler's Senate accuser, Dr. Shipstead—Adams offered his thoughts on health and dentistry:

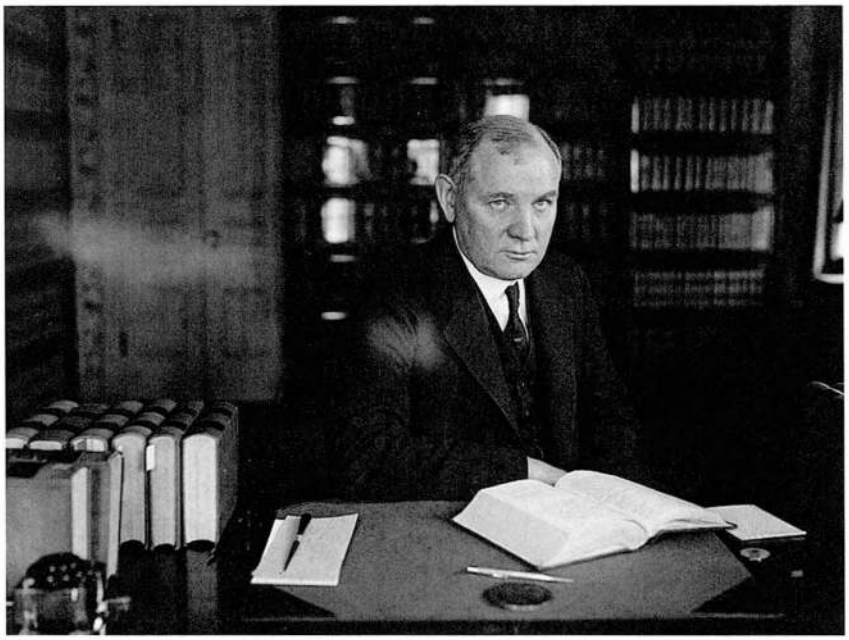
> You know that during the past few years, nearly all of our illnesses have been attributed to defective teeth and

> it is not unlikely that in the pursuance of this policy, Senator Shipstead is of the opinion that your health would be better if he removed your teeth. Whether this doctor of dental surgery is correct in this theory or not, I do not know but we have too many men on the bench and other places now without teeth.[54]

Butler returned the joke: "Having in mind recent learning of the medical profession, I am spending a little time with our family dentist, but he does not advise the removal of the same kind of teeth that Shipstead seems to be after."[55]

At 2:00 on December 13, the subcommittee met as scheduled and Professor Schaper resumed his testimony, relating in detail his dismissal from the University of Minnesota. Shipstead did not attend the December 13 meeting. Schaper presented a letter from retired Minnesota Professor Rankin, who charged that "it was the habit of Pierce Butler to issue orders to the University president directing him to dismiss, or fail to recommend, such persons as had fallen under Mr. Butler's displeasure because of their political or economic views." Rankin's letter also testified that there was "current talk, the truth of which the committee [of Academic Freedom, of which Rankin had been a member] established to its entire satisfaction, that Mr. Butler was insulting and arrogant in his action and conduct whenever a man or woman came before the regents for investigation, [falling] upon the defendant, just as a prosecuting attorney might attack a criminal, acting in the triple capacity of judge, prosecutor and executioner."[56] Marion L. Burton, then president of the University of Michigan but formerly president at Minnesota, had wired Nelson that Butler was "thoroughly devoted to [the] welfare of institution, vigorous and aggressive in his attack upon its problems, [and] always thoroughly genuine and sincere." Burton conceded the men "disagreed sharply but were always friendly," and the president praised Butler as having "one of the keenest analytical minds," thoroughly believing in the Constitution, and being "eminently worthy" of the Supreme Court.[57] The committee also heard testimony regarding Professor John Gray, whom La Follette had encouraged to attend the subcommittee meeting. Gray did not, in fact, attend, and the testimony regarding him came in the form of a long and detailed telegram from Butler, in which he vigorously defended himself of any wrongdoing in Gray's dismissal from the University of Minnesota in 1917. The final witness was C.F. Staples, formerly a member of Minnesota's Railroad and Warehouse Commission, and, at the time of the hearings, a member of the ICC. Staples also refuted Gray's claims that Butler had a vendetta against him because Gray had, when on leave from the university and serving as an examiner in railroad valuation work for the government, ruled against Butler when he, too, was doing valuation work for the railroad companies. Nelson asked Staples if he had heard of Butler's complaints against Gray, and Staples answered, "Yes, [but] I never heard anything of the sort, or anything that would give rise to such a question, until yesterday, and that was from somebody not connected with the commission."[58] Cummins was satisfied with Staples' response, indicating he had only wanted to know whether Butler was the kind of man who "would try to revenge himself upon the examiner by getting him dismissed." The subcommittee dismissed each witness after he had spoken, and, after a bit more than two hours of testimony that day, they rather perfunctorily dismissed the concerns against Butler and unanimously recommended his confirmation to the full Judiciary Committee.

Two witnesses Schaper had hoped would testify against Butler were Max Lowenthal and Felix Frankfurter, both of whom were very incidentally—in Schaper's mind, if not in fact—connected with the professor's dismissal from the university. On December 8, Shipstead indicated to the subcommittee that



When Butler, a conservative Democrat, took his seat in 1923, he became the seventh Justice to be appointed by a President of a different party.

he wished both men be summoned to testify, and that news was reported in various papers. Frankfurter wrote Pierce, Jr., from Harvard Law School, repeating what he had seen in several Boston papers: "It is said that among the witnesses to be called are Prof. Felix Frankfurter of Harvard Law School, a son-in-law of Justice Brandeis." Frankfurter wrote to assure Butler and Pierce, Jr., that he did not intend to appear before the subcommittee. "I should like you and your father to know that it's all rubbish—made out of whole cloth," the professor wrote. "That I am to appear as a witness, that I have any information to give, that I am in anywise involved, directly or indirectly, in the opposition to confirmation is no more true than that I am a son-in-law of Mr. Justice Brandeis—in other words, it is utterly without foundation." Frankfurter said that he believed all nominations should be "thoroughly scrutinized," but he had expressed that rather general statement before Harding submitted Butler's name. "I cannot," Frankfurter concluded, "deny too categorically the utter baselessness of any suggestion of opposition emanating from me."[59] Pierce, Jr., conveyed the information to Mitchell, who shared his relief with Frankfurter: "Your letter confirms the belief I already had that Shipstead did not know what he was doing and had no basis for believing that his witnesses would 'make good.'" Pierce, Jr., and Mitchell surmised—and then explained to Frankfurter—that Schaper invoked Frankfurter's name because, at the time Schaper was dismissed, Lowenthal was in St. Paul and wanted to see Butler "to intercede for Schaper," and Lowenthal had with him a letter of introduction from Frankfurter. Mitchell requested Frankfurter write Nelson to clear up the matter. "I feel sure," Mitchell told Frankfurter, "that on your own account, you would not be willing to have the record left silent on this point, and from Butler's standpoint it would be additional proof that the charges are without substance."[60] Frankfurter complied, telling Nelson he "attributed to irresponsible gossip [the] mention of my name in connection with opposition" to Butler; "I have in nowise, directly or indirectly, been connected

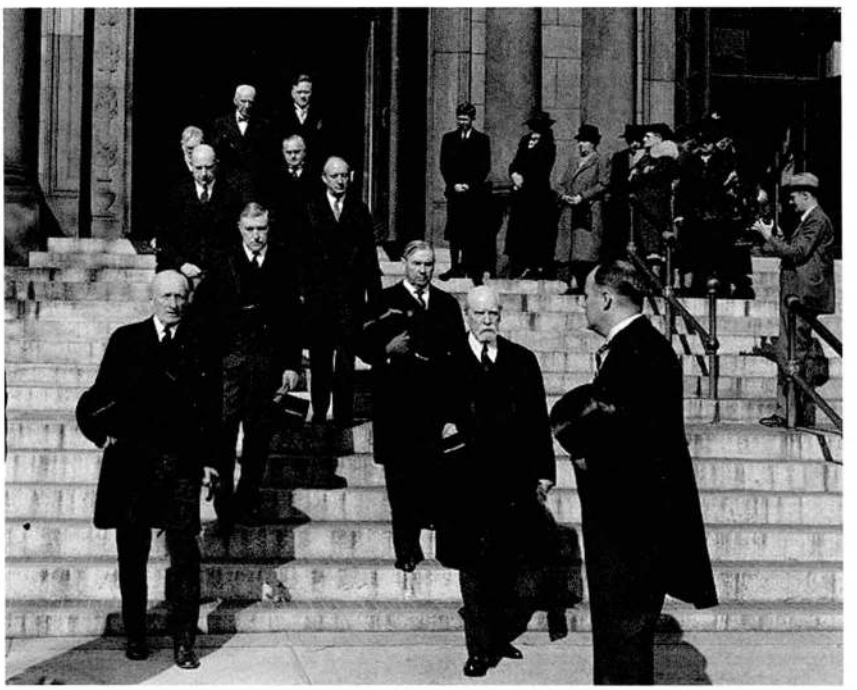
with the opposition to Mr. Butler's confirmation."[61] After his father had taken his seat on the Court, Pierce, Jr., wrote Frankfurter to acknowledge his "thoughtfulness and courtesy in writing me as you did during the late unpleasantness." But the son's intent may have been to burnish his father's image in Frankfurter's eyes—and in the eyes of Frankfurter's many correspondents:

> [F]ather expressed a desire to meet [Lowenthal], and said at the time that anything he could do for Schaper or to place him as an instructor somewhere he would be glad to do, with the exception that he would not assist him in returning to the University of Minnesota. He said that of all the men at the University who were accused or gave grounds for accusation of disloyalty, he liked Schaper best because he was the most honest and frank of the lot, and that he very much regretted that it was Schaper's misfortune to be the only one dismissed.[62]

The subcommittee's decision to recommend confirmation was unanimous. On the following Monday, December 18, the Senate Judiciary Committee—with William Borah, James Reed, John Shields, and Norris absent—voted unanimously to recommend Butler's confirmation.[63] When the nomination was reported and brought up for confirmation in an executive session of the Senate on December 20, it was held over till the following day on the objection of the Democratic minority leader, Joe Robinson of Arkansas, Taft noting to his brother Harry that "Robinson in my contact with him is a pretty good man, but the Ku Klux Klan are very bitter in their attacks on Butler, because he is a Catholic, and that Klan is supposed to be strong in Arkansas." However, Taft had not "the slightest doubt" of confirmation when the vote was finally taken.[64]

On the afternoon of December 21, the Senate went into executive session. Senator Nelson spoke for an hour and methodically dispatched the accusations against Butler, one by one. Montana's Senator Thomas Walsh, who, like Butler was Catholic, spoke in favor of confirmation. La Follette spoke for more than an hour. His strategy was to try to convince enough Senators to vote to refer the nomination back to the Judiciary Committee, where some of the Minnesota professors—and others, if they could be found—could make their cases against Butler. La Follette ventured his entire argument against Butler on Professor Gray's account, trying to portray Butler as a person who lacked the necessary temperament to be a Justice. La Follette's gamble did not pay off: the motion to recommit the nomination to committee was defeated 63 to 7, and the motion to confirm passed 61 to 8, with 27 abstentions.[65] The following day, Butler telegraphed his Chief: "Our gratitude to you is boundless."[66]

Curiously—or perhaps expectedly, given the *Star*'s animosity toward Butler—the paper's one-column headline the day after the Senate confirmed him said that "Butler Will Likely Quit Regent Post." "Butler's resignation as a regent would end his 15 years' connection with that institution," the paper said, "where he has been an aggressive personality and out of which some of the chief charges against him that held up his confirmation by the senate for several weeks, and resulted in the battle of progressive senators to prevent his confirmation." Not surprisingly, that day's editorial ended with this dire judgment: "If we want a government of the people, for the people, and by the people, we will have to learn that A MAN CANNOT SAFELY BE ELECTED TO A LAW-MAKING BODY OR APPOINTED TO A JUDGESHIP WHO HAS BEEN TRAINED IN THE SERVICE OF ANY SPECIAL INTEREST ESSENTIALLY OPPOSED TO THE PUBLIC INTEREST. Pierce Butler's appointment was confirmed because the body which did the confirming is dominated by corporation lawyers."[67]



Butler's funeral mass in 1939 was attended by his Brethren. Of the members of his conservative bloc, only Justice McReynolds (front, left) survived to hold the fort against the liberal Justices who had since been appointed by Franklin D. Roosevelt.

With Butler's confirmation all but voted on, Chief Justice Taft turned his attention and energy to the next open chair on the Court. On December 21, while anticipating a favorable vote on Butler, Taft wrote a "personal and confidential" letter to Elihu Root, Secretary of State under Teddy Roosevelt and former Senator from New York, by this time an elder statesman in the Republican party. Taft wanted to sound him out on Henry Stimson, Taft's Secretary of War and, in the 1920s, a corporate lawyer on Wall Street, and other possible candidates for Justice Pitney's seat. "My impression," Taft wrote, "is that [Harding's] disposition will be toward a Judge on the Bench, and that that is likely to be [Edward] Sanford." Taft thought Stimson would be an able member of the Court, telling Root, "Indeed the only thing I know against Stimson is his good opinion of [Felix] Frankfurter.... I never liked Frankfurter," Taft continued candidly, "and have continued to dislike him more the more I have known him.... I suppose [Stimson's favorable opinion of Frankfurter] does not indicate an unsoundness of view as to the Constitution on Stimson's part, for it would be a great disappointment to have him appointed and then find him herding with Brandeis." While Taft was not happy with Wilson appointees Brandeis and Clarke, neither did he want too many men on the Court "who are as reactionary on the subject of the Constitution as McReynolds." What was important, Taft said, was "men who are liberal but who still believe that the corner stone of our civilization is in the proper maintenance of the guarantees of the 14th Amendment and the 5th Amendment [and] I believe that Stimson believes that." Taft asked for Root's thoughts on the subject before he wrote or spoke to Harding about it.[68]

Within the week, Taft wrote to Harding about a prospective new Justice:

> With Pierce Butler confirmed and the taking effect of Pitney's

> resignation on the opening of the year, the election of another member of our court will press on you. The eligibles you have under consideration are I believe, Anderson, Bullitt, Stimson, practitioners, Hough, Rose, Sanford Judges and possibly Wm. Moschisker C.J. of Penn. You have just put on two practitioners. Would it not be well to vary with a Judge, preferably a Federal Judge familiar with the work?[69]

Several weeks later, Taft again wrote Harding, this time expressing dismay that at least one Senator suggested that Taft "was interfering in the matter of selecting a Justice of the Supreme Court and that Sanford was my candidate." Taft defended himself, saying, "I have no candidate but that I considered that it was not beyond my province to communicate to the Attorney General and you what I regarded as reliable information as to all candidates proposed for the office." Taft seemed not to be concerned that he had, perhaps, blurred the lines among the three branches, both with Sanford, who was nominated the following week, and with Pierce Butler. Sounding injured and a bit put out, Taft sniffed, "I greatly regret that reports have gone out from some source that I was to be consulted in respect to qualifications of judges. I can only say I have never given cause for such a report."[70]

ENDNOTES

[1]Butler to Taft, May 23, 1921, Reel 226, William Howard Taft Papers.

[2]John H. Clarke to Harding, September 1, 1922, Reel 153, Warren G. Harding Papers.

[3]Taft to Harding, September 5, 1922, Reel 236, Harding Papers.

[4]This caused an awkward situation, because the first seat to open was the Chief's, and Taft had told Harding the only position he would accept was Chief Justice. Harding assured Sutherland he would be appointed to the second seat to open.

[5]Van Devanter to Butler, November 23, 1922, Box 12, Willis Van Devanter Papers.

[6]Van Devanter to Walter H. Sanborn, October 11, 1922, Box 12, Van Devanter Papers.

[7]Sanborn to Van Devanter, October 14, 1922, Box 32, Van Devanter Papers.

[8]Butler to Taft, October 22, 1922, Reel 246, Taft Papers.

[9]Kellogg to Harding, three telegrams on October 25, 1922, and one on October 30, 1922, Reel 153, Harding Papers.

[10]Kellogg to Harding, October 30, 1922, Reel 153, Harding Papers. Kellogg seemed to qualify this endorsement a bit, too, because he said William Mitchell, Butler's partner, was "of even better judicial timber than Butler but is not as well known . . . [and] he would not of course get in the way of his senior partner."

[11]Butler to Pierce Butler, Jr., November 1–2, 1922, Pierce Butler Papers—Supreme Court. There is a third reason this letter is remarkable: scholars studying Butler have never seen this document. In the mid-1980s, David Butler, one of Pierce Butler's grandsons, gave a small collection of Butler papers, of which this letter was one, to the United States Supreme Court. David Butler had received the papers from his father Francis; where Francis got them is unknown, though he may have collected them from among the belongings of Pierce, Jr., when the latter died. In the mid-1960s (coincidentally at the time David Danelski was writing **A Supreme Court Justice Is Appointed** and Francis was cooperating with Danelski), Francis's brother Leo inquired if any of their father's papers remained. Francis Butler provided the by-then standard answer: "Actually there are practically no papers of Father's. Acting, I am sure, on instructions, John Cotter [Butler's longtime clerk] burned all of the current court papers. . . . The book by Dave Danelski, dealing with Father's appointment, has gone to Harper's [Random House] for printing and Dave wrote me asking whether or not there were any letters in the office here [in St. Paul]. I have accumulated a substantial number of letters from Father to brother Pierce, Father then being up in Canada and all dealing with this matter. I am sure they would add to Danelski's book but I am not interested in turning them over to him. Accordingly I am using my own judgment and writing Danelski pleasantly that I haven't any data other than which he has which is substantial. Danelski is a very nice boy, but I think these internal family letters should stay precisely where they are which is on the table in front of me at the moment." Francis Butler to Leo Butler, February 4, 1964, Box 1, Pierce Butler Family Papers.

[12]Taft to Harding, October 30, 1922, Reel 153, Harding Papers.

[13]Taft to Butler, November 2, 1922, Reel 26, Taft Papers.

[14]Van Devanter to Sanborn, October 31, 1922, Box 12, Van Devanter Papers.

[15]Butler to Taft, November 5, 1922, Reel 247, Taft Papers.

[16]Taft to Butler, November 7, 1922, Reel 247, Taft Papers.

[17]Butler to Austin Dowling, November 4, 1922, Box 8, Austin Dowling Papers.

[18]Pierce Butler, Jr., to Dowling, no date, Box 8, Dowling Papers.

[19]Dowling to Harding, November 6, 1922, Box 8, Dowling Papers, and Dowling to Harding, November 8, 1922, Reel 153, Harding Papers.

[20]Thomas J. Shahan to Harding, November 14, 1922, Reel 153, Harding Papers. Shahan called on Harding twice to endorse Butler. Butler to Taft, November 11, 1922, Reel 247, Taft Papers.

[21]Van Devanter to Sanborn, November 10, 1922, Box 12, Van Devanter Papers.

[22]Butler to Pierce Butler, Jr., November 7, 1922, Butler Papers—Supreme Court.

[23]Butler to Pierce Butler, Jr., November 14, 1922, Butler Papers—Supreme Court.

[24]Butler to Pierce Butler, Jr., November 20, 1922, Butler Papers—Supreme Court.

[25]Butler to Taft, November 15, 1922, Reel 247, Taft Papers.

[26]Pierce Butler, Jr., to Cooley Butler, November 15, 1922, Box 19, Butler Family Papers.

[27]Taft to Harding, November 17, 1922, Reel 247, Taft Papers. In the preceding weeks, in their correspondence, Taft had asked Butler questions and Butler had responded at length. Taft compiled Butler's answers and created a neat curriculum vitae for the President.

[28]Butler to Harding, November 24, 1922, Reel 153, Harding Papers.

[29]Van Devanter to Butler, November 23, 1922, Box 12, Van Devanter Papers.

[30]Taft to Butler, November 24, 1922, Reel 247, Taft Papers.

[31]*Minneapolis Journal*, November 24, 1922, page 20; *Minneapolis Tribune*, November 24, 1922, page 18.

[32]*Minneapolis Star*, November 24, 1922, pages 1 and 12.

[33]*Minneapolis Star*, November 25, 1922, page 4.

[34]*The New York Times*, November 25, 1922, page 9.

[35]*The Nation* 115:2997 (December 13, 1922), 653 and 660–61.

[36]*The New Republic* 33:419 (December 13, 1922), 65–67.

[37]*The New Republic* 33:420 (December 20, 1922), 81–83.

[38]D.J. Leary to Knute Nelson, November 25, 1922, Pierce Butler Confirmation Papers.

[39]Butler Confirmation Papers.

[40]Butler Confirmation Papers.

[41]Quoted in Edward N. Doan, **The La Follettes and the Wisconsin Idea** (New York: Rinehart and Company, Inc., 1947), 103–4.

[42]Robert La Follette, "Pierce Butler on the Supreme Court," *La Follette's Magazine* XV:1 (January 1923), 2 and 5, Box I:OV4, Robert La Follette Family Papers.

[43]A.O. Moreaux and O.E. Ferguson to Nelson, incomplete date, Butler Confirmation Papers.

[44]Arthur Le Sueur to Nelson, November 28, 1922, Butler Confirmation Papers.

[45]Thomas Latimer and Arthur Le Sueur to Nelson, November 28, 1922, Butler Confirmation Papers.

[46]Butler to Taft, December 2, 1922, Reel 247, Taft Papers.

[47]Taft to Butler, December 5, 1922, Reel 248, Taft Papers. One such person Taft had in mind was George Norris, whom he described as "an ugly kind of an individual, at odds with the world generally."

[48]Taft to Harding, December 4, 1922, Reel 236, Harding Papers.

[49]Learned Hand to Felix Frankfurter, no date (early December 1922), Reel 26, Part III, Court Papers of Felix Frankfurter.

[50]Schaper and Shipstead also argued that Butler's ideas on railroad valuation, which they claimed were inconsistent with the public interest, would taint other Justices' thinking on the subject.

[51]Butler Confirmation Papers.

[52]Butler to Taft, December 9, 1922, Reel 248, Taft Papers.

[53]Taft to Butler, December 12, 1922, Reel 248, Taft Papers.

[54]Elmer Adams to Butler, December 13, 1922, Reel 30, Elmer Adams Papers.

[55]Butler to Elmer Adams, December 16, 1922, Reel 30, Adams Papers.

[56]Albert Rankin to Shipstead, December 10, 1922, Butler Confirmation Papers.

[57]Marion L. Burton to Nelson, November 28, 1922, Butler Confirmation Papers.

[58]Butler Confirmation Papers.

[59]Frankfurter to Pierce Butler, Jr., December 9, 1922, Reel 248, Taft Papers.

[60]Mitchell to Frankfurter, December 15, 1922, Reel 22, Personal Papers of Felix Frankfurter.

[61]Frankfurter to Nelson, December 17, 1922, Reel 22, Personal Papers of Felix Frankfurter.

[62]Pierce Butler, Jr., to Frankfurter, January 20, 1923, Reel 22, Personal Papers of Felix Frankfurter.

[63]Taft to Butler, December 17, 1922, Reel 248, Taft Papers. It appears that Taft involved himself with the Judiciary Committee's business as well. He wrote to Butler, "I think I have arranged it so as to have a very full meeting of the Judiciary Committee on Monday—at least a full meeting of the Republicans."

[64]Taft to Harry Taft, December 20, 1922, Reel 248, Taft Papers.

[65]Those who voted "no" were Walter George and William Harris of Georgia, J. Thomas Heflin of Alabama, La Follette of Wisconsin, Peter Norbeck of South Dakota, Norris of Nebraska, Morris Sheppard of Texas, and Park Trammel of Florida. Of Harding's four appointments, Butler's evoked the most antipathy. However, the other three had more transparent backgrounds: Taft had been President; George Sutherland had been a two-term Senator; and Edward Sanford had been a federal district judge for fifteen

years. That transparency and the records it revealed made confirmation for each all but a formality.

[66]Butler to Taft, December 22, 1922, Reel 248, Taft Papers.

[67]*Minneapolis Star*, December 22, 1922, pages 1, 10, and 12.

[68]Taft to Elihu Root, December 21, 1922, Reel 248, Taft Papers.

[69]Taft to Harding, December 27, 1922, Reel 236, Harding Papers.

[70]Taft to Harding, January 14, 1923, Reel 236, Harding Papers.

The Obscenity Bargain: Ralph Ginzburg for *Fanny Hill*

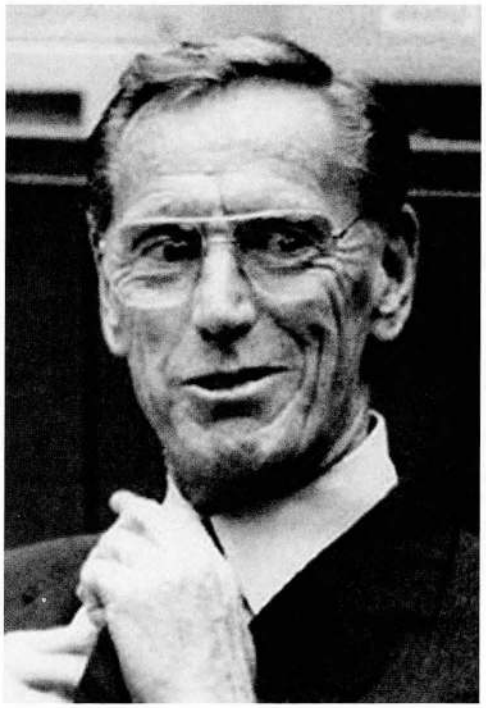
L.A. POWE, JR.

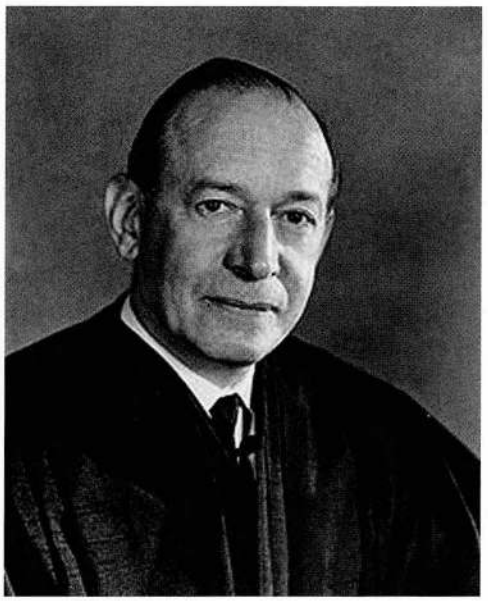
The next-to-the-last witness at the July 1968 hearings on the nomination of Abe Fortas to replace Earl Warren as Chief Justice was James Clancy. Along with another attorney, Charles Keating, who would later gain infamy in the savings and loan scandal of the 1980s, Clancy appeared on behalf of Citizens for Decent Literature, an anti-smut organization that had filed amicus briefs supporting censorship "as essential to the development of good family living"[1] in the Supreme Court's important obscenity decisions.[2] Clancy asserted that everyone should see the materials Fortas had held were entitled to First Amendment protection, and so he had assembled a thirty-minute compilation of them for the Judiciary Committee's viewing.

Fortas had voted to reverse fifty-two obscenity cases in the previous two years, and Clancy made much of the fact. But so had Hugo L. Black, William O. Douglas, and Potter Stewart, joined the previous year by Thurgood Marshall. Indeed, these four Justices always voted that the First Amendment protected whatever materials were before the Court. Before Marshall joined the Court, the fifth vote to reverse an obscenity conviction was as likely to come from William J. Brennan as it was from Fortas. Furthermore, all the key opinions—*Roth*,[3] *Jacobellis*,[4] *Ginzburg*,[5] and *Memoirs*[6]—were written by Brennan. Indeed, his was the law of obscenity.[7]

Clancy did not know it, but in a deeper sense he was correct about how important Fortas's influence was. Although Fortas was only one of two Justices who did not write in the 1965 Term cases,[8] from inside the Court, Fortas dictated the results in *Ginzburg* and *Memoirs*.

Everyone knows that Justices bargain over the wording of opinions. We know there is strategic voting on whether to hear cases.[9] We also know that they bargain over outcomes—for example, Douglas telling Stewart he would join Stewart's draft opinion in *Swann v. Charlotte-Mechlenburg Board of Education*,[10] the first busing case, if Stewart would switch the result from affirm to reverse.[11] The story that follows is about a different type of a pact—different because it explicitly, albeit clandestinely, denies equal justice under law—a





Charles Keating (left) partnered James Clancy who testified on behalf of their anti-smut group—Citizens for Decent Literature—at Abe Fortas's confirmation hearings to be Chief Justice in 1968. They showed the Judiciary Committee materials from fifty-two obscenity cases in which Fortas (right), as Associate Justice, had ruled that the works were protected by the First Amendment. Keating was later convicted of swindling small investors in the savings and loan debacle of the 1980s.

bargain whereby a Justice changed his vote in one case in exchange for another Justice changing his vote in a separate case.[12] Specifically, Fortas proposed and Brennan, with Warren's tacit consent, agreed to swap votes in two obscenity cases. As a result, **Fanny Hill** (as *Memoirs* is typically called) and its reputable publisher, G.P. Putnam's Sons, escaped the censor's ban, while a human being, Ralph Ginzburg, was sent to jail without even a fig leaf of due process from the highest Court in the land.

Memoirs

John Cleland penned **Memoirs of a Woman of Pleasure** while in debtors' prison in mid-eighteenth-century England. It was published after he was released, and publication found him back in court again where he renounced **Fanny Hill** as "a Book I disdain to defend, and wish, from my Soul, buried and forgot."[13]

Fanny Hill was neither buried nor forgot. Instead, it had a "wide" but "clandestine" circulation, culminating in the open publication at issue in *Memoirs*.[14] It is, by all accounts, a very well-written book that lacks a plot—in essence, a "literary stag film."[15] It is inconceivable that anyone would read the book for its supposed "elegance and energy," "undoubted historic value," and "definite literary appeal."[16] As the *New York Herald Tribune* book critic noted, one could have a long career "searching for anyone who read the book for any of the above noted reasons."[17] The publisher, however, was able to find professors at Harvard, MIT, Williams, Boston University, and Brandeis who testified to the literary merit of the work and its historic value.[18] The Massachusetts Supreme Judicial Court did not find otherwise, but it held the book obscene anyway.[19]

That decision came at the end of April 1965. Earlier that month, the U.S. Supreme

Court, against the wishes of Solicitor General Archibald Cox, had granted certiorari in *Ginzburg* as well as in *Mishkin v. New York*,[20] a case involving what was then termed deviant sex.[21] Lawyers for both G. P. Putnam and the Commonwealth wanted a Supreme Court decision unencumbered by prior decisions in *Ginzburg* and *Mishkin*, albeit for different reasons. They agreed to rush a jurisdictional statement to the Court. When it was noted,[22] the three cases were argued together.

Based on the cases that had ruled D. H. Lawrence's **Lady Chatterly's Lover**,[23] Henry Miller's **Tropic of Cancer**,[24] and the Louis Malle film *Les Amants*[25] to be not obscene, it was reasonably clear that literature or art that had serious value was protected by the First Amendment.[26] However, this was of no help to **Fanny Hill**. The novel could create a serious erection, as the Commonwealth prosecutor had acknowledged,[27] but it was not serious literature. Furthermore, it was far more titillating than anything involved in *Ginzburg* or *Mishkin* or any of the prior cases. At Conference, Warren, Tom Clark, Brennan, and Byron White found **Fanny Hill**, as well as the materials in *Ginzburg* and *Mishkin*, obscene.[28] Based on his position in *Roth*, Harlan agreed on the two state cases but wanted to reverse *Ginzburg*.[29] Fortas voted to affirm the findings of obscenity in **Fanny Hill** and *Mishkin*. In *Ginzburg*, he stated that if he exercised an independent judgment, he would reverse the conviction, but if the Court would reverse only if the lower court were clearly wrong, then he would reverse on **Housewife's Handbook** but could affirm the conviction for *Eros* and the fine for *Liaison*.[30] **Fanny Hill** and *Mishkin* were thus 6–3 votes to find the materials obscene; *Ginzburg* was 5–4, but whether to affirm or reverse depended on how Fortas would choose to finally decide.

Warren assigned the opinions to Brennan, a natural move, since Brennan had dominated obscenity jurisprudence beginning a decade earlier with *Roth*. As is now known, Brennan reformulated and tightened his *Roth* test so that "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[31] But this was initially written into his draft of *Ginzburg*, affirming that conviction, before he even started his *Memoirs* opinion.[32]

At this point, although it appeared five Justices would sign on, other Justices withheld joining the opinion until Brennan produced an opinion affirming, or at least not reversing, the Massachusetts court in **Fanny Hill**.[33] Fortas intervened: conceding that obscenity was a "cess-pool problem," he nevertheless thought that the "nation was about to turn to another wave of 'book burning.'"[34] He also "tacitly conditioned" agreement in *Ginzburg* to Brennan switching his vote to a reversal in *Memoirs*.[35] Brennan did so, and he brought Warren[36] along as well,[37] flipping what had been a 6–3 affirmance of the *Memoirs* finding of obscenity into the 6–3 final product that protected **Fanny Hill** because even the court below had acknowledged that the book possessed "a modicum of social value."[38]

Ginzburg

Ralph Ginzburg understood mail-order marketing. By age twenty-three, he was the circulation director at *Look* magazine. Before he was thirty, he had sold over 150,000 copies of his self-published **An Unhurried View of Erotica** via direct mail. With the dawn of John Kennedy's New Frontier, Ginzburg sent out millions of solicitations promoting a new magazine, *Eros*, as "a new quarterly on the joys of love."[39] He announced that "*Eros* is the result of recent court decisions that have realistically interpreted America's obscenity law that have given this country a new breath of freedom of expression."[40] This hardcover "magazine of sexual candor" would be available

annually for $19.50 or $10 an issue (a huge price, showing *Eros* was intended for the coffee table).[41] Ginzburg also offered a biweekly newsletter, *Liaison*, basically a digest of articles about sex with some off-color jokes, and a short book, **The Housewife's Handbook on Selective Promiscuity**, each available for $4.95. Both local and federal prosecutors received complaints from recipients of Ginzburg's mailing. During the summer of 1962, the post office often received 900 complaints about Ginzburg daily.[42]

The first issue of *Eros* appeared in early 1962, opening with classical paintings of nudes and following with an article by Nat Hentoff on jazz. *Time* panned the enterprise, asserting that "*Eros* is a four-letter word spelled 'bore.'"[43] The next issues "were more erotic and increasingly perverse."[44] At the Justice Department, Attorney General Robert Kennedy was offended by the magazine and wanted to prosecute, but he held off, according to then head of the Criminal Division Nicholas Katzenbach, because it would "hurt politically" by solidifying Kennedy's image as a puritanical Catholic.[45]

The winter issue of *Eros*, the fourth and last published (with circulation having reached 150,000), caused Kennedy to authorize prosecution. Like other issues, No. 4 consisted mostly of the printed word, here including a full-page letter from Allen Ginsberg and a number of articles, including one on Warren Harding's mistress, "The Sexual Side of Anti-Semitism," and "My Life and Loves" by Frank Harris. What was different were eight pages of color photos entitled "Black and White in Color."[46] They showed a muscular black man and a white woman, both naked, in various embraces, including one showing them from the hips to the neck with their arms tightly wrapped around each other. None of the photos showed genitalia or suggested simulated sex, although a federal judge, who was either too old or too offended to see what was on the pages, absurdly stated that they "constitute[] a detailed portrayal of the act of sexual intercourse between a completely nude male and female, leaving nothing to the imagination."[47] Dwight MacDonald, a literary critic who did movie reviews on *The Today Show* in the 1960s, stated that "from an artistic point of view I thought it was very good. In fact, I thought it was done with great taste."[48] The Chair of the Fine Arts Department of New York University stated he could "not imagine the theme being treated in a more lyrical and delicate manner."[49]

In authorizing the prosecution, Kennedy had the support of Katzenbach and Solicitor General Cox. Katzenbach believed Ginzburg would keep goading them until he was prosecuted, so why wait. The green light was given to the United States Attorney in racially polarized Philadelphia, where Congresswoman Kathryn Ganahan, the Chair of the Post Office Operations Subcommittee, had demanded prosecution of Ginzburg and claimed obscenity was "part of an international communist plot."[50] The United States Attorney obtained a grand jury indictment, not only for *Eros* but also for *Liaison* and the **Housewife's Handbook** as well. A month later a New York County grand jury, sitting where Ginzburg resided, declined to find *Eros* obscene.

Ginzburg, who feared the attitudes of Philadelphians, waived a jury trial, but to no avail. The government quickly proved the items had been mailed from Middlesex, New Jersey and that Ginzburg had attempted to get mailing privileges from postmasters at Blue Ball and Intercourse, Pennsylvania. It rested its case after 87 minutes.[51]

The defense put on experts as well as materials dealing with sex that had been purchased near the courthouse during a lunch break. The trial judge, Ralph Body, asked his own questions of the witnesses. It became clear he was uneasy about discussions of sex and was particularly disturbed by **Housewife's Handbook**, which, like **Fanny Hill**, candidly discussed many sexual escapades. With one witness, Body closed with an angry question of whether his prior questions had changed

the expert's opinion and received the obvious "No, your honor."[52] Body had the last word, however: "Any testimony [on redeeming social value] is expressly disbelieved by this Court."[53] Body asked a couple of the witnesses about what effects reading the book would have on teenagers[54] and he worried about a "sense of shame . . . a neurotic condition" in readers.[55]

Given his questioning, it was no surprise that Body held all that three items were obscene and convicted Ginzburg on all twenty-eight counts in the indictment. The sentence was steep: five years in jail, three for **Housewife's Handbook** and two for *Eros*, and a $28,000 fine for *Liaison*.[56] As Body explained, "after a thorough reading and review of all the indicted materials . . . they are devoid of theme or ideas. Throughout the pages of each can be found constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural experiences. Each in its own way is a blow to sense, not merely sensibility. They are all dirt for dirt's sake and dirt for money's sake."[57] A year later the Third Circuit easily affirmed, in an opinion written by a judge born in 1893, alluding to "the shoddy business of pandering to and exploiting for money one of the great weaknesses of human beings" and concluding that the law of obscenity was unchanged from *Roth*.[58]

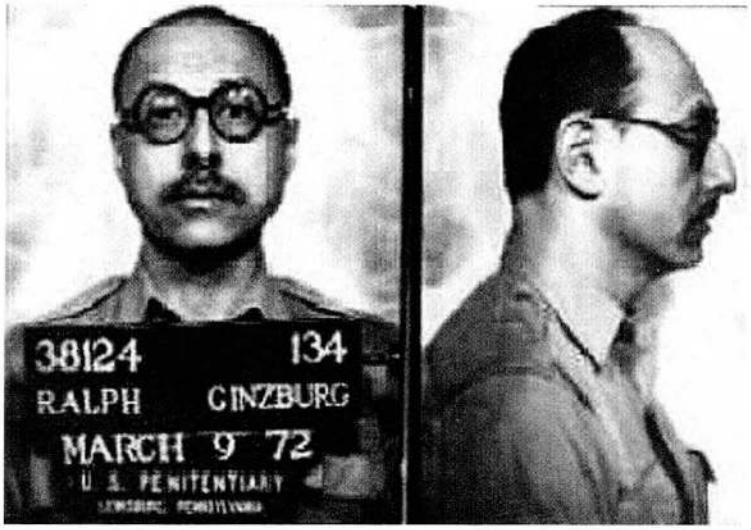
Convicted for materials that did not seem to be out of the pornographic mainstream now that *Les Amants* and **Tropic of Cancer** had been held to be protected[59] and given a sentence that screamed injustice, Ginzburg petitioned for certiorari. He was aided by three amicus briefs, one from the American Civil Liberties Union, a second from Authors League of America, and a third from 111 well-known leaders in the arts and literature, a group including Arthur Miller, William Styron, and Robert Penn Warren. Over the opposition of the government, certiorari was granted in April 1965.[60]

In the Solicitor General's office, Ralph Spritzer, the first deputy, turned the case over to former Frankfurter clerk Paul Bender, who was on leave from teaching at the University of Pennsylvania Law School. After looking the case over, Bender concluded that the conviction was "ridiculous. We've got to confess error."[61] This was not possible: the time to confess error was before the grant of certiorari, and in any event the involvement of Kennedy, Katzenbach, and Cox in initiating the prosecution would have precluded such a course.

Over the summer, two resignations occurred in Washington that would matter to Ginzburg. First, Cox, believing that it was the right thing to do following Lyndon Johnson's election, submitted a letter of resignation that he hoped would not be accepted.[62] It was, and Johnson replaced him with Thurgood Marshall. Second, Johnson maneuvered Arthur Goldberg, who had cast one of the four votes to grant cert in *Ginzburg*, off the Court for the United Nations (and other future benefits) and replaced him with Fortas.[63]

Spritzer agreed with Bender, as did Marshall, that *Ginzburg* cried out for reversal, and he told Bender that just because the government could not confess error, it "doesn't mean we have to win."[64] Bender rejected a draft brief from the Criminal Division and instead wrote his own, with the goals of being honest and still remaining on the government side. His solution was to emphasize and reemphasize the importance of the Justices looking at the materials in the case. If they did, then they would know *Eros, Liaison,* and **Housewife's Handbook** were not obscene. At oral argument, Warren asked Bender whether "we really need to read these things?" to which Bender answered "yes."[65] Ginzburg attended oral argument and said to the person next to him, "You know, I don't think that guy really wants to win this case."[66] That guy was Bender.

As noted above, Fortas wanted to convict Ginzburg in order to get **Fanny Hill**'s publisher off. Meanwhile, Warren had a thought about how Ginzburg's conviction might be affirmed. Warren, who never viewed the materials in



Ralph Ginzburg—the publisher of an erotic art magazine named *Eros*, a biweekly newsletter entitled *Liaison*, and *The Housewife's Handbook on Selective Promiscuity*—appealed his case to the Supreme Court in 1965 after he was convicted on charges of obscenity and sentenced to five years in jail.

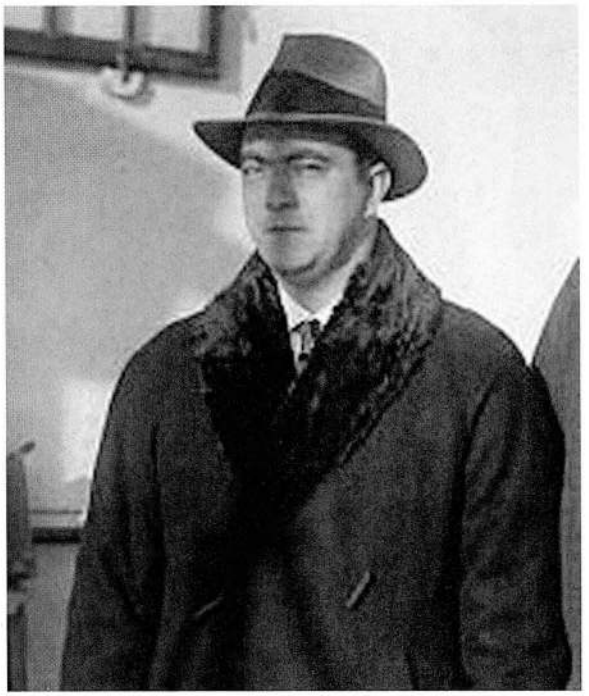
obscenity cases, talked to Fortas about a pandering approach, which had neither been raised in Bender's brief nor discussed at Conference. In so doing Warren was harkening back to his own concurring opinion in *Roth*. For Warren, crimes of vice, as opposed to robbery or assault, were about evil people intentionally making bad choices.[67] Thus, in *Roth* Warren had asserted that "[i]t is not a book that is on trial; it is a person [who was] plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient interest."[68]

Fortas and Brennan seized this opportunity to placate Warren. When they were finished, *Ginzburg* had changed focus once again. At the Justice Department it was about *Eros*; at trial it was about **Housewife's Handbook**; now it was about how Ginzburg hawked his wares.

When Brennan adopted the pandering approach, he freed himself from claiming that *Eros, Liaison*, and **Housewife's Handbook** were utterly without redeeming value—a useful point, since there was evidence that each (and especially **Housewife's Handbook**) had value; indeed, the government conceded as much. Able to finesse the issue because of the focus on pandering, Brennan asserted that in close cases, even nonobscene materials can support an obscenity conviction.[69] Actually, what he asserted was that in close cases evidence about the way the materials were marketed could be allowed to influence the decision on obscenity. Thus, he focused on Ginzburg's efforts in distributing the materials. This came in two parts: Ginzburg's search for a post office and his promotional materials.

Ginzburg had sought mailing privileges from the postmasters of both Blue Ball and Intercourse, Pennsylvania. When they declined because the anticipated volume was more than they could handle, he settled for Middlesex, New Jersey. Brennan agreed with the trial judge that these "hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publication on the basis of salacious appeal."[70]

The most memorable line from Brennan's majority opinion is that the "'leer of the sensualist' also permeates the advertising for the three publications."[71] Advertising stressed the sexual candor of the materials and "openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters."[72] **Housewife's**



Former Frankfurter clerk Paul Bender argued on behalf of the government in *Ginzburg* but was hoping to lose the case. His strategy was to ask the Justices to read the materials and see for themselves that they were not obscene.

Handbook came with an unconditional money-back guarantee "if the book fails to reach you because of U.S. Post Office censorship interference."[73] It was this evidence that "serve[d] to resolve all ambiguity and doubt" over whether the materials were obscene.[74] In essence, Brennan held that Ginzburg was estopped from denying the materials crossed the line. "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in determining obscenity."[75] "Justice Fortas quickly responded favorably to the opinion."[76] He waited to formally join, however, until Brennan circulated *Memoirs*.

As dissents by Black, Douglas, Harlan, and Stewart pointed out, there were several major problems with *Ginzburg*. First, *Ginzburg* was not a close case; **Fanny Hill** may have been, but it was protected as a result of the agreement between Brennan and Fortas. Second, Brennan had rewritten the Comstock Act. It is one thing to do that in a civil case, quite another in a criminal case. Therefore, third, Ginzburg had been convicted at the Court of a crime with which he had never been charged, much less for which he had been tried and convicted. He had no opportunity to rebut the new charges against him. As one of Warren's clerks wrote the Chief Justice (to no avail): "Speaking frankly, sir, my own feeling is that Ginzburg did get cheated out of a chance to explain. If a southern court did this to a Negro in a criminal case, I have no doubt the Court would jump in and with good reason."[77]

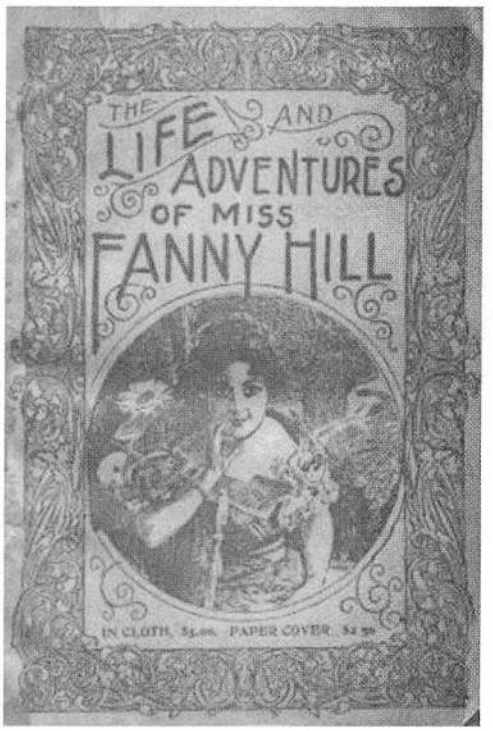
To borrow from Warren in *Roth*, Ginzburg lost because he was as unattractive a First Amendment claimant as possible. In Bender's words, Ginzburg "looked like a smut peddler."[78] But then again, other First Amendment claimants were also unattractive: consider the racist Father Terminiello[79] and the leaders of the Communist party, who would have gladly liquidated the capitalist class if they could.[80] There was just something special about sex, as the district judge, the Third Circuit, and now five Justices on the Court were proving.

The Aftermath

The cases came down on March 21, 1966, three and a half months after argument. Bender was in the Court that day. As Brennan announced that he would deliver the opinion in No. 42 (*Ginzburg*), Bender told Nat Lewin, who was sitting next to him, that he was four for four, "but it was about to be four for five."[81] According to Fred Graham, the *New York Times* Court reporter, Brennan was "red faced and emotionally wrought" when he delivered the opinion; another description was that he had "an air of churlishness" that surprised observers.[82] Bender, now five for five, was stunned and distraught at his victory and sat through Brennan's delivery with his head buried in his hands.[83]

During Brennan's announcement, Warren handed him a note: "Because of the quizzical expression on the faces of some of the Solicitor General's staff I wonder how happy they are with *Ginzburg*, because you know it will cast quite a work burden on that office and on the US Attorneys."[84] Meeting with some law clerks later, Marshall quipped that he had found a sure way to win any case: "Just send Bender up with instructions to lose."[85] Unlike Warren, Brennan understood Bender's position. Bender recalled that every time he came across the Justice, Brennan would say: "Oh, I want you to meet Paul Bender. This is the greatest lawyer I've ever met. He can't even lose a case when he *wants* to."[86] I asked Bender if he thought there was any way the government could have lost the case. Eventually, he said, "If the prosecutor at trial had argued his own case." He felt the man was so atavistic that his argument might have offended a majority.[87]

Several weeks later, Fortas sent a note to Douglas ("alone") acknowledging that he had been wrong in *Ginzburg*. "I was alarmed by Brennan's vote at Conference to affirm the ban on Fanny Hill. So contrary to my principles, I went to work, suggested the 'pandering' formula to Bill (which I think is as good as any for this cess-pool problem) and came out against Ginzburg.—I guess that subconsciously I was affected by G's slimy qualities—but if I had it to do over again, I'd vote to reverse at least as to all except his publication of 'Liaison.' Well, live and learn."[88] If Goldberg had stayed on the Court, there would have been no cause for Fortas's mea culpa and Ginzburg would have been set free.



The same day it announced the *Ginzburg* decision, the Court held, in *Memoirs of a Woman of Pleasure v. Massachusetts*, that the First Amendment would not allow a work to be banned unless it was "utterly without redeeming social value." Written by John Cleland while he was serving time in a mid-nineteenth-century debtor's prison in England, the book, like the decision regarding it, is more commonly referred to as *Fanny Hill*, after the memoir's fictitious author.

Two weeks later Ginzburg's petition for rehearing was denied.[89] Fortas had made a deal, and he kept up his end of the bargain, just as Cox had when Ginzburg filed for certiorari. Ginzburg managed to stay out of jail for several years and ultimately only served eight months.[90]

Warren was not alone in thinking *Ginzburg* was about to open a whole new era of obscenity prosecutions. A *New York* Times article three days after the decision stated that "[l]egal experts agreed that the novel concept announced . . . was likely to result in massive prosecutions around the country."[91] But Warren's hope for seeing prosecutors bring pandering charges never materialized. **Fanny Hill** and then *Redrup*[92] a year later brought legal results into conformity with the changing sexual mores of the 1960s.[93] Ironically, George Wallace summed it up best: there ceased to be a constitutional distinction between "smut and great literature."[94] Without writing a word, that was Fortas's contribution to the law of obscenity—that and assisting Brennan in perpetrating a great injustice and denying Ralph Ginzburg what every other litigant is promised: equal justice under law.

ENDNOTES

[1]Hearings before the Committee of the Judiciary United States Senate, 90th Cong. 2d Sess., on Nomination of Abe Fortas 291 (1968).

[2]*Roth v. United States*, 354 U.S. 476 (1957) is an exception because the organization only came into existence a year later.

[3]*Roth v. United States*, 354 U.S. 476 (1957).

[4]*Jacobellis v. Ohio*, 378 U.S. 184 (1964) (plurality).

[5]*Ginzburg v. United States*. 383 U.S. 463 (1966).

[6]*Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966).

[7]Lucas A. Powe, Jr., **The Warren Court and American Politics** 342 (2000).

[8]Warren was the other.

[9]H.W. Perry, Jr. **Deciding to Decide** (1993). The best recent example is *Boumediene v. Bush*, 553 U.S. 723 (2008), where Justices Stevens and Kennedy joined the four conservatives in denying review of the Military Commissions Act. Then, following revelations that the commission hearings would be rigged, the two switched and voted to grant certiorari. Stevens' vote was clearly strategic based on how he believed Kennedy would case the fifth vote on the merits.

[10]402 U.S. 1 (1971). Stewart's opinion initially would have upheld the court of appeals' decision limiting the busing order of the district court. Douglas wanted the district court order upheld in its entirety.

[11]Stewart did so, although that opinion never came down. Bob Woodward and Scott Armstrong, **The Brethren** 107 (1979).

[12]**The Brethren** also has a story of a questionable vote by Brennan in *Moore v. Illinois*, 408 U.S. 786 (1972), where the authors claim he stuck with the Blackmun opinion denying Moore a new trial (instead of joining Douglas, Marshall, White, and Powell) because of "the big picture," by which he meant abortion and maybe obscenity. *Id.* at 225. The source on the story was Brennan's former clerk Paul Hober, the only clerk to speak on the record publicly, and Hober vigorously disputed Woodward and Armstrong's interpretation.

[13]David Foxon, **Libertine Literature in England, 1660–1745** 54 (1965).

[14]Brief for Appellee Attorney General of the Commonwealth of Massachusetts, October Term 1965, No. 368 at 6.

[15]Charles Rembar, **The End of Obscenity** 317 (1968).

[16]Peter Quennell, "an eminent English student of the Eighteenth Century," offered that thought in an introduction to the American edition. The description of Quennell was offered in the New York trial of **Fanny Hill**. Rembar, **End**, at 259.

[17]*Id.* This helps explain why **Fanny Hill** went through five printings in 1963.

[18]*Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413, 415–16 n.2 (1966). Lawyers who cannot get an expert witness to support their case should turn in their bar cards.

[19]349 Mass. 69, 206 N.E. 2d 403 (Mass. 1965).

[20]383 U.S. 502 (1966).

[21]Black, John Marshall Harlan, Stewart, and Arthur Goldberg voted to grant. Box C82, Tom Clark Papers, Tarlton Law Library, The University of Texas. Why Douglas did not is a mystery.

[22]Black, Douglas, Harlan, Stewart, and Fortas voted to hear the case. *Id.*

[23]*Grove Press v. Christenberry*, 276 F.2d 433 (2d Cir. 1960). The Solicitor General did not seek certiorari. The 1959 American publication of the book produced a book review I wish I could have written: "Although written many years ago, **Lady Chatterley's Lover** has just been reissued by Grove Press, and this fictional account of the day-by-day life of an English gamekeeper is still of considerable interest to outdoor-minded readers, as it contains many passages on pheasant raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper. Unfortunately one is obliged to wade through many pages of extraneous material in order to discover and savor these sidelights on the management of a Midlands shooting estate, and in this reviewer's opinion this book can not take the place of J. R. Miller's **Practical Gamekeeping**." Ed Zern, *Field and Stream* 152 (Nov. 1959).

[24]*Grove Press v. Gerstein*, 378 U.S. 577 (1964).
[25]*Jacobellis v. Ohio*, 378 U.S. 184 (1964).
[26]Lucas A. Powe, Jr., **The Supreme Court and the American Elite, 1789–2008** 258 (2009).
[27]In his closing argument at trial, the Massachusetts prosecutor stated that **Fanny Hill** "did arouse prurient interest and impure thoughts in me. Fortunately I am well adjusted enough so it did not affect my daily life, but I wonder if that could be said for everyone who has access to a book of this nature." Rembar, **End**, at 335.
[28]Box 1364, William O. Douglas Papers, Library of Congress.
[29]Harlan believed states could basically do as they pleased so long as it was not irrational, but the federal government was to be held to the high threshold of hard-core pornography before it could declare materials obscene.
[30]Douglas Conference Notes, Box 1364.
[31]383 U.S. at 418.
[32]Owen M. Fiss and Peter L. Strauss [Brennan's clerks], October Term, 1965 Notes at XVII, Box 11:6, William J. Brennan Papers, Library of Congress.
[33]*Id.*
[34]Bruce Allen Murphy, **Fortas** 458 (1988).
[35]Fiss and Strauss, Notes at XVII.
[36]Warren was so offended by pornography that he relied on others, typically Brennan, to characterize the materials for him. One of his law clerks stated that while **Tropic of Cancer** was "patently offensive," **Fanny Hill** was "stylish, humorous, and at times almost incisive." Bench Memo, 12/7/65 by KZ [Kenneth Ziffren]. Box 280, Earl Warren Papers, Library of Congress.
[37]This may have been implicit in Fortas's switch because Warren would prefer to deal with obscenity via an approach that focused on the defendant's conduct, not the book, magazine, or film. According to Brennan's clerks, after the Conference, Warren "had a long discussion" with Fortas in which the latter "indicated in all likelihood he would join an opinion affirming the convictions on the basis of the pandering approach." Fiss and Strauss, Notes at XIX–XX. Yet there had been "little or no discussion of a pandering approach" at Conference. *Id.* at XIX.
[38]383 U.S. at 420. According to Charles Reed, who was clerking for Clark, in contrast to the divided bosses, all "eighteen law clerks thought to a man that there was no obscenity" in both *Memoirs* and *Ginzburg*. Mimi Clark Gronlund, **Supreme Court Justice Tom C. Clark** 194 (2010).
[39]Richard H. Kuh, **Foolish Figleaves? Pornography In—and Out—of Court** 160 (1967).
[40]Gay Talese, **Thy Neighbor's Wife** 452 (1980).
[41]*Id.* at 160–61.
[42]Ralph Ginzburg, ***Eros* on Trial** 5 (1966). This "book" is more like a magazine of sixty-four pages and consists mostly of the excerpts from the trial and pictures from *Eros*.
[43]*Time*, March 23, 1962 at 77.
[44]Kuh, **Figleaves** at 163.
[45]Victor Navasky, **Kennedy Justice** 391 (1971).
[46]*Eros*, vol. 1, no. 4 (1962) at 73–80.
[47]Quoted in Edward de Grazia, **Girls Lean Backward Everywhere** 509 (1992).
[48]*Id.* at 507.
[49]383 U.S. at 487 (Douglas, J., dissenting).
[50]De Grazia, **Girls** at 509.
[51]Ginzburg, **Trial** at 12.
[52]*Id.* at 23.
[53]Government Brief, Oct. Term 1965, No. 42 at 8.
[54]*Id.* at 22, 46, 48.
[55]*Id.* at 48.
[56]Both Justices Black and Stewart begin their dissents by noting the five-year sentence. 383 U.S. at 476, 497.
[57]Quoted in *U.S. v. Ginzburg*, 338 F.2d 12, 13–14 (3d Cir. 1965).
[58]*Id.* at 15.
[59]Both decisions came down before the Third Circuit affirmed Ginzburg's conviction.
[60]380 U.S. 961 (1965).
[61]Grazia, **Girls** at 504.
[62]Ken Gormly, **Archibald Cox** 195 (1997).
[63]Powe, **Warren Court** at 212.
[64]Bender in conversation with the author, October 27, 2009.
[65]*Id.*
[66]Grazia, **Girls** at 505.
[67]Powe, **Warren Court** at 106. In the more typical cases of robbery, assault, and murder, Warren spoke of the root causes of crime. *Id.* at 408.
[68]354 U.S. at 495.
[69]383 U.S. at 470, 475–76.
[70]*Id.* at 467 (Brennan uses the plural because three corporations Ginzburg controlled were also part of the case).
[71]*Id.* at 468.
[72]*Id.*
[73]*Id.* at 470.
[74]*Id.*
[75]*Id.* (Warren wanted "sole" removed from the sentence, but Fortas insisted it remain. Fiss and Strauss, Notes at XX.) The quotation in text prompted this reply from Stewart: "Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his 'sordid business.'" 383 U.S. at 501. Harlan was equally trenchant: "This curious result is reached through the elaboration of a theory of obscenity entirely unrelated to the language, purposes, or history of the federal statute now being applied, and certainly different from the test used by the trial court to convict the defendants." The Comstock Act was ignored and the new offense created was "a mere euphemism for allowing punishment of a person who mails otherwise protected material just

because a jury or judge may not find him or his business agreeable." *Id.* at 498.

[76]Fiss and Strauss, Notes at XX.

[77]KZ to Warren, Box 278, Warren Papers. I do not know if *Ginzburg* was the trigger, but when I interviewed for a Warren clerkship in the fall of 1967, I was asked if I agreed with the Chief Justice on obscenity and told, before I answered, that a "no" would be disqualifying. Andrew Koppleman, "Does Obscenity Cause Moral Harm?" 105 *Colum. L. Rev.* 1635, 1638 n.13 (2005).

[78]Grazia, **Girls** at 505.

[79]*Terminiello v. Chicago*, 337 U.S. 1 (1949).

[80]*Dennis v. United States*, 341 U.S. 494 (1951).

[81]Bender in conversation with the author, October 27, 2009.

[82]*Playboy*, July 1966, at 50; Talese, **Neighbor's Wife** at 453.

[83]Powe, **Warren Court** at 346.

[84]Fiss and Strauss, Notes at XXI.

[85]Powe, **Warren Court** at 346.

[86]Grazia, **Girls** at 504.

[87]Bender in conversation with the author, March 25, 2007.

[88]Fortas to Douglas, April 15, 1966, Box 1368, Douglas Papers.

[89]384 U.S. 934 (1966).

[90]Ralph Ginzburg, **Castrated: My Eight Months in Prison** (1973).

[91]Sidney E. Zion, "The Ginzburg Decision," *New York Times*, March 24, 1966 at 31.

[92]*Redrup v. New York*, 386 U.S. 757 (1967).

[93]Three weeks before *Ginzburg* and *Memoirs* were handed down, the *New York Times* reviewed the pornographic book **Story of O.** The "free publication of 'Story of O' in this country is an event of considerable importance not because the book has more than limited artistic merit (it probably doesn't) or because it is in some way attractive (it isn't) but because it marks the end of any coherent restrictive application of the concept of pornography to books." Review by Eliot Fremont-Smith, "The Uses of Pornography," March 2, 1966 at 39. That same year, a book by sexual researchers William Masters and Virginia Johnson, **Human Sexual Response**, which was not an easy read, sold 300,000 copies and spent six months on the best seller list. The next year, with *Playboy*'s circulation exceeding 4,000,000, its publisher, Hugh Hefner, graced the cover of *Time*'s March 3, 1967 issue.

[94]Dan T. Carter, **The Politics of Rage** 425 (1995).

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

"The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them."[1] This was the assessment offered by one leading opinion journal more than seven decades ago, after President Franklin D. Roosevelt nominated Professor Felix Frankfurter to the Supreme Court to fill the opening occasioned by the death of Justice Benjamin N. Cardozo. Because vacancies on the Court not only are infrequent but also occur at irregular intervals, the comment illustrates the reality that selection of Justices is among the most important and consequential responsibilities that fall to any chief executive.

This truth was amply demonstrated following Justice David H. Souter's announcement on May 1, 2009 of his intention to retire. This news was followed on June 1 by President Barrack Obama's nomination of Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit to fill Justice Souter's seat. Like Samuel A. Alito, Jr., the Court's then most junior Justice, she was a graduate of Princeton University and Yale Law School and had experience both as a prosecutor[2] and as a judge on a federal court of appeals. Unlike Alito, she had served as a federal trial judge and had experience in private practice, but she lacked his other executive-branch experience in the offices of the Solicitor General and the Attorney General of the United States.

She was also the first Latina to be named to the High Court and the first nominee by a Democratic President in fifteen years. Moreover, she possessed a compelling life story that had begun in a housing project in the South Bronx of New York City in the home of Puerto Rican–born parents. A positive 13–6 vote in the Senate Committee on the Judiciary on July 28 preceded a favorable confirmation vote of 68–31 by the full Senate on August 6. The negative votes, however, totaled more than any Democratic nominee had received since the Senate rejected President Grover Cleveland's nomination of Wheeler Peckham in 1894.[3] Chief Justice John G. Roberts, Jr. swore in the 111th Justice on August 8.

Justice Sotomayor's appointment demonstrated a basic truth about American politics. Although the separate institutions mandated by the Constitution make possible the Court's considerable independence from outside political pressure, three factors thrust the Court

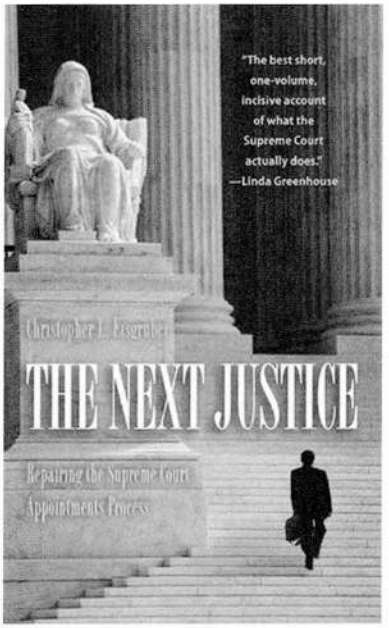
into the partisan life of the nation: the role of interpretation the Constitution allows for the Justices, the significance of the decisions the Justices render, and the method of selection of Justices that the Constitution prescribes. Little wonder the appointment of Justices is of paramount concern to Presidents, Senators, and citizens alike. Indeed, for some observers, Justice Sotomayor's arrival called to mind a comment offered by then Senator Joseph Biden following the confirmation of Justice Sandra Day O'Connor in September 1981: "There is a huge amount of whistling in the graveyard about what kind of Justice [she] will be.... I believe we should caution the electorate that even if they want us to apply a litmus test... it is not something we do very well; because once a Justice dons that robe and walks into that sanctum across the way, we have no control, and that is how it should be.... They are a separate, independent, and equal branch of Government, and all bets are off."[4] This political dimension of the Court's work is generously illustrated by recent books about the Third Branch.

Appropriately, two of these monographs treat judicial selection itself and thus join an expanding list of complementary titles.[5] Auspiciously appearing in print between the arrivals of Justices Alito and Sotomayor was **The Next Justice** by Christopher L. Eisgruber,[6] who is Provost and a professor of public affairs in the Woodrow Wilson School at Princeton University. His volume is a sensible, illuminating, and sometimes insightful look at the confirmation process for Supreme Court nominees.[7] For a subject that can appear complex and often be emotionally charged, the author has provided an account that is eminently readable and informative, one that is entirely manageable and digestible in an evening. Eisgruber thus succeeds on two fronts: he offers something serviceable to the expert and novice alike. This compact volume unfolds in three parts. The first offers perspective, the second description, and the third prescription.

For the author, any wide-angle view of Supreme Court appointments captures a striking contrast. In the seventy-four years between 1894 and 1968—that is, from the second Cleveland presidency deep into Lyndon Johnson's presidency—the Senate rejected only a single nomination to the High Court: Hoover's choice of Judge John J. Parker to succeed Justice Edward T. Sanford in 1930. Yet the slightly more than four decades since Chief Justice Earl Warren retired in 1969 have witnessed seven failed nominations, either because of rejection by the Senate or because of their withdrawal by the President.[8]

The demise of what had been a general era of good feelings over the business of judicial selection occurred because of three factors that distinguish the more recent nominations from earlier ones. First, the Court itself has become "politically prominent and controversial."[9] It is hardly coincidental that confirmation battles became more frequent at or soon after the end of the Warren Court. Warren's tenure had been one of the most active and remarkable in American history. By one count, in the approximately 150 years before Warren's appointment, the Court overruled eighty-eight of its precedents. In Warren's sixteen years, it added another forty-five to that list. Hardly an aspect of life went untouched by landmark decisions on race discrimination, legislative apportionment, privacy, and the Bill of Rights. Under Warren, the Court initiated a revolution that is measured by President Dwight Eisenhower's latter-day lament over Warren's appointment: "the biggest damn fool mistake I ever made."[10] "Only during the Marshall era did the Supreme Court produce so many significant decisions."[11]

Second—and hardly surprisingly—Presidents and presidential candidates who found some of those decisions objectionable as a matter of law and policy have sought or promised "nominees who would advance their ideological perspectives while on the Court." Senators who have "battled fiercely about whether to confirm those nominees"[12] now



Christopher Eisgruber's new book examines the confirmation process for Supreme Court nominees.

comprise the third factor. It requires little skill at reading crystal balls to predict that none of these conditions capable of generating great nominational tumult seems likely to diminish soon. Heightened congressional partisanship will surely only add to their longevity. Thus, Eisgruber's analysis is especially timely. Because of the changes that the Court can bring to every American, the selection of Supreme Court Justices is a serious matter that requires close attention to the confirmation process, a requirement that itself demands an accurate grasp on the part of both Senators and the public of who a nominee truly is and a clear understanding of what it is that Justices actually do.

Eisgruber believes that truly knowing the nominee has been particularly difficult since 1987. In that year, President Ronald Reagan nominated Judge Robert H. Bork, of the District of Columbia Court of Appeals, to fill the seat vacated by Justice Lewis Powell. For several years, Powell's votes since his arrival in late 1971 had made him a pivotal member of the Court, especially in abortion, privacy, church-state, and affirmative-action cases. With Powell's departure, Reagan had a chance to advance judicially his social agenda, much of which had been rebuffed by Congress. Of particular concern to some was a woman's right to terminate her pregnancy—the "right to choose." What had been a firm 7–2 majority for that right in *Roe v. Wade*[13] now seemed literally to hang in the balance. The views of Powell's replacement would be critical for the future of this application of the constitutionally protected right of privacy.

The President's choice to replace Powell was Judge Bork. Not since Felix Frankfurter's appointment in 1939 had the Senate considered a Supreme Court nominee with a resume so rich with articles and published speeches. Of particular interest along this paper trail was a 1971 article in the *Indiana Law Journal*[14] that, among other things, called into question the constitutional underpinnings of *Griswold v. Connecticut*,[15] the landmark 1965 ruling on a right of privacy and birth control. If *Griswold* rested on dubious ground, so did *Roe v. Wade*. For those who wanted to know Bork's thinking, the nominee was more than accommodating, as he discussed his views at great length. The Senate Judiciary Committee held what became twelve record-setting days of hearings on the nomination, with Bork testifying and being questioned on five of those days. Not since Woodrow Wilson nominated Louis Brandeis in 1916 had a confirmation battle become so vitriolic. Finally, finding his views too extreme, Bork's Senate opponents prevailed, 58–42—a larger negative vote than either Clement Haynsworth or Harrold Carswell, the two rejected nominees of President Richard Nixon, had endured. The phrases "to Bork" or "to be Borked" consequently entered the American political lexicon.

The effects of the Bork confirmation struggle have been long-lasting, and, in the author's view, not altogether salutary. More recent nominees have prudently "been less candid. They have played it safe, refusing to say anything meaningful about their view of the

Constitution or the Court's role. In the post-Bork era, the hearings have become, in the words of Senator Arlen Specter, 'a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed.'"[16] Accepting this rhythmic performance analogy, Eisgruber sees the dance as both "formal and highly choreographed, with the nominee knowing just how to match each move the senators make."[17] In short, successful nominees today must master the art of speaking competently throughout, yet without revealing anything of substance about their constitutional philosophy.

With this perspective on recent history in place, the author offers a description of the job of appellate judging, particularly as illustrated by the mainly constitutional jurisprudence espoused or practiced by Justices as varied as Hugo Black, O'Connor, and Antonin Scalia. This analysis reveals that members of the Court typically draw upon two kinds of values, "ideological" and "procedural." The former include "political and moral values of the sort that distinguish liberals from conservatives. Many of these values will describe what sorts of inequalities are justifiable in a free society." Procedural values "pertain to the jurisdiction, responsibility, or operation of institutions, including courts."[18] Indeed, as a former clerk to Judge Patrick E. Higginbotham of the Court of Appeals for the Fifth Circuit and Justice John Paul Stevens, the author has seen these values at work firsthand. Moreover, because nominees will differ as to which values are appropriate or desirable, choosing a "good justice means, among other things, choosing someone who will invoke an attractive combination of ideological and procedural values when interpreting the Constitution."[19] Because of the importance of values, any attempt by Senators to assess a nominee "through nonpolitical criteria is a dead end." Thus, it is pointless, Eisgruber believes, to extract from a nominee assurance that she or he will adhere to principles of judicial restraint or follow the intention of the Framers of the Constitution. Those are "tantalizing but bogus concepts"[20] that reveal little about a prospective Justice's real jurisprudential thinking. And it is a nominee's judicial values that should matter.

In the author's view, the contemporary confirmation process for High Court nominees has been unsatisfactory, not because of "newly partisan behavior by the Senate," but because of "newly aggressive nomination practices by recent presidents."[21] Accordingly, he proposes a two-part cure. The first entails building a consensus on the goal of Senate hearings. The aim of the Senate and the attentive public that follows the Senate's work "should be to understand what a nominee thinks judicial review is good for, and to evaluate whether that judicial philosophy is an acceptable one." The second sets a standard for Senators' behavior and expectations. "The Senate ought not to regard the confirmation hearings either as the principal means for exploring a nominee's judicial philosophy or as a test that, if passed, entitles the nominee to confirmation. The Senate should evaluate nominees on the basis of their record and reputation, just as presidents do. If the nominee's record suggests to senators that his or her views about the purpose of judicial review are rigid or extreme rather than moderate, they have no obligation to defer to the president's choice."[22] Rather, they and the public "should be willing to demand that the nominee present evidence of his or her moderation. If the nominee refuses to do so, senators can legitimately reject the nomination."[23] For Eisgruber, apparently, moderation should be the new litmus test. Given the power over public policy that the Court wields, that "kind of transparency is essential to constitutional democracy."[24] Yet the link between judicial review and constitutional democracy is also tenuous because of what has sometimes been called the "countermajoritarian" difficulty or dilemma: the apparent contradiction presented when *unelected* judges use the power of judicial review to nullify the actions of *elected* legislators or executives.[25] Eisgruber's objective seems to be to make sure that

Senators and the public truly grasp the thinking of those who will be able to negate the popular will in a political system founded on the principle of government by the consent of the governed.

While **The Next Justice** sets goals for Senators and the general public in assessing Supreme Court nominees, **Advice and Dissent**,[26] by George Washington University political scientists Sarah A. Binder and Forrest Maltzman, provides a close and unusually valuable look at the politics of confirmation of judges appointed to the United States district courts and the courts of appeals in the eleven numbered federal circuits.[27] Viewed together, these benches today include a large number of judges: current law authorizes 168 judges for the federal appeals courts and 678 for the district courts.

For several reasons, this emphasis on staffing the lower-level federal tribunals should be of special interest to students of the High Court. First, service on one of the courts of appeals now seems to have become a de facto requirement for nomination to the Supreme Bench. Thus, to understand the politics of appointment to the lower federal courts, especially to the appeals bench is to understand part of the recruitment process for High Court designees. Indeed, beginning with Justice O'Connor's retirement and the arrival of Justice Alito, the Supreme Court, for the first time since creation of the courts of appeals in 1891, has been staffed exclusively by Justices who were nominated directly from one of those courts, a pattern that has persisted with the appointment of Justice Sotomayor. While some Justices sitting in earlier decades had appeals-court experience, of course, nominees often came from much more varied backgrounds. Consider, for example, the Supreme Court of 1963. While two Justices (John M. Harlan and Potter Stewart) were named directly from an appeals court, one (William J. Brennan, Jr.,) came from a state supreme court, one (Black) was nominated while sitting as a United States Senator, another (Warren) while serving as Governor of California, and a third (William O. Douglas) while serving as chair of the Securities and Exchange Commission. Two (Tom C. Clark and Arthur J. Goldberg) moved to the Court directly from heading Cabinet-level departments (Justice and Labor), and yet another (Byron R. White) was deputy attorney general when named. In contrast, with the recent departures of Justices O'Connor and Souter, no member of the current Court has any experience on a state bench.

Second, as the authors explain, the "lower federal courts are the workhorses of the federal judiciary."[28] This fact manifests itself in at least two ways. First, while some cases accepted for review by the Supreme Court come from the highest court of a state, a large fraction comes from one of the lower federal courts, a fact that should not be surprising given the breadth and complexity of congressional legislation and rules issued by the various regulatory agencies. Moreover, the comparatively small number of cases that the Supreme Court annually decides today (well under 100 in most recent Terms) means that, for the overwhelming majority of cases that originate within the federal judicial system, one of the lower federal courts is almost always the court of last resort.

Third, as the literature amply illustrates, far more attention attaches to Supreme Court nominations than to nominations to the lower federal tribunals. This fact has real consequences. "Out of the public spotlight, a nominee's detractors have a far easier time blocking appointments they oppose. Senators understand the latitude they have to block nominations, and they do so surreptitiously by exploiting the Senate's formal rules and informal practices."[29]

Fourth, "indicators of the health of the nomination and confirmation process suggest that something has gone astray in the Senate's practice of advice and consent."[30] Here the authors point to comparative confirmation rates. They report that about 80 percent of the nominees to both the Supreme Court and the courts

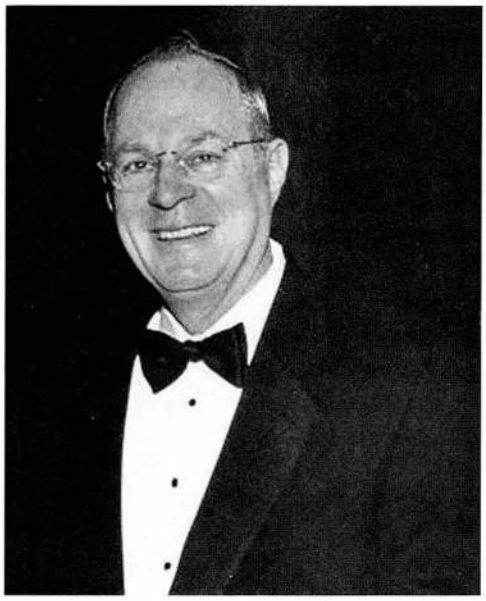
of appeals since 1947 have gained Senate approval. However, if one looks at the period only since 1992, the approval rate for the Supreme Court remains about the same, but for the appellate level it falls to under 60 percent, with a rate of below 50 percent in some years. Moreover, the authors have found that the confirmation rate is not the same across the circuits. While nominees for some circuits generate little controversy, about half of those for the Fourth and Sixth circuits and the District of Columbia Circuit have failed since 1991. Also noteworthy, the authors believe, is the fact that the duration of the process has stretched out. "From the 1940s to the 1980s, a typical court of appeals nominee was confirmed within two months of nomination. By the late 1990s, the wait for successful nominees had stretched to about six months."[31] Even those figures obscure instances during the Clinton and George W. Bush administrations, when nominations lingered between one and two years. In addition, Presidents themselves increasingly take more time to make nominations. At the end of the 1950s, once a vacancy occurred, about 200 days would typically elapse before a nomination was announced. By the late 1990s, the wait time had swelled to more than 600 days. "Despite the low salience of so many nominations to the lower courts, senators clearly take stock of these nominees and often exploit the rules of the game to derail the nominations on their way to confirmation."[32] Certainly the political reality is that no President will probably encounter a decline in his job-approval ratings for failure to submit a prompt appellate court nomination, whereas a Senator might well score political points among certain groups by judicious application of institutional rules and procedures to sidetrack a nominee.

The authors note that two different explanations have been floated to account for this transformation of nominations and confirmations. A "big bang" theory points to a breaking point in national politics, after which the prevailing norms of deference and restraint in judicial selection have fallen apart."[33] Something as politically traumatic as the confirmation fight over Judge Bork could be such an event. Alternatively, there is the "nothing-new-under-the-sun" theory that argues "that ideological conflict over the makeup of the bench has been an ever-present force in shaping the selection of judges and justices," as Presidents and Senators compete for influence in shaping the judiciary.[34] While there is evidence to support each approach, the authors prefer a third explanation that is largely institutional. And herein rests the book's real contribution: an examination of the origin and operation of Senate rules and practices that heavily influence the outcome of judicial selection today. Thus, there is an extensive look at the origin and development of "advice and consent" and procedural devices, such as the "blue slip" and the "hold." These, in turn, have helped to feed the heightened partisanship of recent years and have encouraged Senators to deploy these tools to determine the fate of judicial nominees.[35]

Findings from the data gathered by Binder and Maltzman are not altogether surprising. First, nominees to the courts of appeals are more often the targets of such derailing devices than are nominees to the district courts. Second, "appellate courts that are evenly balanced between the parties are more often targeted than appellate courts that have already tipped to one party or the other." Similarly, the "placement of new judgeships corresponds to judicial demand but also to the electoral and institutional preferences of the legislators who create them."[36] Third, distinctly negative consequences flow from such tactics. Prolonged vacancies contribute to swelling court dockets and increased delays for litigants. One wonders, too, if a confirmation process that closely resembles an obstacle course tends to discourage some potential nominees who, along with their families, may be reluctant to subject themselves to it. Moreover, the authors offer some evidence to suggest that confirmation conflict over judicial nominees even at levels below the Supreme Court undercuts the

public's long-term trust of federal judges and their decisions—that is, the legitimacy of the judicial system.

Finally, the authors consider remedial measures to set the confirmation process on a better footing. These range from widespread adoption of commissions at the state level that would probably encourage the nomination of more widely acceptable (and therefore probably centrist) candidates to providing a non-statutory fast track for nominations, akin to budget and trade measures in Congress. They even look at adjusting the numerical threshold for confirming nominees.[37] They conclude by leaving responsibility where the Constitution has lodged it since the Founding: in the Senate. "How well senators are able to repair the partisan breaches of Senate trust will tell us much as we look ahead about whether the breakdown in consent over lifetime appointments to the bench will have temporary or lasting and harmful effects."[38]



The jurisprudence of Justice Anthony Kennedy, who has served on the Supreme Court since 1988, is the subject of two new books.

Like each of his colleagues in early 2010, Justice Anthony M. Kennedy reached the Supreme Court after service on one of the federal courts of appeals. He thus successfully—and apparently happily—navigated not only the process described in **The Next Justice** but that examined in **Advice & Dissent** as well. Ironically, but for the successive misfortunes of two Reagan nominees to the High Court in the fall of 1987, Justice Kennedy might well have never had office space at One First Street, N.E. After the negative vote on the Bork nomination in the fall of 1987 that was described above, President Reagan on October 29 selected Douglas H. Ginsburg, one of Bork's colleagues on the District of Columbia Circuit. Senators never got a chance to query Ginsburg, however. Problems over possible conflicts of interest and marijuana usage surfaced quickly, and on November 7 he withdrew his name from consideration.

For the first time since 1970, a President would have to make a third nomination to fill a single vacancy. Time was critical. Reagan was nearing the start of his last year in office. "Lame-duck" talk abounded. As had happened with President Johnson's nomination of Justice Abe Fortas to the Chief Justiceship in 1968, the vacancy might carry over to a successor in 1989. On November 10, Reagan averted that possibility by nominating Kennedy, a longtime acquaintance who had been sitting on the Ninth Circuit Court of Appeals after leaving private practice.[39] Having exhausted themselves in the fight over Bork, Senators could find little wrong this time with Reagan's nominee. An hour's debate in the Senate on February 3, 1988 preceded the vote to confirm, 97–0, allowing Kennedy to be sworn in on February 18 and ending the seven-month standoff over Justice Powell's successor.

Now, after more than two decades on the Supreme Bench, Justice Kennedy is the subject of two recent books. While books about sitting Justices are hardly unprecedented, it is nonetheless noteworthy to have two on the same Justice that appear within the same year. **The Tie Goes to Freedom**[40] is authored by political scientist Helen J. Knowles of the State University of New York, Oswego. Her volume

is not a biography. Neither does she claim to offer an analysis of all of Kennedy's judicial opinions, although her book draws heavily on some and on his addresses and other public statements. (She also mined the papers of Justices Brennan, Harry A. Blackmun, and Thurgood Marshall at the Library of Congress.) Rather, her goal is to present a jurisprudential "examination of the justice's understanding of the content and boundaries of constitutionally protected liberty, as it pertains to four areas of the law—freedom of expression, equal protection of the law, race-based classifications, and noneconomic individual decisionmaking and autonomy."[41] Her guiding question is: "What meaning has Kennedy, whose vote has been determinative in so many landmark cases, given to the constitutional 'Blessings of Liberty'?"[42] Indeed, his votes and some of his opinion-writing opportunities may even suggest that "the Constitution has become 'What Anthony Kennedy says it is.'"[43] Knowles' question and assertion are important in that the Justice "continues to baffle those who comment on the judicial behavior of the men and women appointed to sit on America's highest court."[44] In the years since he took his seat, "the votes he has cast and the opinions he has written have consistently frustrated observers' attempts to affix ideological labels to him. For the most part, they have had to be content with describing him as a judicial centrist—an enigmatic 'Man in the middle.'"[45]

While disavowing any claim "to have found the definitive key to unlocking the mysteries that surround many of the justice's judicial decisions," Knowles nonetheless offers a clue. From her analysis, she believes that Kennedy's jurisprudence, while falling "short of an all-encompassing judicial philosophy," is consistent, flows from a "highly principled jurist," and reflects a "modest libertarianism."[46] She finds his approach to adjudication, with values heavily influenced by his upbringing in northern California, composed of three elements: (1) toleration of diverse views, (2) preserving and protecting human dignity, and (3) personal responsibility.

Of course, it seems paradoxical to align an expansive application of judicial review, as one does find in some of Justice Kennedy's opinions, with a theoretical tradition (libertarianism) that typically prescribes a limited role for government. However, "imagine a libertarianism that uses the authority of the state's judges—neutral decisionmakers—to ensure that government actions (by the other branches of government) pass far more stringent tests when they impinge upon liberty. Now imagine this libertarianism takes an equally dim view of government actions that demean the individual, negatively affect a person's dignity, or diminish personal responsibility." This, she concludes "would be a modest libertarianism that is entirely consistent with the tenets of libertarian thought. This holds true even if the means to achieving the goal of greater individual freedom and respect is vigorous use of the authority vested in a government institution."[47] It is this set of components of the libertarianism Knowles finds reflected in Kennedy's opinions that provide the rationale for the use of judicial power among those troubled by the majoritarian dilemma or difficulty, which Knowles calls the "Madisonian dilemma."[48] As suggested by the three paragraphs of Justice Stone's famous Footnote Four in 1938,[49] imposing the judicial will on a political majority is justified when a text-based violation of the Constitution has occurred, when the Court is protecting the majoritarian political process itself, or when the Court protects otherwise defenseless "discrete and insular" victims of that process when it has run amuck.

Justice Kennedy's Jurisprudence,[50] by political scientist Frank J. Colucci of Purdue University's Calumet campus, explores much of the same ground as that covered by Knowles' book. As did she, he acknowledges the widespread interest, particularly among students of the Court, in the positions of the

104th Justice. Colucci reports that, at least as of the date his book went into final production, Kennedy has been in the majority more than any other Justice since he joined the Court. Indeed, during the October 2006 Term he was in the majority in all twenty-four cases decided by a 5–4 vote.[51] Moreover, his willingness to use judicial power qualifies him as the "justice most likely to strike actions of federal and state government on constitutional grounds."[52] "Such a count, moreover, "actually understates his attempts to expand judicial power; even in areas where he has upheld governmental action—including challenges to districting for partisan advantage and takings as well as cases involving federalism and political representation—his concurring opinions subject those policies to more searching constitutional review." Accordingly, because his theory of liberty allows him to support intervention into areas favored both by liberals and by conservatives, his view of the judicial role "puts him at the center of a divided Court."[53] For some—and here Colucci echoes one of Knowles's observations—"his influence is so profound that the current Court should be considered the Kennedy Court."[54]

From opinions across a range of constitutional topics, Colucci draws a conclusion that complements Knowles' study: that Kennedy "employs a consistent jurisprudence based on what he considers the 'full and necessary meaning' of liberty even though Kennedy has been reluctant, as he explained to the Senate after his nomination to the High Court, 'to offer myself as someone with a complete cosmology of the Constitution. I do not have an over-arching theory, a unitary theory of interpretation.... So many of the things we are discussing here are, for me, in the nature of exploration and not the enunciation of some fixed or immutable ideas.'"[55] Colucci, however, finds that a theory has by now indeed emerged, one that reveals itself in an approach that "shares much with the moral reading of the Constitution championed by theorist Ronald Dworkin and former Justice William J. Brennan as well as the 'presumption of liberty' advocated more recently by libertarian law professor Randy Barnett."[56] Moreover, he argues that the Justice's particular concepts of liberty and human dignity "have clear rhetorical roots in post–Vatican II Catholic social thought." The result is a jurisprudence that "seeks to bring personal liberty to the forefront of constitutional interpretation"[57] in a context in which it is the judicial duty to enforce and implement that liberty. Indeed, the phrase "full and necessary meaning" itself (which Colucci appropriates as a subtitle for his book) comes from Kennedy's testimony during confirmation hearings before the Senate Judiciary Committee, where he insisted that "the enforcement power of the judiciary is to insure that the word 'liberty' in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[58] It is to resolve disputes over the meaning of liberty, he explained to the Committee, that "we look to the concept of individuality and liberty and dignity that those who drafted the Constitution understood." Indeed, he believes that Americans today can have a better understanding of rights than the Framers did. "[I]t sometimes takes humans generations to become aware of moral consequences of their own conduct. This does not mean that moral principles have not remained the same."[59]

Yet it must surely be ironic that, as central as liberty is to what both Knowles and Colucci have gleaned from Kennedy's opinion and other statements, the Framers of the Constitution of 1787 used the word but once: in the Preamble. It fell to the First Congress, which drafted the Fifth Amendment, and to the Fortieth Congress, which drafted the Fourteenth Amendment, to incorporate that word into those respective additions to the Constitution. Viewed both textually and conceptually, "liberty" may be far more central to the Declaration of Independence than to the original trunk of the Constitution.

Colucci notes that Kennedy's pivotal position on the Court has led some observers

to "group him with Justice O'Connor during their shared years on the Court as a centrist or swing justice. However, "his rhetoric and approach differ fundamentally from hers. O'Connor engaged in strategic accommodation, wrote quasi-legislative, narrow, intensely fact-specific opinions, and acted as a minimalist who disclaimed any 'Grand Unified Theory' of constitutional interpretation. In contrast, Kennedy's opinions express a coherent moral vision about the nature of personal liberty and justify expanding judicial power to enforce that vision."[60]

As Colucci's aside about Justice O'Connor illustrates, his book hardly ignores those with whom Kennedy has shared the Bench. As one finds in **The Tie Goes to Freedom**,[61] Colucci has also included rich examples of the interactions among the Justices in several high-profile cases. For example, Appendix A reprints a short but poignant "Dear Harry" letter from "Tony" dated June 21, 1990 that expresses "deep resentment"[62] over words in Blackmun's opinion in *Ohio v. Akron Center for Reproductive Health*.[63]

Another example of an intra-Court exchange involves *Lee v. Weisman*,[64] which was argued in November 1991. This litigation challenged the practice in Providence, Rhode Island, whereby a member of the clergy—a Jewish rabbi, in this instance—was invited to deliver a prayer at a middle-school commencement. In a 5–4 ruling announced in June 1992, the Supreme Court, speaking through Justice Kennedy, concluded that the custom violated the Establishment Clause of the First Amendment. Drawing particularly from Justice Blackmun's papers at the Library of Congress, Colucci reconstructs part of the decision-making process and explains that, at Conference, Kennedy voted with four other Justices to uphold the policy. According to Blackmun's record of the discussion, Kennedy said that the coercion principle that had been latent in at least two other decisions[65] was not applicable in the commencement case. In one of these, Kennedy had dissented from the holding that a crèche on the grand staircase of the Allegheny County courthouse in Pittsburgh, Pennsylvania violated the Establishment Clause. In Providence, however, his view was that the "graduation was a public event and no one could interpret mere student attendance as participation in prayer." Kennedy "also feared that striking the prayer would 'undermine confidence with the people.'"[66]

After the Conference voted 5–4 against the prayer's opponents, Chief Justice William Rehnquist assigned the majority opinion to Kennedy. According to Colucci, "Kennedy did not circulate an opinion for more than three months. On March 30, 1992, he sent a memo to Blackmun, the senior Justice in dissent, 'After writing to reverse in the high school[67] graduation case, my draft looked quite wrong. So I have written it to rule in favor of the objecting student.' . . . Kennedy admitted that 'after the barbs' . . . [following his vote in the crèche case] 'between the two of us, I thought it most important to write something that you and I and the others who voted this way can join. That is why it took me longer than it should have.' Three days later, Blackmun—the senior member of the new majority—assigned the majority opinion to Kennedy."[68] As Colucci interprets this judicial fluidity, "Kennedy applied the coercion principle . . . to strike official-led prayer in the context of public school graduations. He focused not on the potential establishment of religion by government but on the dissenting students' right of conscience." Although Kennedy was joined by none of his colleagues who had signed his dissent in the crèche case, Colucci believes that Kennedy's opinion in *Lee* "is best read as a defense of personal liberty, dignity, and conscience"[69] and as such is consistent with his overall jurisprudential posture.

In seeking to remove doubt that, for Kennedy, liberty is the nation's central constitutional value, Colucci concludes by acknowledging that the Justice's "interpretive approach stands or falls" on whether he is correct about

three things: "about the centrality of liberty as a constitutional value, about his conception of the substantive nature of that liberty, and about the proper role of the Court in discovering and enforcing it."[70] It will surely be Justice Kennedy's current colleagues, as well as Justices of Courts yet to be fashioned, who will make that determination.

Still, with respect to both the Knowles and the Colucci books, one wishes that each author had written at greater length about the maturation of Kennedy's thinking that has resulted in his evident constitutional fixation on liberty. Except for occasional intimations, neither book has much to say about the broad education and shaping of the Justice's mind. In this context, one thinks particularly and fondly of Daniel Meador's expedition through Justice Black's library (admittedly written after Black's death).[71]

With a handful of exceptions, and excluding authors of books surveyed in this essay, every individual discussed in the preceding paragraphs is the focus of an essay in **The Yale Biographical Dictionary of American Law**,[72] an important, comprehensive, and convenient desk reference edited by Roger K. Newman of Columbia University's School of Journalism. Readers of the *Journal of Supreme Court History* also know him as a biographer of Justice Hugo L. Black.[73] At a total length of about 600 pages, Newman's most recent contribution contains more than 700 entries authored by nearly 600 contributors.[74] The richness of the volume is best grasped by thinking of the title with an emphasis on "biographical" rather than on "dictionary." It is most certainly not a dictionary of law. That is, it is not a collection of definitions of legal terms. Nor is it a collection of essays about legal concepts, movements, or doctrines, although entries frequently refer to some of these. Instead, it is a collection of legal portraits in miniature—essays, ranging between 400 and 1,600 words in length, about individuals who have played a prominent role in the development of American law from the earliest years of the Republic to the present time. Thus, it is similar in design to, but also numerically far more inclusive than, Melvin I. Urofsky's **The Supreme Court Justices: A Biographical Dictionary**.[75] Likewise, because the Urofsky book contains far fewer entries, they are usually significantly longer and provide greater depth than those in Newman's. Moreover, anyone consulting Newman's **Dictionary** should also consult two works edited by John R. Vile, each in two volumes: **Great American Lawyers: An Encyclopedia**, published in 2001, and **Great American Judges: An Encyclopedia**, published in 2003.

The variety of entries in **The Yale Biographical Dictionary of American Law** is extensive because as Newman explains, "American law is in many ways the story of the United States itself.... To understand law, one must look at its leading figures."[76] This was presumably Felix Frankfurter's point when, in his little book on Justice Oliver Wendell Holmes, he counseled, "In Law, also, men make a difference.... There is no inevitability in history except as men make it."[77] The same thought may explain Newman's allusion to Ralph Waldo Emerson's assessment that all "history resolves itself very easily into the biography of a few stout and earnest persons" where "there is properly no history, only biography,"[78] although Emerson was also emphasizing the unavoidable subjectivity that historical writing entails.[79]

As for the "stout and earnest persons" selected for inclusion in Newman's book, the first entry is on Wisconsin's Chief Justice Shirley S. Abrahamson, while the last entry treats the late Professor (and former judge) Irving Younger of the University of Minnesota. Newman explains that his book is not limited to constitutional lawmakers and interpreters, although this group is clearly well represented. One finds, for example, both Justices who bear the name John Marshall Harlan. One also finds an entry on Edward Samuel Corwin and one on Thomas M. Cooley. Because the cutoff date for inclusion was 2005, the three most

recently appointed Supreme Court Justices (Chief Justice Roberts and Justices Alito and Sotomayor) could not, of course, be included. With an individual such as William Howard Taft, who had a multifaceted career, the essay emphasizes the legal dimension thereof more than the political side. With Franklin D. Roosevelt, the internment of American citizens of Japanese descent is featured more prominently than the President's role in shaping military strategy with the Allies during World War II. While most of the individuals chosen as subjects have been lawyers, some non-lawyers—such as James Madison, journalist Anthony Lewis, and professor and judicial biographer Alpheus Thomas Mason—are incorporated, too. Indeed, Newman notes that some 10 percent of entries address persons other than practicing lawyers, judges, and law professors. Similarly, while some entries concern figures from the founding generation and from the nineteenth and early twentieth centuries, contemporary notables are present too, as illustrated by Theodore Olson, David Boies, Rudolph William Lewis Giuliani, Laurence Tribe, and Ralph Nader. One is also pleased to see representation of the recent past, as well in entries on individuals such as Rex E. Lee, Solicitor General for four years during the Reagan administration and a law-school dean, and Griffin B. Bell, a former federal judge who served as Attorney General in the Carter administration and who died in early 2009, just as Newman's book was in production.[80] As for other subjects, if there is properly an entry on Judge James Skelly Wright, there probably should have been one as well on Judge J. Waites Waring, and perhaps on Judges William Augustus Bootle and Susan Webber Wright.

Although the book is carefully compiled and complete with a brief bibliographical note at the conclusion of each entry, one useful feature is nonetheless missing: the table of contents lacks a list of the subjects treated in the many entries. This is not an insurmountable omission, of course. If one wants to see whether Clarence Earl Gideon made the cut (he did, in a brief essay authored by Anthony Lewis), one merely looks through the volume to the section where the "G" entries are printed (between pages 213 and 243). There one finds an entry on Gideon on page 220, sandwiched between Phil S. Gibson's and Grant Gilmore's. But this flip-and-turn, seek-and-find task would be easier, quicker, and far more efficient if a list of names had been inserted at the front of the volume, with corresponding page numbers, as part of the table of contents showing all individuals who merited treatment in an entry. While not as convenient as a full index (which the book also lacks), a complete table of contents would also not have been as space-hungry and labor-intensive as an index, but would have been a much-welcomed enhancement.

Any publisher contemplating development of a project on the scale and of the sort that Newman has skillfully guided to completion must surely make a fundamental and preliminary commercial assessment even of the need for such a volume in the age of the Internet, where so much information is so quickly accessible online by so many. Resorting to any one of several leading search engines connects one with numerous sources within a matter of seconds or, more often, in a fraction of a single second. The happy reality is that anyone with a link to the Internet now has access to resources and the data they contain that, less than three decades ago, would have been available only at a major research library. This is a truth that is hard to fathom by those who never lived life before or without the Internet. Today, one might as well try to imagine life before electricity—or, say, the world of the Framers of the Constitution, who lived at a time when news traveled, on average, at about four miles per hour. As one columnist has explained, "[i]t took about 4,000 years from the invention of writing to the Roman-era codex of bound pages replacing scrolls, 1,000 years from the codex to movable type creating books, 500 years from the printing press to the Internet—and only 25 years

to the launch of the iPad." It and similar devices remind "us there is a digital revolution redefining the book"[81] in progress.

In light of the realities of the contemporary online world, one must therefore ask whether there is still a practical reason to have a bound copy of the **Yale Biographical Dictionary of Law** (or a similar work in a different field) on one's shelf. For several reasons, the answer to this question is clearly an affirmative one. The era of the usefulness of such works has not passed. First, a book like Newman's contains finished pieces of content, synthesis, and analysis. Whatever the topic, much of the hard research work of mining reputable sources has already been done. In short, any reader enjoys a tremendous convenience in turning to a reference like Newman's. It is the biographical version of one-stop shopping. Second, some essential sources may not be available online. This is certainly true for information and perspective that can be gleaned only from books, most of which have yet to be digitized. Third, the printed work (or an electronically accessible version in digital form on a wireless reading device) contains carefully crafted essays by authors chosen, presumably, for their expertise on particular individuals. An essay about Justice White, for example, is not merely a collection of information about President John F. Kennedy's first Supreme Court nominee, but is truly a window into this person's life after that life has been probed and investigated by someone competent to do so. The reader may thus have a comfortable degree of confidence in the accuracy and thoroughness of the essay she or he is reading. Fourth, the essays have been subjected to quality control by the editor, who, in this instance, has worked with a nine-member board of editors and a major university press in a way partially akin to, although certainly not identical to, the peer-review process by which articles are screened for publication in leading academic journals. This process also assures balance in avoiding essays that are overly skewed in one ideological direction or another. Fifth, there is therefore a consistency to the presentation of material that increases the value and utility of each entry. Sixth, a book facilitates browsing in a way that is difficult when one jumps from one Internet site to another or among subjects within a single site. The fortuitous result is that, in the process of looking for and reading one essay, other entries will catch the eye of the user and possibly lead to another reading adventure. That was certainly the experience of the author of this review article when examining the **Biographical Dictionary of American Law**. Readers will learn much about individuals with whom they were previously entirely unfamiliar and will also become reacquainted with others about whom they probably have not thought in a long time. The appropriate analogy might be to making friends in a new setting or encountering unexpectedly some old acquaintances, or to browsing in the stacks of a library or among the shelves of a well-stocked bookstore. What one discovers across the entries in Newman's compendium are numerous links between the judiciary and the political process in the United States. In particular, the volume illustrates how, thanks to the courts, the Constitution, along with the litigation it has encouraged, is now the place where law and politics meet.

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

BINDER, SARAH A. AND FORREST MALTZMAN. **Advice & Dissent: The Struggle to Shape the Federal Judiciary** (Washington: Brookings Institution Press, 2009). Pp. xii, 198. ISBN: 978-0-8157-0340-2, paper.

COLUCCI, FRANK J. **Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty** (Lawrence: University Press of Kansas, 2009). Pp. xi, 243. ISBN: 978-0-7006-1662-6, cloth.

EISGRUBER, CHRISTOPHER L. **The Next Justice: Reforming the Supreme Court Appointments Process** (Princeton, N.J.: Princeton University Press, 2007). Pp. xiii, 239. ISBN: 978-0-691-13497-0, cloth.

KNOWLES, HELEN J. **The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty** (Lanham, MD: Rowman & Littlefield, 2009). Pp. xvii, 283. ISBN, 978-0-7425-6257-8, cloth.

NEWMAN, ROGER K., ED. **The Yale Biographical Dictionary of American Law** (New Haven, CT: Yale University Press, 2009). Pp. xiii, 622. ISBN: 978-0-300-11300-6, cloth.

ENDNOTES

[1]Editorial, "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.

[2]Alito served as United States Attorney for New Jersey, while Sotomayor was an assistant district attorney in Manhattan.

[3]David Lightman and Michael Doyle, "Historic Confirmation," *The Star-Ledger* (Newark, N.J.), August 9, 2009, p. 1. The vote to confirm President Woodrow Wilson's nomination of Louis D. Brandeis in 1916 was 47 to 22. Abe Fortas was confirmed as Associate Justice by a voice vote in 1965. His nomination by President Lyndon Johnson to be Chief Justice in 1968 was blocked by a filibuster.

[4]Quoted in Alpheus T. Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (8th ed., 1987), 10.

[5]The list is extensive. For example, see: Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** (2000); Stephen L. Carter, **The Confirmation Mess** (1994); Michael Comiskey, **Seeking Justices: The Judging of Supreme Court Nominees** (2004); Sheldon Goldman, **Picking Federal Judges** (1997); John Massaro, **Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations** (1990); David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (1999); Lee Epstein and Jeffrey A. Segal, **Advice and Consent: The Politics of Judicial Appointments** (2005).

[6]Christopher L. Eisgruber, **The Next Justice** (2007), hereafter cited as Eisgruber.

[7]The book's dust jacket is also a humorous reminder of the perils that current events present, not so much for an author as for the publisher's publicist or illustrator. Depicted in a photograph are the steps of the Marble Palace as they are being ascended on the northwest side by an individual (presumably "the next Justice") who is attired in a business suit and carrying an oversized briefcase. The individual in the photo, however, is clearly a man. As events shortly unfolded not long after publication, however, the next Justice was not.

[8]Eisgruber's count includes Justice Fortas, Homer Thornberry, Clement Haynsworth, Harrold Carswell, Robert Bork, Douglas Ginsburg, and Harriet Myers. Id., 3. Eisgruber misspells Carswell's name both in the text and in the index. *Id.*, 3, 127.

[9]*Id.*, 3.

[10]Quoted in Alpheus T. Mason and Donald Grier Stephenson, **American Constitutional Law: Introductory Essays and Selected Cases** (15th ed., 2009), 7.

[11]Michal R. Belknap, **The Supreme Court under Earl Warren 1953–1969** (2005), xv.

[12]Eisgruber, 3.

[13]410 U. S. 113 (1973).

[14]Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1 (1971).

[15]381 U. S. 479 (1965).

[16]Eisgruber, 4.

[17]*Id.*

[18]*Id.*, 9.

[19]*Id.*, 9–10.

[20]*Id.*, 187.

[21]*Id.*, 187–88.

[22]*Id.*, 187.

[23]*Id.*

[24]*Id.*, 191.

[25]The concept and usual phrasing of the countermajoritarian difficulty or dilemma is widely attributed to the late Alexander Bickel. See Bickel, **The Least Dangerous Branch** (1962), 16. See also Robert H. Bork, **The Tempting of America** (1990), 188.

[26]Sarah A. Binder and Forrest Maltzman, **Advice & Dissent** (2009), hereafter cited as Binder and Maltzman.

[27]That is, the book excludes consideration of nominees to the Court of Appeals for the Federal Circuit. Established in 1982, this court has a narrower and more highly specialized jurisdiction than the other appeals courts. Its jurisdiction is also nationwide. The court was formed by the merger of the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims.

[28]Binder and Maltzman, 2.

[29]*Id.*

[30]*Id.*

[31]*Id.*, 4.

[32]*Id.*, 6.

[33]*Id.*, 7.

[34]*Id.*

[35]With this focus, **Advice & Dissent** is therefore a very different book from, say, **Origins of the Federal**

Judiciary, which focuses instead on the creation of the establishment of the federal judiciary by the Judiciary Act of 1789. Edited by Maeva Marcus, **Origins** is a collection of essays published by Oxford University Press in 1992.

[36]Binder and Maltzman, 11.

[37]*Id.*, 147–56.

[38]*Id.*, 160.

[39]When President Gerald R. Ford named the thirty-eight-year-old Californian to the appeals bench in 1975, Kennedy soon became the youngest federal judge in the nation.

[40]Helen J. Knowles, **The Tie Goes to Freedom** (2009), hereafter cited as Knowles.

[41]*Id.*, xvi–vii.

[42]*Id.*, xvii. The phrase "blessings of liberty" comes, of course, from the Preamble to the U.S. Constitution.

[43]Knowles, 193.

[44]*Id.*, 2.

[45]*Id.*

[46]*Id.*, 196, 15, 3.

[47]*Id.*, 26.

[48]*Id.*, 32.

[49]*United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938).

[50]Frank J. Colucci, **Justice Kennedy's Jurisprudence** (2009), hereafter cited as Colucci.

[51]According to statistics compiled by the *Harvard Law Review* from 1994 to 2005, "during the natural Rehnquist Court, Kennedy cast the fewest dissenting votes in eight of thirteen Terms and trailed only O'Connor in four of the other five." Colucci, 193, n. 1. A "natural Court" (also sometimes called a "discrete Court") is a period of Supreme Court history in which no change in the Court's membership occurs.

[52]Colucci, x.

[53]*Id.*, 171.

[54]*Id.*, 1.

[55]*Id.*, 2.

[56]*Id.*, ix–x.

[57]*Id.*, x.

[58]*Id.*, 9.

[59]*Id.*, 9–10.

[60]*Id.*, 171.

[61]For example, see Knowles' discussion of Justice Kennedy's role in *Metro Broadcasting v. F.C.C.*, 497 U. S. 547 (1990). Knowles, 132–38.

[62]*Id.*, 187.

[63]497 U.S. 502 (1990). In his dissenting opinion in *Akron Center*, Blackmun wrote, "A plurality then concludes, in Part V of the primary opinion, with hyperbole that can have but one result: to further incite an American press, public, and pulpit already inflamed by the pronouncement made by a plurality of this Court last Term in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)." 497 U.S. at 541 (Blackmun, J., dissenting).

[64]505 U.S. 577 (1992). In *Akron Center*, the Court, voting 6–3, upheld parts of an Ohio abortion statute. Justice Kennedy wrote the plurality opinion in that case. Justices Brennan and Marshall joined Justice Blackmun's dissent.

[65]*Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

[66]Colucci, 16.

[67]The Providence school system policy applied to both middle schools and high schools. *Lee v. Weisman* itself concerned a challenge to the prayer at a middle-school commencement. The District Court held that petitioners' practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. The Court of Appeals for the First Circuit affirmed.

[68]*Id.*, 16–17.

[69]*Id.*, 17.

[70]*Id.*, 185.

[71]Daniel J. Meador, **Mr. Justice Black and His Books** (1974). Meador opens his book with a pointed quotation from Learned Hand from 1930: "I venture to believe that it is important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlisle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him." *Id.*, xi. The quotation also appears in Learned Hand, **The Spirit of Liberty** (1952), 81. Hand's next sentence is equally pertinent: "The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined."

[72]Roger K. Newman, ed., **The Yale Biographical Dictionary of American Law** (2009), hereafter cited as Newman.

[73]Roger K. Newman, **Hugo Black: A Biography** (1994).

[74]The author of this review essay wrote the 800-word entry on Chief Justice Morrison R. Waite, who served on the Court between 1874 and 1888. See Newman, 566–67. As the essay on Waite explains, "no chief justice has worked harder than Waite. He had the misfortune both to lead the Court when its workload became almost unbearable, and

then to die before Congress provided relief. A backlog of about 600 cases in 1876 ballooned to some 1500 by 1888. Such numbers pointed to what Waite called an 'oppressive wrong.' Yet, Waite went out of his way in 1887 to issue what amounted to an advisory opinion to Congress: acceptable relief did not include dividing the Court into panels so that it could move ahead at three times its usual pace. The Constitution precluded that alternative: 'I beg you to note this language: *One* Supreme Court,' he quoted from Article III." Id., 567.

[75]Urofsky's book was published in 1994.

[76]Newman, xi.

[77]Felix Frankfurter, **Mr. Justice Holmes and the Supreme Court** (1939), 9.

[78]Newman, xiii.

[79]See Ralph Waldo Emerson, "History," in **The Complete Works of Ralph Waldo Emerson** (1903), vol. 2, 10.

[80]Not long before his passing, Bell had just seen a finished copy of his own memoir, **Footnotes to History: A Primer on the American Political Character**, which Mercer University Press published in 2008 and which was edited by John P. Cole.

[81]L. Gordon Crovitz, "From the Roman Codex to the iPad," *Wall Street Journal*, February 1, 2010, A-15.

Contributors

Stephen G. Breyer has served as an Associate Justice since 1994.

Ross E. Davies is a professor of law at George Mason University and has been editor of *The Green Bag, An Entertaining Journal of Law* since 1997. Davies says that, like Justice Anthony Kennedy, he is "not very good at golf" (see Oral Argument, *PGA Tour, Inc. v. Martin* at 33 (Jan. 17, 2001)), although Justice Kennedy may have been too modest (see "Washington's Top 200," Golfdigest.com, April 2008, at 136, 138 ranking the Justice 192nd).

Nancy Maveety is a professor of political science at Tulane University.

L.A. Powe, Jr. is the Anne Green Regents Professor of Law and Government at the University of Texas and a member of the *Journal*'s Board of Editors.

David Schroeder is a professor of history at Martin Luther College in New Ulm, Minnesota. His doctoral dissertation on Pierce Butler will be published in 2011.

Donald Grier Stephenson, Jr. is the Charles A. Dana Professor of Government at Franklin and Marshall College and regularly contributes "The Judicial Bookshelf" to the *Journal.*

Charles C. Turner is chair of the Department of Political Science at California State University, Chico.

Lori Beth Way is coordinator of the Criminal Justice Program at California State University, Chico.

Illustrations

All illustrations are from the Library of Congress except as listed below:

Page 100 (both), Collection of the Supreme Court of the United States

Page 104, Collection of the Supreme Court of the United States

Pages 126, 128, Courtesy of Richard Harlan

Page 184, Collection of the Supreme Court of the United States, photograph by Steve Pettaway

Cover: Associate Justice Pierce Butler, Library of Congress