Introduction

Melvin I. Urofsky

The job of editor of this *Journal* is a very pleasant one, primarily because of all the help I get from so many people. At the top of the list is Clare Cushman, who has been the managing editor since I took over. Once we have accepted a piece, it is Clare's hard work and eagle eye that make sure the piece is properly edited, facts checked, and interesting pictures chosen. Without her work, the issue you hold in your hand would not have been possible, and I want to thank her publicly for all she does.

My "burden," if one could call it that, has also been made easier by the addition of an associate editor, Tim Huebner. A well-respected legal historian and chairman of the History Department at Rhodes College in Memphis, Tennessee, Tim immediately understood that an editor's job is not just waiting for articles to come in, but going out and talking to people in the field about what they are working on and whether they would like to offer it to the *Journal* for publication. It was a lot of fun at the annual meeting of the American Society for Legal History last fall to "work the crowd" with Tim, and the fruit of that labor will be appearing in the *Journal* in the near future.

I cannot overstate what a rock Grier Stephenson has been in culling through the growing number of books that appear on legal and constitutional history, picking out the best of them that apply to the history of the Supreme Court, and then providing our readers with pithy and intelligent reviews. It is a labor of love for him, I know, but that does not detract from the benefit it gives to us.

Finally, my thanks to Jim O'Hara and David Pride, the chairman of the Publications Committee and the executive director of the Society, respectively. They have provided guidance and support since I came on board, and make our work all that much easier.

To all of these people, a sincere thanks.

This issue explores a number of different aspects of Court history. Everyone knows that for nearly a century, the Justices complained about having to ride circuit, until Congress finally established the Circuit Courts of Appeals system in 1891. It was not just the long travel in days when travel was difficult, but also the harsh living conditions and occasional dangers. Steven Brown tells a circuit-riding story that concerns John McKinley, a lesser-known

judge in judicial history. While McKinley's circuit was unusually large (and later reduced in size), the story shows us how much different a Justice's job was in the nineteenth century.

Each year the Society awards two Hughes-Gossett Awards. One is for the best article to appear in the *Journal of Supreme Court History* in the previous year. The other goes to a paper written when the author was a student—either in college, graduate, or law school—and includes publication in the *Journal.* Emily Kendall's article on Salmon Chase is this year's winner of the student Hughes-Gossett; she wrote her paper "Because of 'His Spotless Integrity of Character': The Story of Salmon P. Chase: Cabinets, Courts, and Currencies" while a law student at George Mason University.

There are few cases in Supreme Court history that bear the odium surrounding *Lochner v. New York* (1905). It has been roundly derided for more than a century as the worst example of judicial activism, and Justice Oliver Wendell Holmes's dissent in that case has been considered iconic in its call for judicial restraint. Recently, however, some scholars have been taking a second look at *Lochner* and suggesting that perhaps it is not the terrible decision everyone has said it is. David Bernstein is the latest scholar to join this group. He argues that if we look at the legal culture of the times, *Lochner* makes not only perfectly good sense, but also good law. Whether such an argument will win over the legal academy remains to be seen, but it is a debate well worth having.

Harry Truman once claimed that Tom Clark was dumb and that putting him on the Supreme Court was one of the worst mistakes he ever made as President. For many years, Clark's reputation suffered from Truman's characterization, but in the last decade or so historians have taken a second look at Clark and his work. While he will never be part of the pantheon that includes John Marshall, Field, Holmes, and Brandeis, his reputation has grown, especially in such little-noticed areas as the administration of justice. Clark's work in that field, particularly after he left the Court, gave him a great deal of satisfaction. Craig Smith looks at another area of his work, the effort to open up the doors of clerking to students from schools other than the handful of elite institutions that had dominated placement until his time.

Finally, Grier Stephenson keeps us up to date on the latest books.

As always, an interesting medley. Enjoy!

An Assault on Justice: John McKinley and the Affair at Jackson

STEVEN P. BROWN

In April 1837, President Martin Van Buren nominated former Alabama senator John McKinley to serve as an Associate Justice of the United States Supreme Court. A wealthy Kentucky attorney who moved to Alabama in 1819, McKinley was one of the state's most notable men at the time of his appointment because of his legal acumen, property investments in northern Alabama, and service in both houses of Congress. His reputation as a leading land speculator, lawyer, and politician prompted Andrew Jackson to once refer to him as "the most prominent man in allabama [sic]."[1]

Just prior to Jackson's departure from office, his advisors encouraged him to appoint McKinley to the ninth seat on the newly expanded Supreme Court. It was sound advice given McKinley's reputation, his two-decade-long business and personal relationship with the President, and his recent service as one of Jackson's key lieutenants in the House of Representatives. However, Jackson decided to nominate an old friend, former South Carolina Senator William Smith, instead. When Smith declined the appointment, the nomination fell to the recently inaugurated Van Buren, who promptly named McKinley for the slot.

McKinley was thrilled with the opportunity to join the Court. However, because of his previous congressional service and business interests throughout the South, he also understood the difficulties of traveling to and from Washington and throughout the region embraced by the new Ninth Circuit—something he briefly noted in a letter to James K. Polk shortly after his nomination:

> I have accepted the appointment, although it is certainly the most onerous and laborious of any in the United States. Should I perform all the duties of the office I shall have to hold eight circuit courts, and assist in holding the Supreme [C]ourt, and travel upwards of five thousand miles every year. These are four or five

> times greater than many of the judges have . . .[2]

During McKinley's tenure, the Court met in Washington for just a few months. After their Term there was finished, the Justices would set off in their capacity as circuit judges to hear legal disputes throughout the rest of the United States.[3] From the earliest years of the Supreme Court itself, virtually every previous Justice had complained about the difficulties of his circuit duties, but McKinley's were impossible to complete in their entirety.[4]

Well before the formation of the original Ninth Circuit, several members of Congress had already called attention to the serious physical challenges that would accompany the extension of the circuit-court system to what was then known as the old Southwest. In spite of these concerns, Congress created a single circuit that included Alabama, Arkansas, the eastern portion of Louisiana, and Mississippi, all of which were among the top ten largest states in the Union at that time. McKinley's was not only the newest and largest circuit, it was also the furthest from Washington and by far the most difficult to traverse. Congress appeared to have organized the Ninth Circuit with little regard for the actual means of reaching the population centers in the old Southwest, for, with the exception of New Orleans, there was simply no easy way to reach the circuit-court sites it designated. Travel throughout the largely unsettled Ninth Circuit was time-consuming, hazardous, and costly, since McKinley, like all of the Justices, was required to pay his own expenses. These challenges, coupled with the congressionally mandated court schedule that required him to zigzag his way across the circuit, would subsequently take a terrible toll on McKinley's health.

Because he was not confirmed until the last week of September, McKinley was unable to travel the 1,000 miles from Washington in time to make the fall 1837 session of circuit court in Mobile, Alabama. However, he did arrive on schedule in Jackson, Mississippi for the court that convened on the first Monday in November. The heavy docket there, coupled with the fact that New Orleans, the next scheduled circuit site, was still recovering from a yellow-fever epidemic, caused McKinley to remain in Jackson far longer than he normally would have.

A former senator and representative of Alabama, John McKinley was also a wealthy land speculator renowned for his legal acumen. In 1837, President Martin Van Buren appointed him to the Supreme Court.

To show their appreciation for McKinley's extra effort, members of the Mississippi bar adopted the following resolutions and had them published in Jackson area newspapers during the first week of December:

> *Resolved,* That the thanks of this meeting be presented to the Honorable John McKinley, for the able dignified and impartial manner, and the unwearied patience and industry with which he has discharged his duties during the present Term of this court.
>
> *Resolved,* That in leaving this State, at the close of the present Term of the court, the Hon. John McKinley

> carries with him, the kindest wishes of the Mississippi Bar, for his safe return to his family, and his health and prosperity through life.[5]

There is some irony in these resolutions, since Jackson, the circuit-court site to first praise the newest Justice, would be the source of much of McKinley's distress.

Such commendations also could not mask the harsh realities of the new circuit that had already become apparent to McKinley. He raised the issue personally with President Van Buren when he arrived in Washington a few weeks later to prepare for the Court's upcoming 1838 Term. In a subsequent letter to Van Buren, McKinley reminded him of their meeting and of the President's apparent sympathy with his concerns:

> At the time of the supreme court of 1838 I had the honor to bring to your attention, by a conversation I then held with you, the great inequality of the labors and duties of the several Judges of the supreme court, while performing circuit court duties that you might present the subject to the consideration of Congress at its [next] session. You then appeared to think it a proper subject to communicate in your annual message.[6]

Much to McKinley's disappointment, Van Buren never mentioned the matter in his State of the Union address that year.

In addition to its other challenges, McKinley's circuit also encompassed a region that was only recently settled and the growing pains in which included a huge number of property claims involving landowners, speculators, and squatters. The extraordinary litigiousness of this area was clearly seen in March 1838, after the conclusion of McKinley's first full Term in Washington, when the members of the Court left to confront some 6,000 cases on their cumulative circuit dockets. McKinley's Ninth Circuit alone accounted for 4,700 of that total.[7]

The next year, when he arrived for circuit court in Jackson, he found some 2,500 cases awaiting him.[8] A Virginia newspaper explained the circumstances that created the overwhelming caseload there:

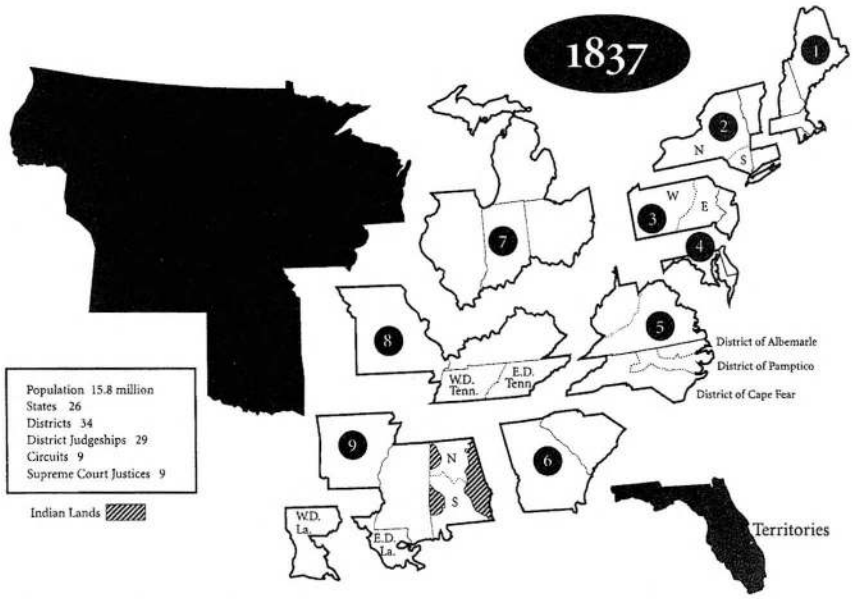
> Our neighbors in Mississippi, from every account, appear to be in a bad way . . . The simple fact appears to be, that the majority of the community are in debt over their means of extricating themselves, except by sale of their property. Not willing to submit to this alternative—a ruinous one—and unable to obtain discounts from their banks, the law is resorted to by the creditor, and the sheriff walks in as a third party.[9]

McKinley immediately set to work to clear the circuit docket at Jackson of frivolous claims and dilatory actions, so that his time might be better spent on legitimate disputes. Newspapers praised his efforts:

> Judge McKinley did most perseveringly devote himself to the business of the Court . . . , and performed the business more rapidly than is usually done by the State Judges. From a sense of duty, he overruled all defences [sic] which were interposed by the counsel for the defendants for mere delay, and as far as he could, prevented lawyers from making long speeches upon plain and settled questions.[10]

In the midst of this progress and praise, however, McKinley experienced a humiliating slight during the circuit-court session in Jackson that profoundly embarrassed him, as it was later recounted in newspapers across the country. The incident also served as the basis for an unsuccessful campaign to impeach him in 1841.

The entire episode originated in a January 1839 message by Governor Alexander G. McNutt to the Mississippi state legislature in which he accused the recently deceased state treasurer, James Phillips, of accepting payment



As a new Justice on an enlarged Supreme Court, McKinley was assigned to the newly created Ninth Circuit, which encompassed his native Alabama, Arkansas, the eastern portion of Louisiana, and Mississippi, all of which were among the top ten largest states in the Union at that time. The Ninth Circuit was the furthest from Washington and by far the most difficult to traverse: it proved impossible for McKinley to cover it all and return in time for Supreme Court sessions.

for treasury drafts in depreciated paper money, rather than in gold and silver as directed by law. Phillips' son-in-law, Richard L. Dixon, was outraged by the public slur and took every opportunity to express his disgust with the governor.

On April 25, 1839, the governor happened to walk by Dixon and a group of his associates on his way to the state capitol. After the governor passed by, Dixon apparently commented to his friends that "he had spit on the damned rascal, and that he intended to insult him whenever he should meet him."[11] The remark was relayed to A.J. Paxton, a friend of the governor's, who inserted Dixon's words into a local paper some weeks later. To the story, Paxton appended the following commentary:

> [I]f Dixon has told this story, without the indignity having been offered, as is manifest, he is an infamous liar and puppy. If he did, in fact, perpetuate this disgusting obscenity, he is a filthy blackguard and cowardly poltroon.[12]

Dixon was understandably upset by this characterization in print and set out to confront Paxton. He found him in the rotunda of the state capitol building in Jackson and proceeded to beat him with a walking cane. Unfortunately for McKinley, the fight spilled over into a side room in the capitol where he was holding circuit court.

Three contemporary accounts provide contrasting views on the events that followed. The *Boston Courier* reported:

> The presiding judge [McKinley], as the organ of the Court, ordered the parties to be brought before the Court to answer for the contempt. Mr. Boyd, the *Crier*, stated that the men were armed, and the Marshall and all his deputies were absent. Amidst great excitement and confusion, the Court directed the Crier to send for the Marshall. He returned perhaps twice with a confused and unsatisfactory excuse to the Court, when the presiding Judge, who appeared to be a

> good deal excited by the scene, said, "Why, sir, you appear to be as stupid as a jack; go yourself, and request the Marshall to come into Court."[13]

A correspondent for a Philadelphia newspaper, using the headline teaser "An Affair at Jackson, Spitting on the Governor—A Street Fight—Contempt of Court—Judge McKinley's Nose Pulled," recounted what happened next:

> Judge McKinley, of the U.S. Court, after adjourning Court, and whilst on his way to his room, had his nose pulled severely, by a Mr. James H. Boyd, a young man who had been acting as an officer of the court during the aforesaid affray between D[ixon] and P[axton], and for not interfering was called "*a stupid jackass*" by Judge McKinley, for which he had his smeller pulled.... He (Boyd) is justified by every one [sic] whom I have heard speak of the matter, and will be sustained.[14]

The *Daily National Intelligencer* in D.C. gave a third and slightly different version:

> The Crier made the assault upon [McKinley] in the street but not as represented. He barely thrust his hand into the Judge's face, and may have touched his nose, but it was so slight as scarcely to be felt. Mr. Boyd seemed to be an inoffensive man, and wholly incompetent to the duties of his office; and no one that knows him will believe that he was any thing [sic] more than the tool of others in committing this outrage.[15]

The D.C. paper went on to suggest that the assault could be traced to actions taken by McKinley earlier in the session. In addition to his docket-clearing efforts noted above, McKinley had refused several motions to set aside forthcoming bonds, "amounting to a great number, and a very large sum of money."[16] It concluded that, "[a]ll these things have rendered Judge McKinley unpopular with the debtor class and their counsel, which makes a large majority of the population in the district... where the Court is holden."[17]

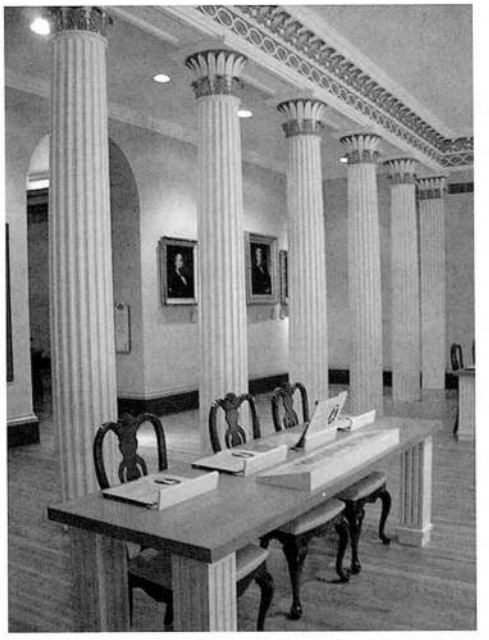
While generally disgusted by the incident, the *Boston Courier* (as a Whig newspaper) could not resist taking a political swipe at McKinley's Jacksonian background:

> Judge McKinley ha[s] been assaulted by a mob in Mississippi. The atrocious proceeding is to be reprehended by every citizen, and should receive the decided censure of everybody, except, perhaps, Judge McKinley himself. He should be the last to complain of the practical illustration of the principles of Jacksonianism, by the advocacy of which, he is what he is.[18]

It was widely reported that as McKinley left Jackson, he swore to never return, which the *New Orleans Bulletin* found completely understandable: "After such treatment, it is not to be expected that Judge McKinley will ever revisit the *inhospitable* jurisdiction. Thus has Mississippi repudiated the salutary restraints and supervision of a Federal Court."[19]

In November 1839, with two full years of circuit experience behind him, McKinley again sought help from Washington. He wrote a lengthy letter to President Van Buren giving a blunt assessment of the challenges facing the Ninth Circuit:

> It must be obvious to everyone at all acquainted with judicial proceedings, that it would be impossible for any Judge to perform the duties of the [N]inth [C]ircuit with that deliberation which is due to the proper discharge of the judicial function, even if he were to sit the whole year. And how can it be expected of him when two of the cities—New Orleans and Mobile—where two of the most important courts are holden, are subject



ASSAULT UPON A JUDGE.

The following is a more particular account of the outrage upon one of the Judges of the United States, alluded to in late paragraphs in New Orleans papers:

FROM THE N. O. BULLETIN, MAY 24.

ATTACK UPON JUDGE McKINLEY.

From the Natchez Daily Courier we copied yesterday an account of the disgraceful outrage perpetrated at Jackson, Mississippi, during the session of the Circuit Court of the United States. It is just matter for regret that a narrative of the assault upon Judge McKINLEY, distorted by the prejudices of the writer, should have received publicity through the columns of that respectable print, the Natchez Courier, without any comment by the editor, showing his disapprobation of the "foul deed." The following statement may be relied on as correct:

A fight occurred in the Rotundo of the State House, within the view of the Court; one of the combatants retreated into the Court-room, the others following, and continuing to fight in the presence of the Court. The presiding Judge, as the organ of the Court, ordered the parties to be brought before the Court to answer for the contempt. Mr. Boyd, the Crier, stated that the men were armed, and that the Marshal and all his deputies were absent. Amidst great excitement and confusion, the Court directed the Crier to send for the Marshal. He returned perhaps twice with a confused and unsatisfactory excuse to the Court, when the presiding Judge, who appeared to be a good deal excited by the scene, said, "Why, sir, you appear to be as stupid as a jack; go yourself, and request the Marshal to come into Court." The Judge has frequently expressed his regret that he should have been betrayed into so improper an expression in or out of the Court, and that he would so have stated to Mr. Boyd, if he had applied to him for an apology or explanation.

Without ever mentioning the subject to the Judge, the Crier made the assault upon him in the street, but not as represented. He barely thrust his hand into the Judge's face, and may have touched his nose, but it was so slight as scarcely to be felt. Mr. Boyd seemed to be an inoffensive man, and wholly incompetent to the duties of his office; and no one that knows him will believe that he was any thing more than the tool of others in committing this outrage.

Judge McKinley did most perseveringly devote himself to the business of the Court when at Jackson, and performed the business more rapidly than is usually done by the State Judges. From a sense of duty, he overruled all defences which were interposed by the counsel for the defendants for mere delay, and, as far as he could, prevented lawyers from making long speeches upon plain and settled questions. At the last term, an attempt was made to set aside all the forthcoming bonds, amounting to a great number, and a very large sum of money. The Court sustained the bonds, contrary to decisions made by many of the State Courts. All these things have rendered Judge McKinley unpopular with the debtor class and their counsel, which makes a large majority of the population in the district of country where the Court is holden. The plaintiffs are citizens of other States, and their business confided to a few lawyers, compared with the whole number attending the Court. These facts will very readily account for the state of feeling which prevails in the debtor district in Mississippi, and the odium which is attempted to be cast on the Judge of the Supreme Court whose duty it is to preside there.

After such treatment, it is not to be expected that Judge McKinley will ever revisit the *inhospitable* jurisdiction. Thus has Mississippi repudiated the salutary restraints and supervision of a Federal Court.

Mississippi Governor Alexander G. McNutt accused the recently deceased state treasurer of accepting payment for treasury drafts in depreciated paper money rather than in gold and silver, as directed by law. The treasurer's son-in-law, Richard L. Dixon, was outraged by the public slur and took every opportunity to express his disgust with McNutt. When Dixon got into an altercation with a friend of McNutt's in the state capitol building in Jackson, the fight spilled over into the courtroom where McKinley was presiding on circuit (pictured above as a modern day museum). An officer of the court allegedly pulled McKinley's nose after the Justice criticized him in connection with the incident. The *Daily News Intelligencer*, a Washington, D.C. newspaper, recounted that the man "barely thrust his hand into the Judge's face." But the paper also defended McKinley, saying he "most perseveringly [devoted] himself to the business of the Court when at Jackson" (above right).

to yellow fever from the latter part of summer till the end of Autumn, almost every year? And when the fact is known that by the peculiar mode of founding under the laws of Louisiana it takes double the time to try a case that it would to try one, of like character, by the rules of the common law.

At the two last terms that I attended the courts in Mississippi there were at each term upwards of two thousand seven hundred cases on the docket for trial. To do anything like justice, to the parties, in the short time allowed for the holding of the court, we are compelled to hurry over the docket as rapidly as possible, and to refuse to hear arguments upon plain and well settled questions. This gave great offense to the host of debtors who thronged the court and who had employed counsel, not to maintain a meritorious defense to the suits against them, but to prevent, by all the means in their power, the rendition of judgments against them. . . . These circumstances finally led to a gross personal indignity being offered to one of the members of the court, the history of which I need not here detail.[20]

McKinley's understated reference to the nose-pulling incident was designed, not to garner sympathy from Van Buren, but to demonstrate to the President the level of frustration that existed in Jackson and other areas where the docket was so large, the resources of the circuit court so few, and the circuit schedule so inflexible that he could make but the barest progress before having to depart for his next assigned court. It made a mockery of justice, and the circuit courts, and to a large extent even Congress itself (because of its continued refusal to assist), were thus partially to blame for the frustration and violence among litigants in the Ninth Circuit.

McKinley wrote to President Martin Van Buren (pictured) to describe the level of frustration that existed in Jackson and other areas where the docket was so large, the resources of the circuit court so few, and the circuit schedule so inflexible that he could make but the barest progress before having to depart for his next assigned court.

Assessing both the people of Jackson and his own role as the presiding circuit judge under these difficult circumstances, McKinley questioned the wisdom of continuing to hold court there:

> A great majority of the people in this new settled country which surrounds Jackson—the place where the court is now holden—are greatly in debt. Many of these are desperate men, who, are determined to keep possession of their property by any and all means in their power. Under such circumstances and among such people it is easy to conceive how unpleasant and how unsafe the condition of a Judge must be, who is determined to do his duty. I am perfectly satisfied that justice cannot be fairly administered at that place and that public policy requires that the court be

> removed to Natchez where there is an old and respectable population, comparatively free from debt, and where impartial juries might be obtained. Natchez can, by means of steamboats, be more easily approached by a majority of the suitors, witnesses, and lawyers than Jackson can.[21]

McKinley was unable to personally follow up on the matter with Van Buren, as he missed the Court's entire 1840 Term because of illness, but he and his circuit became the focus of considerable discussion in Congress. Committees in both the House and Senate reported bills that year that would have removed Mississippi from the Ninth Circuit. In transferring that state, Congress also considered proposals to rearrange several other circuits to equalize the Justices' workload. One would have reordered the circuits such that three Justices would be assigned to perform circuit duty in the Southwest area that McKinley currently oversaw alone. Another proposal would have placed Kentucky in McKinley's circuit and Arkansas in Justice John Catron's Eighth Circuit.[22]

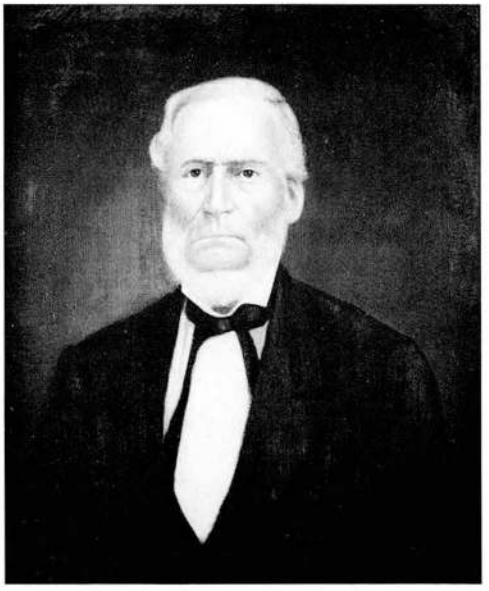
Even as such plans to help ease the burdens of the Ninth Circuit were circulating, however, states already within its boundaries that felt neglected by McKinley began to call for serious action against the Justice. Infuriated that McKinley had not attended circuit court in Jackson the previous year (the same illness permitted him to complete only a portion of his circuit duties in 1840), members of the Mississippi legislature retaliated. In Washington, the *Madisonian* newspaper reported,

> Judge McKinley, of the United States Supreme Court, having refused, as in duty bound, to hold a session of the Circuit Court in Mississippi, the Legislature of that State have [sic] passed resolutions requesting their representatives in Congress to prepare a bill of impeachment against him. The resolutions have been approved by the Governor.[23]

On April 6, 1842, in the course of debate on a general appropriations bill that would have increased the salary of the Supreme Court Justices, the Mississippi impeachment resolution gained traction when Representative Edward Cross of Arkansas offered an amendment to the bill to withhold $500 from any Justice who did not complete his circuit-riding responsibilities unless that Justice was ill. This was in clear reference to McKinley, who, even after nearly five years on the Bench, had yet to hold circuit court in Arkansas, citing court-scheduling issues and difficult travel conditions. According to former President John Quincy Adams, then serving as a representative from Massachusetts, this amendment "started a debate of nearly two hours, in which Cross and Thompson, of Mississippi, vehemently denounced Judge McKinley."[24]

John Pope of Kentucky rose to defend McKinley, whom he described as a longtime acquaintance.[25] Pope pled for his colleagues to understand that it was virtually impossible for McKinley or any other man to cover the Ninth Circuit in its entirety and make it back to Washington in time for the Court's Term. But if the House was determined to punish McKinley, Pope argued, it could not do so by withholding part of his salary. The only punishment for federal judges that the Constitution authorized was that of impeachment, which could only happen, Pope claimed, if the House found McKinley guilty of criminal negligence.[26]

Pope's argument was designed to dissuade his colleagues from levying either punishment against McKinley, since withholding $500 was not authorized as a penalty and impeachment appeared to be too harsh. As to the latter punishment, Representative Jacob Thompson of Mississippi responded with the resolution from his state legislature instructing him to do just that because of the incident at Jackson. Thompson recounted the episode again for his colleagues and then said,



On April 6, 1842, in the course of debate on a general appropriations bill, Representative Edward Cross of Arkansas offered an amendment to the bill to withhold $500 from any Justice who did not complete his circuit-riding responsibilities unless that Justice was ill. The amendment was clearly aimed at McKinley.

> While the judge's wrath was up he swore that he would never return to Jackson again. Of course, our citizens supposed that he spoke in anger and that when his passions subsided he would return to the discharge of his duties. But not so; thus far he has obstinately staid [sic] away from that place.[27]

Thompson then declared, "[T]his conduct evinces, on the part of the judge, cowardice, a want of moral firmness, or else an unblushing effrontery and bare-faced impudence."[28]

A number of other representatives leaped to defend McKinley's honor, which had been "unjustly assailed" and "maltreatedly most flagrantly."[29] One of these was William Gwin, who, as a representative from Mississippi, was an unlikely source of sympathy. As recounted by the *Congressional Globe*, Gwin declared that

> the charges [against McKinley] were unjust, and had no proper foundation, for he knew of his own knowledge that this judge had discharged more duty than any judge on the Supreme Bench. . . .
>
> Notwithstanding Judge McKinley was unpopular among his constituents, he would do him justice . . . [and] would not join in denunciations . . . for not doing what it was physically impossible for him to do. Notwithstanding the complaints against him, he performed more labor than any of the judges on the bench. The remedy for the evils complained of should be cured by the legislation of Congress, and not by requiring an impossibility of the judges of the Supreme Court.[30]

According to the *Globe,* Gwin concluded by reminding the House that

> Judge McKinley did not accept the office he now holds knowing the duties required of him. . . . He was the first judge of the Supreme Court that ever presided in that circuit, which was created in the spring of 1837, and he could form no conception of the enormous amount of business he found in the circuit. In fact, since the creation of the circuit, the business had increased fourfold.[31]

Ultimately, Adams prevailed upon Representative Cross to withdraw his amendment and the issue died.

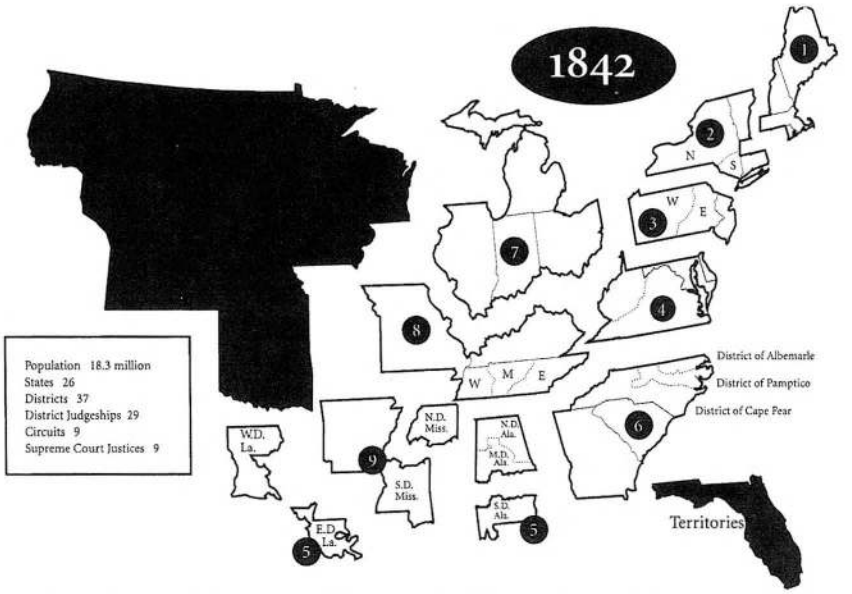
However, rumors regarding McKinley continued to swirl. In Washington, there was continued discussion about the creation of two or three additional circuits to aid those Justices who "have upon their hands more business than they can transact," referring to the thousands of cases that awaited McKinley on circuit.[32] In Mississippi, the rumors were more negative. It was said that Justice McKinley was so cowardly that he refused to hold circuit court in that state unless the marshal of the Southern District Court could guarantee his safety,

which he (McKinley) sincerely doubted. That this rumor continued to circulate, at the very time at which McKinley was in Jackson presiding at circuit court, says much about journalistic care and quality and the prejudice against him.[33] In fact, the Jackson bar even held a public dinner in McKinley's honor on June 2, 1842, which the *Mississippian* newspaper cited approvingly as a means of alleviating some of the courtroom tension between McKinley and local attorneys:

> It must be recollected that he [McKinley] is naturally somewhat irritable and impatient, and perhaps sometimes seems rude when he does not intend it. It should also be remembered, that our bar is rather given to much talking, and have hitherto been a good deal indulged in that way, and are therefore restive under restraint.[34]

Although already proven utterly false, the rumor that McKinley feared to come to Jackson for circuit court prompted the local U.S. Marshal, Anderson Miller, to pen a public letter, much of it directed at Representative Thompson, which was later reprinted in several Washington newspapers. Anderson wrote the letter to both refute the rumor of McKinley's cowardice and to respond to the manner in which McKinley "was very roughly handled" by members of Congress during their recent debate. Anderson declared,

> [T]he last charge I expected to made against Judge McKinley was cowardice; . . . I had known him for upwards of thirty years intimately, and had always considered him as brave as any man; and further I was acquainted with the district he had to attend courts in, from the first settlement of the country, and . . . I was satisfied that no man had the physical ability to discharge the duties assigned to him. And I can further state that he has been holding courts here for five weeks, to the entire satisfaction of the whole bar, and indeed every other person, so far as I knew. . . . I have thought it due to Judge McKinley, so far as I was concerned, to



Congress finally approved a circuit-reorganization plan in 1842, one that took into account the vast territory of the old Southwest. As McKinley had urged, the Ninth Circuit was divided in half, with Mississippi and Arkansas remaining in the circuit while Alabama and Louisiana occupied a newly reconstituted Fifth Circuit.

> contradict the abuse that has been so lavishly heaped upon him.[35]

In Congress, McKinley's allies continued to press the issue of circuit reorganization in order to give him some relief. Given the tenor of the recent House debate regarding McKinley, Senator William King pled with his colleagues to again consider that

> Judge McKinley . . . has been mostly unjustly censured. He could not perform all the duties assigned him. The Court did not adjourn in [Washington] until the 14th or 15th of March. The Alabama term of his Court was held on the second Tuesday of the same month. The Arkansas term commenced on the fourth Tuesday of the same month. He is now at Jackson, Mississippi, holding a term of his Court, and there are eleven hundred cases upon the docket.[36]

On August 16, 1842, after years of debate that began even before the creation of the first Ninth Circuit, Congress finally approved a circuit-reorganization plan that took into account the vast territory of the old Southwest. As McKinley himself had earlier requested, the Ninth Circuit was divided in half, with Mississippi and Arkansas remaining in the Ninth Circuit while Alabama and Louisiana occupied a newly reconstituted Fifth Circuit. The only question that remained to be resolved was which Justices would now be assigned to these new circuits.

New circuit assignments would not be made until the next Term of the Supreme Court, so McKinley made plans to return to the second session of the circuit court in Jackson in order to get ahead in his docket. Prior to his arrival, however, he suddenly took ill. In early November, Mississippi newspapers were the first to report that McKinley would not be attending circuit court because he had been "stricken with paralysis whilst on his way" to Jackson.[37] The once robust McKinley was now sixty-two years old, and while he had long complained of a variety of maladies, the paralytic stroke was by far the most serious. By the end of the month, the *Vermont Gazette* in Bennington announced that "[the] Hon. John McKinley . . . has been stricken with paralysis, and lies dangerously ill at his residence [in] Alabama. He is not expected to recover."[38]

McKinley did survive the attack, but he never regained his full health. His physical limitations, coupled with his relatively few majority opinions for the Court during his tenure, have been cited by legal historians as evidence of his inadequacy as a Supreme Court Justice.[39] Indeed, his efforts to win more equitable circuit assignments for the Justices are typically cited as his primary contribution to the Court.

Those who knew him personally, however, saw something more. Writing about McKinley in 1876, former Mississippi Governor Henry S. Foote declared,

> He was undoubtedly a man of great morality and uprightness, and deficient neither in legal learning nor in ability in the argument of causes, both before courts and juries. There was much in his busy and varied career to reward the labors of some impartial and competent biographer.[40]

Justice John McKinley served until 1852 and as long as his health permitted, even after he became partially paralyzed, he continued to attend to his Supreme Court and circuit court duties. A less conscientious judge might have abandoned them entirely.

ENDNOTES

[1]Andrew Jackson to John Coffee, 17 February 1823, in **The Papers of Andrew Jackson,** ed. Harold D. Moser, David R. Hoth, and George H. Hoemann, vol. 5 (Knoxville: University of Tennessee Press, 1996), 249. Despite Jackson's assertion, the life of the "most prominent man in Alabama" has resulted in little research. John Dollar's master's thesis is the longest treatment to date of McKinley. See his "John McKinley: Enigmatic Trimmer" (master's thesis, Samford University, 1981). Other monographs, articles, and book chapters on

McKinley include: Tom Campbell, **Four Score Forgotten Men** (Little Rock, AR: Pioneer Publishing Company, 1950); Herbert U. Feibelman, "John McKinley of Alabama—Legislator, U.S. Congressman, Senator, Supreme Court Justice," *The Alabama Lawyer* 22 (October 1961): 422–26; Frank Otto Gatell, "John McKinley," in **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions**, ed. Leon Friedman and Fred L. Israel, vol. I, (New York: Chelsea House Publishers, 1969), 769–92; Jimmie Hicks, "Associate Justice John McKinley: A Sketch," *The Alabama Review* 28 (July 1965): 227–33; John M. Martin, "John McKinley: Jacksonian Phase," *The Alabama Historical Quarterly* 28 (Spring 1966): 7–31; and George C. Whatley, "Justice John McKinley," *Journal of Muscle Shoals History* 12 (1988), 27–30. Amateur historian William L. McDonald has also written about McKinley, using mostly anecdotal references about the latter's founding of and subsequent life in Florence, Alabama (McDonald's hometown). See his **A Walk through the Past: People and Places of Florence and Lauderdale County, Alabama** (Killen, AL: Heart of Dixie Publishing, 1997). The author recently completed a book-length manuscript on Justice McKinley's life and Supreme Court career that is currently under review.

[2]John McKinley to James K. Polk, May 5, 1837, in **Correspondence of James K. Polk,** ed. Herbert Weaver, (Nashville, TN: Vanderbilt University Press), 4:115.

[3]For more information about the circuit-riding responsibilities of the Justices generally, see Maeva Marcus, **The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 3, **The Justices on Circuit** (New York: Columbia University Press, 1990); and Charles Warren, **The Supreme Court in United States History**, 2 vols. (Boston: Little, Brown, and Company, 1937). Warren also provides specific reference to the activities of the Taney Court, as does Carl Brent Swisher, **The Taney Period, 1836–64**, vol. 5, **History of the Supreme Court of the United States** (New York: Macmillan Publishing Company, 1974) and Timothy S. Huebner, **The Taney Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2003).

[4]In 1790, during the Court's first Term, Chief Justice John Jay pled with George Washington to convince Congress to remove the Justices' circuit-riding responsibilities. Two years later, the entire Bench signed their names to a letter to Washington declaring that "the burdens laid upon us [are] so excessive that we cannot forbear representing them in strong and explicit terms." Quoted in Warren, **The Supreme Court in U.S. History**, vol. 1, 88.

[5]*The Mississippian (*Jackson, MS), Dec. 1, 1837, issue 39, col. A, in nineteenth-century newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 23, 2009.

[6]John McKinley to Martin Van Buren, Nov. 6, 1839, in Martin Van Buren Papers, Manuscript Division, Library of Congress, Washington, D.C.

[7]Gerhard Casper and Richard A. Posner, **The Workload of the Supreme Court** (Chicago: American Bar Association,1976), 15.

[8]*Virginia Free Press* (Charlestown, VA [now WV]), May 23, 1839, issue 17, col. F, in nineteenth-century U.S. newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 24, 2009.

[9]*Id.*

[10]*Daily National Intelligencer* (Washington, D.C.), June 1, 1839, issue 8205, col. D, in nineteenth-century U.S. newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 24, 2009.

[11]Quoted in William D. McCain, **The Story of Jackson: A History of the Capital of Mississippi, 1821–1851** (Jackson, MS: J.F. Hyer Publishing Company, 1852), 169.

[12]*Id.,* 170.

[13]*Boston Courier* (Boston, MA), June 6, 1839, vol. 13, no. 1578, p. 1, in America's Historical Newspapers, Newsbank, Ralph Brown Draughon Library, Auburn University, Oct. 27, 2008.

[14]*North American* (Philadelphia, PA), May 30, 1839, vol. 1, no. 57, p. 2, in America's Historical Newspapers, Newsbank, Ralph Brown Draughon Library, Auburn University, Oct. 27, 2008.

[15]*Daily National Intelligencer*, June 1, 1839, *supra* note 10. It must be noted that, according to the code of honor to which McKinley and other members of antebellum Southern society subscribed, any attack upon a man's nose was a particularly egregious offense, because of what it symbolized rather than for any physical damage it might cause. As Kenneth S. Greenberg has observed, "One of the greatest insults for a man of honor [in the South]... was to have his nose pulled or tweaked.... It was the ultimate expression of contempt toward the most public part of a man's face." Kenneth S. Greenberg, **Honor and Slavery** (Princeton, NJ: Princeton University Press, 1996) 16.

[16]*Daily National Intelligencer*, June 1, 1839, *supra* note 10.

[17]*Id.*

[18]*Boston Courier*, *supra* note 13.

[19]Quoted in *id.* (emphasis in original). McKinley apparently put both Mississippi and the initial incident behind him. In early February 1841, Attorney General Henry D. Gilpen received Dixon's application for a presidential pardon of the $400 fine imposed on him by McKinley for contempt of court. Among the application materials was a letter from McKinley himself recommending that the fine be pardoned. In advising President Martin Van Buren, Gilpen stated that there was nothing to preclude the President in granting the pardon if he so chose. See United States Congress, "Message from the President of

the United States, transmitting copies of opinions given by the Attorneys General, etc., which give construction to the public laws not of a temporary character. March 3, 1841," 26th Cong., 2nd Session, H.Doc 123, Serial Set vol. no. 387, Session vol. no. 6, p. 1382. U.S. Congressional Serial Set, Record Number: 103DFDA759F06180, Ralph Brown Draughon Library, Auburn University, April 6, 2009.

[20]McKinley to Van Buren, *supra* note 6.

[21]*Id.*

[22]*Daily National Intelligencer* (Washington, D.C.), Feb. 5, 1841, issue 8729, col. E, in nineteenth-century U.S. newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 24, 2009.

[23]*The Madisonian* (Washington, D.C.), Feb. 23, 1841, vol. 4, no. 63, p. 3, in America's Historical Newspapers, Newsbank, Ralph Brown Draughon Library, Auburn University, Oct. 27, 2008.

[24]John Quincy Adams, **The Memoirs of John Quincy Adams**, ed. Charles Francis Adams, vol. 11 (Philadelphia: J.B. Lippincott and Company, 1876; reprint New York: AMS Press, 1970) 125.

[25]Pope's nephew, Alexander Pope Churchill, married McKinley's daughter, Mary, in 1839.

[26]*Congressional Globe*, Twenty-Seventh Congress, 2d Session, 392.

[27]*Id.*

[28]*Id.*

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*New York Herald*, May 21, 1842, issue 424, col. E, in nineteenth-century U.S. newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 24, 2009.

[33]McKinley's presence at circuit court in Jackson was noted in the *Mississippian*, May 6, 1842, issue 1, col. C, in nineteenth-century U.S. newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 24, 2009.

[34]Cited in McCain, *supra* note 11, 133.

[35]*Daily National Intelligencer* (Washington, D.C.), June 18, 1842, issue 9154, col. F., in nineteenth-century U.S. newspapers, InfoTrac, Ralph Brown Draughon Library, Auburn University, June 24, 2009.

[36]*The American* (Baltimore, MD), May 19, 1842, issue 13150, p. 4, in newspaper archive, Ralph Brown Draughon Library, Auburn University, Jan. 21, 2011.

[37]*The Guard* (Holly Springs, MS), Nov. 15, 1842, p. 1, *available at* http://marshallcountyms.org/articles/images4/1842-11-15-1.pdf (last visited June 4, 2011).

[38]*Vermont Gazette* (Bennington, VT), Nov. 29, 1842, vol. 13, p. 3, in America's Historical Newspapers, Newsbank, Ralph Brown Draughon Library, Auburn University, Oct. 28, 2008.

[39]In 1935, renowned Court scholar Carl B. Swisher observed that McKinley was "a man of moderate ability who achieved neither distinction nor notoriety." Carl Brent Swisher, **Roger B. Taney** (New York: The Macmillan Company, 1935) 427. Three decades, later in his definitive work on the Taney Court, Swisher rendered a harsher verdict: McKinley "made no significant contribution to legal thinking in any form. When he died in 1852 he had not made any notable imprint on the work of the profession. He was probably the least outstanding of the members of the Taney Court." Swisher, **Taney Period, 1836–64**, vol. 5, 67.

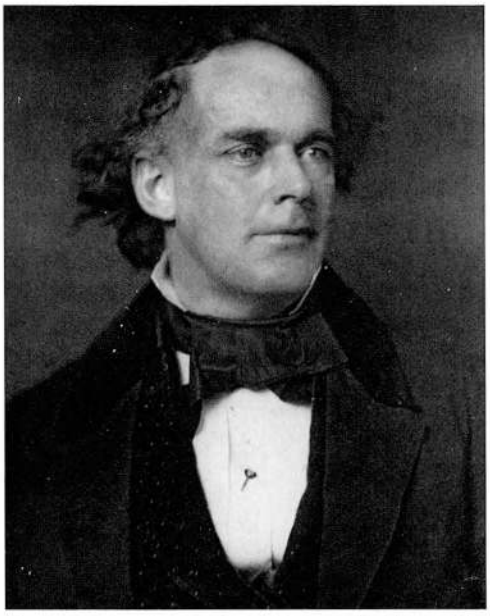
[40]Henry S. Foote, **The Bench and Bar of the South and Southwest** (St. Louis: Soule, Thomas, and Wentworth, 1876) 7.

Because of "His Spotless Integrity of Character": The Story of Salmon P. Chase: Cabinets, Courts, and Currencies

EMILY KENDALL*

Salmon P. Chase boasts an impressive resume in American political history, having held both the position of Secretary of the Treasury in President Abraham Lincoln's Cabinet and that of Chief Justice of the Supreme Court of the United States (1864–1873). His active years during the Lincoln and Ulysses Grant administrations were some of the most politically charged years in the nineteenth century, coinciding with the Civil War, the Emancipation Proclamation, and Reconstruction. Yet he is most remembered for a single decision made during his time in the Cabinet that came back to haunt him during his tenure on the high Bench: his decision to substitute specie money for fiat currency.

As Treasury Secretary, Chase extolled the virtues of fiat currency as absolutely indispensable to the triumph of the Union and the survival of the country.[1] As Chief Justice, Chase instead adhered to the position that legal tender was *not* in fact lawful, but rather unconstitutional.[2] What, if anything, can account for Chase's holding these two diametrically opposed viewpoints? Did he have a change of heart somewhere between the Cabinet and the Court, or was he yielding to political pressures? As Secretary of the Treasury, Chase wrote the Legal Tender Acts, so why did he not recuse himself during the Court's eventual review of their constitutionality when he was serving as Chief Justice? The following essay seeks to answer these questions and present a complete account of one of the most controversial judicial acts in Supreme Court history, one that called a Chief Justice's ethics into question.



Abraham Lincoln appointed Salmon P. Chase, the most prominent and capable representative of the antislavery element of the Republican party, as his Secretary of the Treasury in 1861.

Part I: Chasing the Dream: How Chase Became Lincoln's Secretary of the Treasury

On November 6, 1860, Abraham Lincoln became the sixteenth President-elect after receiving 180 electoral votes and more than one million popular ballots.[3] Although he was not inaugurated until March 4, 1861, President Lincoln wasted no time in appointing the men who would become his Cabinet advisors.[4] After appointing William H. Seward as Secretary of State, Lincoln turned to the vexing problem of staffing his Treasury Department.[5] Lincoln was well acquainted with Chase, as the two had run against each other for the Republican nomination in the 1860 presidential election. The President had frequently and without constraint expressed his desire to appoint Chase as his Secretary of the Treasury, "not only on account of his acknowledged executive talent, but above all because his spotless integrity of character would at once impart confidence in the national credit."[6] He was confident that Chase was viewed as the most prominent and capable representative of the antislavery element of the Republican party, and that, as such, his nomination would be favorably viewed by the second-largest element of that party.[7]

But Lincoln was also conflicted about whom to name to the Treasury position, and well aware that a misguided selection could prove ruinous to his administration.[8] His main goal was to restore the American people's confidence in their nation's economy, as that confidence had been greatly shaken by maladministration and the stirrings of what was to become the Civil War.[9] Against his personal preference for Chase was Pennsylvania's claim to the appointment for its Senator, Simon Cameron, based on an unauthorized promise of the post by Lincoln's managers. Pennsylvania was particularly antagonistic to the potential appointment of Chase for other reasons as well: because of Chase's unwavering belief in the doctrines of free trade, he would undoubtedly be opposed to any protective legislation for manufacturing proposed by Pennsylvania.[10]

Once Lincoln won the election, Cameron believed that the promise of the Treasury position had all but come to fruition, with the exception of the actual appointment letter from Lincoln, viewed by Cameron as a meaningless formality.[11] In his excitement and ardor, Cameron told the Pennsylvania press that he had accepted Lincoln's nomination.[12] Lincoln quickly wrote to Cameron and informed him that he could no longer offer him the Treasury position and hoped he would accept the Secretary of War position in its stead.[13] Upon his acceptance, Lincoln returned to the Treasury appointment quandary.

Cameron's premature acceptance of a position never officially offered had not escaped Chase, who arrived in Springfield, Illinois at the behest of Lincoln on January 4, 1861.[14] Lincoln was so anxious to meet with Chase and clear the air regarding the Treasury position that Chase had scarcely settled himself in his hotel room when he learned that Lincoln himself was in the lobby waiting for him.[15]

Chase, who held matters of propriety in high regard, was greatly surprised that the President-elect, a man whom he had never formally met, would personally call directly at his hotel room.[16] After brief introductions, both men put all formalities and niceties aside and turned the conversation straight to the business at hand.

The discussion began with Lincoln's frank disclosure that "I have done with you what I would not perhaps had ventured to do with any other man in the country—sent for you to ask whether you will accept the appointment of Secretary of the Treasury without however being exactly prepared to offer it to you."[17] If Chase was startled by Lincoln's bluntness, he did not make his feelings known. But his own disappointment at not being asked to serve as Secretary of State, the first position in the Cabinet, was not as well concealed. Chase controlled his feelings with dignity and civility, but his reply clearly demonstrated his displeasure. Extraordinarily prideful and sensitive, Chase avowed that he would not come to Springfield with his cap in his hand for an appointment and denied that he sought any position in the Cabinet.[18] He also implied that he would not accept what he viewed as a subordinate place.[19] However, equally political as he was prideful, Chase knew that the Treasury position was both distinguished and valuable, and he did not burn any bridges with Lincoln at this time. Instead, he and his bruised ego agreed to remain in Ohio for the week and discuss the remaining Cabinet positions.[20]

During that week, Chase and Lincoln had several frank and intimate conversations, a way of doing business that would persist throughout their entire relationship. Although originally somewhat distant towards the President, Chase gradually warmed up to Lincoln. He was impressed with Lincoln's honesty and straightforward conversations, as well as what he viewed as Lincoln's unwavering commitment to restore the Union.[21] These feelings were reciprocated by Lincoln who, being equally impressed with Chase, greatly valued his extensive and intimate understanding of the political and economic issues plaguing the Union. Chase's confidence in his ability to develop solutions to effectively solve the problems of the Union assured Lincoln that he had found the strength and endurance of character needed by his administration. When Lincoln saw Chase off on the train at the end of the week, he was convinced that it was "not only highly proper, but a necessity that Governor Chase shall take the place of Treasury."[22] Salmon P. Chase's nomination as Secretary of the Treasury was unanimously approved by the Senate on March 5, 1861.[23]

Part II: Tenure as Treasury Secretary: The Adoption of Paper Currency

Chase was amply qualified for his new post.[24] As a Dartmouth College–educated lawyer and former director of various banks, Chase was as knowledgeable in financial affairs as any of his predecessors and probably more so than most.[25] Most importantly, he was well versed and competent in the established economic theories of the time.[26] As an ardent hard-money Treasury Secretary, Chase dogmatically believed in the soundness of hard currency. He took this belief with him to Washington when he began his tenure in the Cabinet.

Upon arriving in the Capital, Chase had to devote long hours to the financial affairs, policies, and problems of the Union. In order to lay the best foundation upon which to craft his own strategies and procedures, he first had to educate himself about the current state of the Treasury and the legislation governing its policy.[27] Second, Chase endeavored to educate himself about the unfamiliar field of government finance, which he found to be a beast entirely different from his own financial experiences.[28] What he learned was that there was an incredible outflow of Treasury funds in order to support the Union's expanding army and navy. Chase found himself confronted with an

ever-increasing need for money, which was only surpassed by the resulting mounting debt.

As Chase took office in March of 1861, the government had to its credit a three-million-dollar balance against its total debt of approximately sixty-five million dollars.[29] More than a third of this debt was in unfunded Treasury notes, which were paying high interest rates for short terms.[30] The Panic of 1857 and the political crises that ensued had so impaired the government's credit that even the highly liquid Treasury notes were sold only at ruinous discounts.[31] Congress had enacted numerous pieces of legislation involving the national Treasury, and these acts authorized Chase to issue Treasury notes and government bonds up to forty million dollars.[32] Despite the increasingly catastrophic circumstances, Chase acted cautiously and conservatively. He hoped to sell more government bonds in order to increase the credit of the Union, but many wary bankers would not purchase them.[33] As a result, only half of the bonds were sold.[34]

With the Battle of Fort Sumter on April 12, 1861, the Civil War officially commenced.[35] Washington began to hear news of the great patriotic upsurge in the North, leading Chase to attempt to market nine million dollars in bonds in preparation for the anticipated astronomical leap in military spending.[36] The immediate need for millions of dollars was so dire as to develop into an emergency, spurring Chase to sell seven million dollars of bonds in one measure and complete another sale of nine million dollars of notes and bonds in a second one.[37] The sale of these bonds, coupled with the funds that had accrued in the Treasury, seemed sufficient to Chase to provide for the government until the special session of Congress that Lincoln had called was convened on July 4, 1861.[38] He believed that the states, on account of their recent booming patriotic pride, would assist in expenses for recruiting, clothing, arming, transporting, and initially feeding the Union troops.[39] However, in place of patriotism, Chase found competition. State bonds and city issues competed with the Washington government's notes, and, in as little as four months, Chase learned that he could not rely on the patriotism or political backing of the Union's banks.[40] He would have to implement new and different measures in order to procure the funds needed for the President's military forces.

The first months of the war proved to be unpredictably financially devastating. Both the North and South foresaw almost immediate victory for their respective sides, and no expense was spared to bring about such an anticipated triumph.[41] Chase was forced to contend with unprecedented national bills, specifically the astronomical funds needed for military expenses, and he viewed such exorbitant debts as true national exigencies. One of the first measures he implemented to address the rising debt was the issuance of "demand notes,"

Leading bankers, many of whom had recently loaned the government thousands of dollars, urged upon Chase the adoption of paper money. Their sentiments, combined with the publicly accepted opinion that wartimes were constitutionally justifiable exigencies, forced Chase to rethink his view on hard currency in the face of the government's mounting debt.

payable in coin, for the payment of salaries or other debts of the Union.[42] The American people initially harbored an intense distrust of this paper money, the evils of which had been extolled by the Founding Fathers.[43] In order to inspire confidence in the notes, Chase and other public officers elected to receive them in payment of their salaries. This measure mollified the American populace, who eventually began accepting the notes as well.[44]

Unfortunately, the demand-note policy did not adequately solve the problem of the spiraling debt. The real solution would have to be a tremendous loan to the Union government.[45] On August 19, 1861, Chase met with the principal bankers of the Union in New York.[46] He explained to them the needs of the government and tried to emphasize the safety and value of its securities.[47] Chase's persuasive skills prevailed, and the bankers agreed to loan the government fifty million dollars to stave off looming war expenses.[48]

Even as he secured this loan, however, Chase was well aware that the volume of currency in the country was insufficient to finance the enormous requirements of the public expenditure. Largely brought on by burgeoning war costs, the public debt had risen to over three million dollars, and the daily expenditures amounted to nearly two million dollars.[49] In response to these figures, the growing sentiment in both the political and financial worlds was that the time for last resorts had arrived. Paper money, once thought of as the scourge of civilized and advanced societies, was rapidly gaining mainstream acceptance as the only remaining solution to the country's debt. Leading bankers, many of whom had recently loaned the government thousands of dollars, urged the adoption of paper money, hailed as the only practical expedient, upon Chase.[50] Politicians and bankers alike pressured Chase to change what they deemed to be his antiquated financial views in favor of a more modern monetary policy. Their sentiments, combined with the publicly accepted opinion that wartimes were constitutionally justifiable exigencies, forced Chase to rethink his view on hard currency or risk political suicide.[51]

Chase, who had been largely influenced in all of his financial views by the philosophies of former Secretary of the Treasury Alexander Hamilton, was reluctant to entertain, if not stubborn about entertaining, even the idea of introducing paper money to the Union.[52] Chase was particularly influenced by Hamilton's statements in a report he made on the national bank in 1790: "[T]he wisdom of the government will be shown in never trusting itself with the use of so seducing and dangerous an expedient. The stamping of paper is an operation so much easier than the laying of taxes, that a government in the practice of paper emissions would rarely fail, in any such emergency, to indulge itself too far in the employment of that resource."[53] It appears that Chase's ultimate trepidation regarding the legalization of paper money was the fear that what would begin as the last resort would quickly become the first response. In spite of this reluctance, however, Chase felt that the Civil War presented such a financial emergency as to risk all of his beliefs.

Chase's agents in various parts of the North had frequently intimated that the corporate institutions of the country would not receive the notes of the government unless they were made a legal tender by act of Congress.[54] The special session of Congress on July 4 was rapidly approaching, and Chase turned all of his efforts towards preparing his report on the adoption of the Legal Tender Act.[55] In late June, Chase requested a meeting with the members of the House Ways and Means committee and the Senate Committee on Finance to discuss the Secretary's plans for financing the coming war operations.[56] He drafted a series of bills that would grant the Treasury, specifically the Treasury Secretary, taxation and borrowing authority.[57] Having worked with many of these men himself while in the Senate, Chase was well aware that these committeemen were among the more diligent and knowledgeable

members of the 37th Congress.[58] As such, he planned accordingly and directed his efforts towards forming an alliance with Thaddeus Stevens, the popular and tremendously powerful Chairman of the House Ways and Means Committee.

An extraordinary influential member, Stevens, nicknamed the "Dictator of Congress," was, in Chase's mind, the sole figure needed to pass the Legal Tender Act.[59] Prior to joining Congress, Stevens had been a successful businessman, and his paper-money views and loose-credit policies were in sharp distinction to Chase's hard-money precepts.[60] In the tension of the war, however, the unlikely allies found a common ground. Chase yielded his hard-money beliefs to the adoption of paper money. He emphasized that this reversal was wholly on account of the war. In fact, in a letter to Stevens, Chase wrote that

> it is not unknown to them that I have felt, nor do I wish to conceal that I now feel, a great aversion to making anything but coin a legal tender in payment of debts. It has been my anxious wish to avoid the necessity of such legislation. It is at present impossible, however, in consequence of the large expenditures entailed by the war and the suspension of the banks, to procure sufficient coin for current disbursements. It has therefore become indispensably necessary that we should resort to the issue of US notes.[61]

Once Chase took the view that paper currency was "indispensably necessary," he dedicated himself to its enactment. In late June of 1861, Chase laid bare his estimates for the upcoming fiscal year. He estimated the necessary military and naval expenditures at $318 million—more than six times what Congress had appropriated the previous year.[62] "He proposed to raise $240 million though loans, the remainder from increased imposts, excises, and the direct taxes on the states. He urged authority to open a national loan of $100 million in Treasury notes bearing annual interest of 7.3 percent and redeemable at par any time after three years. And he asked for discretion in deciding whether these notes should be payable on demand for coin or issued without interest."[63] Aware of the inflationary implications of his requests, he assured the committee members that the greatest care would be taken to prevent these notes from becoming irredeemable paper currency.

The Secretary's assurances did little to quell the fierce opposition against the Legal Tender Act present in both houses. The measure received the most violent denunciations during its debates.[64] Ultimately, however, the Legal Tender Act became law on February 25, 1862, authorizing the issue of $150 million from the government of the United States, without interest, payable at the Treasury of the United States in denominations of not less than five dollars.[65] These notes were to be received in payment of "all debts and demands" of every kind due in the United States.[66]

Part III: "Après moi, le déluge"

Any elation or satisfaction Chase might have felt in February 1862 had dissipated completely by June of that same year. The military drained the supply of greenbacks in less than five months, and complaints from soldiers about delays or mistakes in their pay were flooding into Congress.[67] Chase reasoned that the fault for these financial problems was properly found, not in his failure to accurately predict and provide an estimation of military expenditures, but in Congress for not promptly passing the Legal Tender Act.[68] Chase had recommended quick passage in his report. Rationalizing that this delay was the cause of the present financial crisis, he took the lead in passing the second Legal Tender Act.[69]

Chase argued that greenbacks had not dramatically driven up prices since passage of the first act (failing to take into account the lack of a proper time frame to feel such

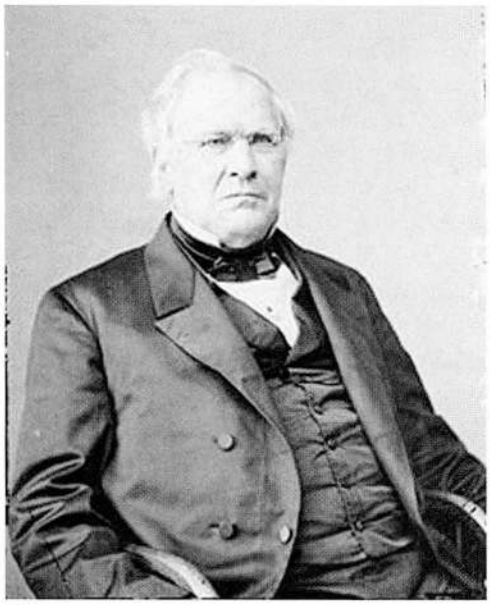
Less than five months after passage of the first Legal Tender Act in 1862, the military had drained the supply of greenbacks and soldiers were complaining to Congress about delays or mistakes in their pay. Chase consequently secured passage of a second Legal Tender Act to pump out more government money.

effects).[70] However, the greenbacks had resulted in problems for the Union. Since the first Legal Tender Act, metallic coins had virtually disappeared.[71] Chase proposed that this inconvenience be met by the issuance of fractional currency in small denominations, representing the furthest break yet from his previous convictions regarding hard money. After much less bitter debate than had occurred over passage of the first Legal Tender Act, the Second Legal Tender Act became law on July 11, 1862.[72]

If Chase was pleased with the passage of this second act, he did not show it. In the aftermath of the adoption of the first act, Chase, ever Hamilton's protégé, had been crafting what he viewed as the single most important piece of legislation that would prove to be the keystone to the success of his financial policies.[73] This keystone legislation was the establishment of a national banking system—or "Associated Banks," as Chase called it.[74] The bill had encountered heavy opposition in the House, and its passage had stalled. In order to meet the demands of the ever-increasing war costs, Chase proposed three measures, of which the national bank system would be the anchor.[75] The adoption of the national bank was of the utmost importance to Chase, who believed that such an adoption would force the banking community to accept government bonds as security for their circulations.[76] The

second measure involved granting Congress authority to sell bonds at the market without the par restriction. Finally, Chase was drafting a Treasury order that would empower the Treasury to sell its bonds directly to the people, in addition to the banks and businesses. Of these three measures, the only successful measure was the National Banking Act, which was signed on February 23, 1863.[77]

Chase's fears of paper currency becoming the nation's first response to economic problems seem to have been validated. Over his objections to multiple aspects of the bill, Congress passed and Lincoln signed the Third Legal Tender Act on March 3, 1863.[78] This act added another $150 million worth of greenbacks and another $50 million in fractional currency to national circulation. Public confidence in the rapidly growing government stocks was not strong, and Chase took it upon himself to speak to the people in order to renew their confidence.



Ailing and increasingly forgetful, Justice Robert Grier changed his vote in *Hepburn v. Griswold* to join the majority declaring the Legal Tender Acts unconstitutional. He resigned from the Court before the opinion was handed down.

Shortly after the passage of the Legal Tender Acts, Chase went on a speaking circuit, traveling to various cities to meet with Americans and reassure them that their money and that of their nation was not in jeopardy. Typical of his political message was a speech given in Indianapolis, cheekily entitled "Financial Policy in a Nutshell."[79] In this speech, Chase called upon all of his storied powers of persuasion and oratorical skill to rally his audience around his policy. He began with a tale sure to strike at the inflamed patriotism of the Northern citizens. He related how, at the onset of the Civil War, the *London Times* ran a story asserting that if Chase came to England looking for funds to support the war effort, "he will find English capitalists little inclined to invest in the bonds of a broken union."[80] To add insult to injury, the *Times* article had foreboddingly prophesized, "We shall see then what will become of the vaunted Republic."[81] Ever the able politician, Chase emphasized the need for the Union to save face and show England that Americans—his audience especially—would not be prostrating themselves before their Old Mother but could stand on their own two feet and handle their affairs themselves. To the outcries of his audience, enraged at the disrespect thrown at them from across the pond, Chase assured them that he had acted exactly as they would have wanted: "I said, 'Mr. Chase will never be seen in London asking for money . . . If the *Times* waits for American to borrow of England, it will wait till the little island is sunk in the sea."[82]

With this patriotic tale as his introduction, Chase proceeded to rhetorically ask the audience what they would have done in such a scenario—and to answer that they would have acted exactly as he did.[83] Chase stated that he borrowed as much as he possibly could on the nation's credit, but that even that was not enough to feed the troops. Playing again to the audience's patriotism, Chase intimated that he could not bear asking the soldiers to keep delaying their payments—and that he knew his audience could not bear the thought, either. Ultimately, he framed the decision to print greenbacks as the decision to take better care of the troops. For comedic effect, he stated, "I had

some handsome pictures put on them and I like to be among the people and was kept too close to visit them any other way and as the engravers thought me rather good looking I told them [they] might put me on the end of the one dollar bills."[84] His final push was to instill further confidence in the paper currency by noting that the passage of the Second Legal Tender Act was performed quickly and that "[t]he effect of this was curious for instead of being tenderer[, the paper currency] was even stronger than before."[85] Ever the able orator, Chase had the people on his side.

Part IV: The Parting of the Ways: Chase's Resignation from the Treasury

Chase never entirely warmed to Lincoln. Always fully convinced of his superior ability to run the Executive Office, he was accused of erroneously believing there was a "fourth person in the Trinity."[86] Chase continually tested the boundaries with Lincoln—tests that, in the President's estimation, amounted to adult temper tantrums.[87] Chase's attitude towards the President was characterized as "one which varied between the limits of active hostility and benevolent contempt."[88] Chase clung to the belief that a great mistake had been committed in Chicago when the nomination was lost to him, and he very thinly veiled his personal qualms with the President.[89]

Well aware of his worth to the President and his administration, due to the great need for his financial acumen and admitted popularity with the country, Chase leveraged his position against Lincoln on multiple occasions in order to push through his nominees for various state posts.[90] In fact, Chase threatened to resign three times on account of Lincoln's refusal to appoint Chase's recommendations.[91] Each time, Lincoln was able to mollify him without jeopardizing the respect of the presidency. However, the fourth threatened resignation proved to be the twig that broke the log-splitter's back.

Chase desired to make the appointment for an office in New York, and he sent his recommendation to Lincoln. Lincoln responded and informed his Treasury Secretary that his recommendation, while appreciated, would not be honored. Angered that Lincoln would dare to fill a position with anyone but his appointee, Chase tendered his resignation again to the President. Much to Chase's surprise, Lincoln finally called his bluff and on June 30, 1864, wrote to Chase, "Your resignation of the office of Secretary of the Treasury, sent me yesterday, is accepted. Of all I have said in commendation of your ability and fidelity I have nothing to unsay, and yet you and I have reached a point of mutual embarrassment in our official relation which it seems cannot be overcome or longer sustained consistently with the public service."[92]

This acceptance of his resignation undoubtedly caught Chase by surprise. Ever the dignified statesman, however, he withdrew from his position without raising a fuss. Conversely, quite a fuss was raised by Congress, particularly among the members of the various finance committees. The government's accounts were exceedingly poor. The deficit was again ballooning, and expenditures had exceeded Chase's estimates by over $116 million.[93] The timing of Chase's resignation—or at least of Lincoln's acceptance of it—could not have been worse.

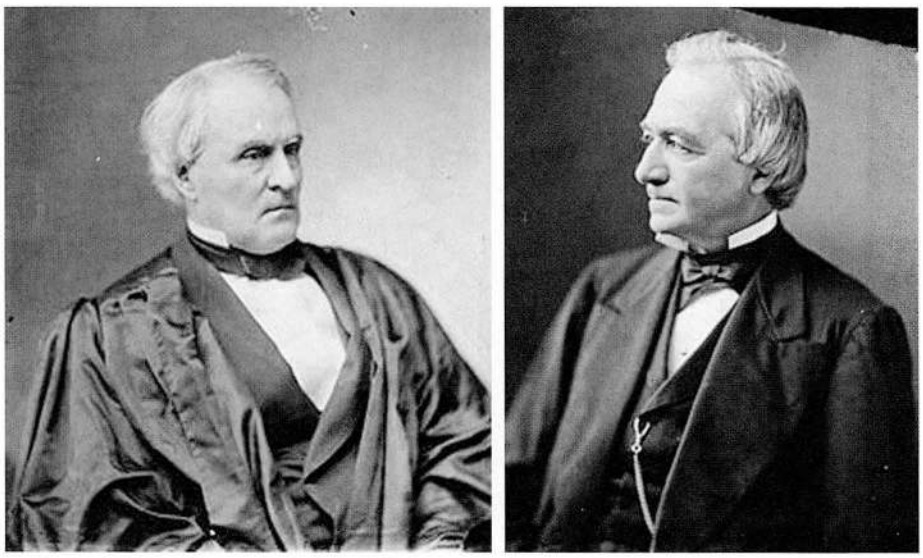
Part V: From Cabinets to Courts: Chase's Promotion to Chief Justice

After Chase took his leave from the Cabinet, he traveled the country giving speeches. He also spent a great deal of time with his family. His reprieve from politics was short-lived, however. On October 12, 1864, Chief Justice Roger Taney died.[94] Friends of Chase—and there were many on account of the successful appointments he had been able to push through while Treasury Secretary—proclaimed that he should be named Taney's replacement.[95] The

general consensus was that the national currency would be best cared for by its parent.[96] As the country was still wracked by inflation and financial issues, the national currency was at the forefront of every American's mind, and they trusted Chase with this important issue. It did not seem to matter what position he held as long as he could solve the nation's monetary problems.

Despite the mounting pressure to appoint Chase, Lincoln refused to entertain discussions about the post, saying that he would not make a nomination until the November elections had concluded.[97] However, he had alluded to Chase's nomination and even seemed resolved on the appointment before Taney died in a letter written to Ward Hill Lamon in which he said, "I was satisfied that the appointment of Governor Chase would satisfy the country."[98] Even after the resignation episode, Lincoln maintained great respect for Chase's abilities as a lawyer and constitutional scholar.[99] This respect, coupled with Lincoln's prediction that Chase would be easily confirmed, led the President to nominate Chase on December 6, 1864, and the Senate confirmed the nomination without incident.[100] Chase had to wait another nine days before he was actually sworn in, but, by December 15, 1864, he had been confirmed and certified.[101] On that historic day, the small Supreme Court Chamber was crowded with dignitaries who had come to witness the first Chief Justice installed since 1836.[102]

At the Court, Chase found himself in uncharted territory. His papers indicate that he did not enjoy being a judge. He was accustomed to having his own way, but for the first time in his career, he found that he was unable to force his opinions on his colleagues.[103] In a letter dated March 3, 1865, he told his daughter that he "detested reading, thinking, writing and hearing morning, noon and night."[104] Even if he did not enjoy his work, Chase approached his duties on the Bench with vigor and dedication and generally got along amicably with his fellow Justices and acclimated well to Court life. Regrettably, however, Chase's battles were far from over. In 1867, a mere two years after his appointment, Chase presided over what would be known to posterity as the benchmark of his career: *Hepburn v. Griswold*.[105]



William Strong (left) and Joseph P. Bradley (right) were nominated to the Supreme Court by President Ulysses Grant to overturn the *Hepburn* precedent. Their appointments are considered the first instance of a President trying to "pack" the Court.

Part VI: About Face: *Hepburn v. Griswold*

If Chase had ever envisioned that he would be evaluating the constitutionality of his own financial measures, these predictions were never intimated. Yet Chase found himself in just this position with *Hepburn*.

The facts of the case are relatively innocuous in comparison to the controversy the verdict generated. On June 20, 1860, a certain Mrs. Hepburn wrote a promissory note promising to pay $11,250 to Henry Griswold on February 20, 1862. At the time the note was made, as well as at the time it fell due, gold and silver coins were the only legal tender available to pay debts in the United States.[106] Specifically, not until five days *after* Mrs. Hepburn's note became due did Lincoln signed the Legal Tender Act into law.[107] Mrs. Hepburn did not pay her note in full upon its maturity, and interest accrued on it.[108] Mr. Griswold having brought suit on the note in the Louisville Chancery Court, Mrs. Hepburn tendered the remaining balance of $12,720 in U.S. legal tender notes in March 1864.[109] Mr. Griswold refused the tender as payment for the debt.[110] "[R]esolving all doubts in favor of the act of Congress," the chancellor declared the tender legally sound and ruled that Mrs. Hepburn's debt had been duly satisfied.[111] Mr. Griswold was not satisfied, and he appealed to the Court of Errors of Kentucky, where the chancellor's judgment was reversed and the case remanded in accordance with that opinion.[112] Mrs. Hepburn then appealed to the Supreme Court of the United States.[113]

Hepburn was first argued in the December Term of 1867 and was reargued in the December Term of 1868.[114] However, the decision was not handed down until December 1869.[115] The majority opinion, which rejected the constitutionality of legal tender, was written by Chase and concurred with by Justices Samuel Nelson, Nathan Clifford, Robert Grier and Stephen J. Field.[116] The dissenting opinion was written by Justice Samuel F. Miller and joined by Justices Noah Swayne and David Davis.[117]

While at Treasury, Chase had supported the issuance of paper money because he believed it necessary to sustain the Union.[118] However, his letters seem to indicate that he always maintained a principled opposition to paper money because of the detrimental reliance that could be placed upon it.[119] Chase based his argument that the Legal Tender Acts were unconstitutional on two major points. The first dealt with the provision in Article 1 Section 10 of the U.S. Constitution, which forbade states to "emit bills of credit [or] make anything but gold and silver coin a tender in the payment of debts." The second cited the Fifth Amendment, which forbade the government from taking property without due process of law. Chase cited John Marshall's doctrine of implied powers in the famous case of *McCulloch v. Maryland* as supporting his contention that even though Article 1 dealt with state power, it could be legitimately implied to inhibit national power because fiat currency violated the spirit of the Constitution.[120]

In his opinion, Chase phrased the ultimate issue in the case as "whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin."[121] He carefully established the premise that the general rule of the Supreme Court is to hold that acts of Congress are regarded as constitutional unless clear evidence rebuts this presumption.[122] From that premise, Chase stated that acts of Congress are contrary to the Constitution if the acts do not flow from the powers granted to Congress by the Constitution.[123] Analyzing the Constitution from a strict constructionist perspective, Chase ultimately argued that the act of making paper legal tender for payment of debts previously contracted is not an appropriate means to carry into effect any express power vested in Congress. [124] As such, Chase concluded, the Legal Tender Act was unconstitutional.[125]

Part VII: Changing of the Guard: Bradley and Strong

The judgment declaring the unconstitutionality of the Legal Tender Acts was supported by many of the country's most influential Republicans.[126] The decision also had an important and positive effect on the national credit both at home and abroad. Not all were pleased with the decision, however. In his dissenting opinion in *Hepburn*, Justice Miller argued that fifteen states' courts had previously affirmed the constitutionality of the Legal Tender Acts, and he hypothesized about the ill effects the Court's decision would have on the states.[127] Importantly, it was freely charged by Democratic politicians—and even by some Republicans—that if the judgment in *Hepburn* had not been disadvantageous to the interests of certain powerful railroad corporations, the decision would have remained unchallenged by subsequent cases.[128] These allegations concerning railroad interest are particularly interesting in light of the controversy surrounding the rapid overturning of *Hepburn*.

A brief digression into the politics of the Supreme Court must be entertained in order to fully appreciate the intrigue surrounding the reversal of *Hepburn*. On April 10, 1869, by its own act, Congress authorized the addition of another Supreme Court Justice, bringing the Bench membership to nine.[129] This act was to take effect on the first Monday in December of 1869, the very month that *Hepburn* was decided.[130] Additionally, pursuant to the act, any Justice who should resign after reaching the age of seventy and having completed at least ten years of service on the Court would receive retirement payment for life.[131]

This latter part of the act was of particular importance to the Court because of Justice Grier's increasingly failing health and deteriorating mental capabilities. Appointed by President James Polk in 1846, Grier could not walk and needed to be carried to the Bench. He could barely hold a pencil to write. Increasingly forgetful and muddled, he was, by 1870, wholly unfit to sit on the Court.[132] During the conference that determined the outcome in *Hepburn*, the Court split evenly four to four.[133] *Hepburn* had a companion case, *McGlynn v. McGraw*, with the same issue: questioning the constitutionality of the Legal Tender Acts.[134] In the conference concerning both cases, Grier apparently first stated that the Legal Tender Acts were unconstitutional during the Court's discussion in *McGlynn*.[135] Then, during its subsequent discussion of *Hepburn,* he advised that the Acts were constitutional.[136] After Chase reminded Grier that in *McGlynn* he had argued for the constitutionality of the Act at issue, Grier reversed his opinion in *McGlynn* and changed his vote to concur with Chase, Clifford, Field, and Nelson.[137] It was Grier's vote that carried the majority, thus making it possible for the Court to declare the Legal Tender Acts unconstitutional.

On December 11, 1869, prior to the announcement of the decision in *Hepburn*, Grier wrote to President Grant, informing him of his intention to retire.[138] On December 15, Grant responded with a letter accepting Grier's resignation and set himself to the task of replacing both Grier and Justice James Wayne, who had died during the previous Term.[139] Grant thus had to fill two seats on the Supreme Court in the wake of the most controversial decision since the Civil War.

Unsurprisingly, Grant had numerous political flies in his ear who felt they could best advise him on whom to bestow these critically important positions. Most of his advisors were of the opinion that Grant should take steps to balance the Northern-Southern upset currently on the Bench. For instance, Justice Miller, who wrote the dissent in *Hepburn*, wrote to Grant on April 14, 1869, suggesting that, because all of the current Justices were from north of the Mason-Dixon Line, it would behoove the President to make his next appointment from south of that line.[140]

On December 14, 1869, President Grant nominated his Attorney General, Ebenezer Hoar, to the position soon to be vacated by

Grier.[141] However, Hoar was rejected by the Senate on February 3, 1870.[142] Five days later, on the same day the Court announced the *Hepburn* decision, Grant nominated Joseph P. Bradley and William Strong to the Court.[143] Strong was confirmed on February 18, 1870, and Bradley on March 21, 1870.[144] Although they were confirmed with relative ease, Grant's nominations of Bradley and Strong would prove to be extremely controversial and would be considered the first Court-packing scheme.

Bradley and Strong were not unknown to the American public prior to their appointments, as they had both been lawyers for prominent railroad companies. Bradley had been active with a prominent railroad, Camden & Amboy, which had a financial interest in the reversal of *Hepburn*. Railroad companies incurred much of their debt prior to 1862, when coin was the only legal tender in the country. Therefore, these companies were poised to gain financially if they could repay debts in the controversial paper money, which was not worth as much as the coin.[145] In 1830, the New Jersey General Assembly chartered the Camden & Amboy Railroad and the Delaware & Raritan canal company and granted them a monopoly of the rail and water transportation in exchange for a share of the companies' profits.[146] In 1831, the corporations merged and thereafter exploited their monopoly to the fullest extent possible, so that Camden & Amboy came to have a hateful reputation.[147] In 1848, there was a movement to repeal the statute that granted the company its monopoly. The company's board of directors appointed three men to examine the prospective charges; Bradley was chosen to be their secretary.[148] In 1849, the New Jersey General Assembly also created a commission to investigate the company; Bradley managed Camden & Amboy's defense and served as its legal advisor.[149] Until his appointment to the Court in 1870, Bradley thereafter held increasingly important roles at the railroad, including that of director.[150] During his long tenure with the railroad, Bradley advised the company of his firm belief in the constitutionality of the Legal Tender Act, and the railroad acted accordingly in its business practices. A Republican, Bradley also made political speeches defending the Legal Tender Act.[151]

Strong was also a defender of the Legal Tender Act. As a judge on the supreme court of Pennsylvania, Strong had upheld the Act's constitutionality in the 1866 case of *Shollenberg v. Brinton*.[152] Newspapers protested that Strong was both a stockholder and legal advisor to the Pennsylvania Central Railroad Company.[153]

The public was outraged that both Bradley and Strong were stockholders in their respective railroad companies. Once these shareholdings were discovered, the press called for the Justices to sever their financial ties with these companies to ensure there was no bias on the Bench. And so they did. The *Springfield Daily Republican* of April 19, 1870 quoted its Washington correspondent: "Judge Bradley states that he transferred all his interest in railway companies owning bonds issued prior to passage of the legal tender act immediately after his confirmation and Judge Strong says he is going to dispose of his railway shares before the legal tender question is reopened."[154]

Why were Bradley and Strong's railroad connections considered so outrageous? Because it was widely suspected that Grant had appointed these men solely to ensure the reversal of *Hepburn*, which occurred less than a year after the two new members joined the Court.[155] It seems that Chief Justice Chase shared this suspicion. Strong took the Supreme Court oath and was seated on March 14, followed by Bradley on March 23. Chase went home and wrote in his diary that he feared the two new Justices would reverse the decision he had made.[156]

The Friday after Bradley and Strong were sworn in, Attorney General Hoar moved that two cases, *Latham v. United States* and *Deming v. United States*, be set on the Supreme Court's calendar for argument so that the legal-tender question could be reconsidered. Chase was adamant that the Court not revisit

the question, fearing a reversal of *Hepburn*. Unfortunately for the Chief Justice, the changing of the guard had resulted in a new majority, and he now found himself in the minority. Taking what measures he could, Chase filed a motion precluding the new majority from reopening the legal-tender question.[157] The four Justices who had comprised the majority in *Hepburn* backed his motion.[158]

Chase's premise for why the legal-tender question should remain decided rested on procedure, and informal procedure at that. The Constitution grants the Court no authority to adopt a super-precedent that will reverberate through the halls of time. Rather, Chase reminded his colleagues, it was the settled rule of the Court, made in 1852, that "no re-argument will be granted in any case, unless a member of the court who concurred in the judgment desires."[159]

Much to Chase's chagrin, his reminder fell on deaf ears and the new majority voted to reopen the legal-tender question. However, counsel quickly filed a motion to dismiss. The motion was granted and Chase's *Hepburn* precedent survived this initial challenge. In the next Term, however, in a case called *Knox v. Lee*,[160] the Court reversed Chase's decision and ruled the Legal Tender Acts constitutional.

Part VIII: Mea Culpa, Mea Culpa, Mea Maxima Culpa

In his opinion in the *Hepburn* case, Chase did not give a personal account of what appeared to all as a radical change of heart in his financial philosophy. Unsurprisingly, the supporters of the legal-tender system criticized Chase for his inconsistency from Cabinet to Court.[161] For how could the man denounce as unconstitutional as Chief Justice a measure he himself had drafted as Secretary of the Treasury? Most of Chase's biographers attempt to explain his contradictory holdings by emphasizing his statements that, although he came around to supporting paper money as legal tender, he was never fully convinced of its constitutionality.[162]

Chase himself briefly gives what could easily be interpreted as a tongue-in-cheek pseudo-apology for the discrepancies in his actions at the end of the *Hepburn* decision. There, he states that the tumult of the late Civil War

> was not favorable to the considerate reflection upon the constitutional limits of legislative or executive authority... Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions and now concur in [the Act's unconstitutionality.][163]

This statement clearly does not amount to a personal apology or personal accounting for Chase's apparently contradictory actions. It does hint, though, that he recognizes, and is aware that others might recognize, the irony of his judicial opinion in the face of his Cabinet action.

Chase makes a more overt accounting for his inconsistency in his dissenting opinion in *Knox v. Lee*:

> The reference made in the opinion just read, as well as in the argument at the bar, to the opinions of the Chief Justice, when Secretary of the Treasury, seems to warrant, if it does not require, some observations before proceeding further in the discussion. It was his fortune at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes and received the sanction of Congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to Congress was the expedient of making the notes of the United States a legal tender suggested. He urged the issue of notes payable on demand in coin or received as coin in

payment of duties. When the State banks had suspended specie payments, he recommended the issue of United States notes receivable for all loans to the United States and all government dues except duties on imports. In his report of December, 1862, he said that "United States notes receivable for bonds bearing a secure specie interest are next best to notes convertible into coin," and after stating the financial measures which in his judgment were advisable, he added: "The Secretary recommends, therefore, no mere paper money scheme, but on the contrary a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution."[164]

Although Chase was a reluctant supporter of the country's adoption of paper currency, he came to wholeheartedly and avidly support the measure. Viewing it as "indispensably necessary" to the preservation of the Union, Chase ultimately sacrificed his own personal financial beliefs for what he thought was the greater good of the nation. Scholars can only speculate, however, as to whether Chase's personal financial beliefs changed or were subjugated.

Part IX: Descendant, Ancestor, or Simply Part of the Family? How Salmon P. Chase Fits into the History of Cabinet Members Turned Supreme Court Justices

In terms of judicial ethics, Chase could be castigated by historians and legal scholars for not recusing himself from the *Legal Tender Cases*. The fact that Chase had earlier spearheaded, drafted, and rallied the country around these acts could be viewed as the quintessential conflict of interest, because the *Legal Tender Cases* effectively called on Chase to evaluate the constitutionality of his own actions. Rule 2.4(B) of the American Bar Association's (ABA) Model Code of Judicial Conduct states that "[a] judge shall not permit family, social, political, financial, or other interests . . . to influence the judge's judicial conduct or judgment."[165] Additionally, under section 455, "Disqualification of Justice, Judge or Magistrate," of the portion of the United States Code that deals with the judiciary and judicial procedure, "any justice, judge, or magistrate judge of the United States shall disqualify himself . . . where he has served in governmental employment and in such capacity . . . concerning the proceeding."[166] It is fair to say that Chase's position as the lead supporter of the Legal Tender Acts was a significant political interest that could influence his judicial judgment. Moreover, it was as a governmental employee that he became involved with the issue. To safeguard his own judgment, or at least to maintain the dignity and propriety of his office, why did Chase not recuse himself?

By looking to his predecessors' actions, insight may be gained as to why Chase elected to rule on this case. The ABA did not begin to create its Model Code of Judicial Conduct until 1908.[167] Therefore, it is more appropriate and fair to evaluate Chase's actions against the standards of judicial conduct at the time of his judgeship.

Prior to Chase, six other Justices served as Cabinet members before joining the Court. John Jay was President George Washington's Secretary of State for two months before accepting an appointment to the Court.[168] John Marshall was the Secretary of State before (and briefly during) his term as Chief Justice.[169] Smith Thompson was Secretary of the Navy while it was still part of the Cabinet,[170] Roger B. Taney was Secretary of the Treasury,[171] Levi Woodbury was Secretary of both the Navy and the Treasury,[172] and Nathan Clifford was the Attorney General.[173] Given these precedents, it is safe to assume that it was not Chase's prior service in the Cabinet that caused consternation in many of his fellow

Americans. Rather, it was his decisions while actually on the Court.

In comparison to his six forebears, Chase was unique in finding himself in the situation of having to evaluate the constitutionality of his own measure. It could be argued that Jay's writings in the **Federalist Papers** advocating for a stronger federal government were generally reviewed by the Supreme Court, with Jay acting as Chief Justice, in *Chisholm v. Georgia*.[174] But none of Jay's personal actions as Secretary of State were reviewed specifically in proceedings before his Court. Marshall poses a more interesting comparison, for, as Secretary of State, his now-infamous failure to ensure delivery of the commission to William Marbury paved the way for the landmark *Marbury v. Madison* decision in which Marshall himself wrote the majority opinion establishing the principle and practice of judicial review.[175] However, Marbury's suit was not against Secretary of State Marshall for failing to deliver the commission, but against Marshall's successor, James Madison. The situation is thus not analogous to Chase's because it did not concern an action, or lack thereof, by Marshall. Thompson also provides an inadequate comparison, as he did not perform any functions as Secretary of the Navy for which he was made to answer as Justice.

Taney's circumstances come closest to being an appropriate comparison to Chase's. A strong and unapologetic Jacksonian, Taney was appointed Secretary of the Treasury by President Andrew Jackson in September 1833 during a congressional recess, to enforce Jackson's wishes concerning the National Bank.[176] As acting Treasury Secretary, Taney withdrew federal funds from the Second United States Bank and established a system of government depositories, actions that angered the Bank's supporters, most of whom were also outspoken detractors of Jackson. Upon the Senate's refusal to confirm Taney in 1834, Jackson appointed him to the Supreme Court, and the Senate, despite having a large faction of disapproving Whigs, confirmed the appointment in 1836.[177] During Taney's tenure, the Court heard many landmark cases, including *Scott v. Sandford*, *Ex parte Merryman*, and *Swift v. Tyson*,[178] but Taney was not called upon to hear a case regarding the United States Bank, the entity that he himself had helped to weaken during his brief term as Secretary of the Treasury. Taney thus provides no useful precedent for Chase.

Nor do the two remaining Justices with Cabinet experience offer Chase help. Woodbury served as both Secretary of the Navy and Secretary of the Treasury under President Jackson, and he also helped to end the Second Bank of the United States.[179] Nathan Clifford served as President Polk's Attorney General and was entrusted with a diplomatic mission to Mexico to get that country to ratify a peace treaty and end its war with the United States. Neither Justice's actions in government were later reviewed by the Supreme Court.

In sum, looking to his predecessors would not have provided Chase with any guidance as to how he should conduct himself in the seemingly unprecedented situation of being called on to evaluate the constitutionality of his own actions.

Lacking any precedential guidelines, did Chase get help from the press or the public? Was there a public campaign to persuade Chase to recuse himself? The act of recusal has its roots centuries before the Supreme Court was ever conceived. Records dating back to 530 A.D. indicate that judges were pressured to recuse themselves from any case in which they had any sort of interest to preclude any suspicion regarding the fairness of the decision.[180] Although, in the Middle Ages, there remained a "strong abhorrence of adjudication by a partial judge,"[181] and judges were pressured to recuse themselves, there was no strict law that absolutely prevented judges from hearing certain cases.[182] The first federal recusal law was enacted in 1792, but it required recusal only in instances in which the sitting judge had an interest in the case or had been counsel to a party.[183] A 1911 federal law required judges to

recuse themselves for bias.[184] Federal recusal law has since been codified in 28 U.S.C. § 455, and it continues to evolve and expand. Today, the American people are infinitely more vigilant regarding their judges' actions, potential biases, and motives for decision-making than they were in Chase's day.

The number of sources contemporary to Chase that advocated recusal is so limited that it seems evident that Chase's decision not to remove himself in the case did not trigger much public controversy. The *New York Times* did charge Chase with unconstitutionally invading the realm of Congress.[185] Specifically, the paper proclaimed, "A mind content with judicial honors would have avoided this extraordinary contradiction, by leaving to others to overthrow [the] policy."[186] The *Times* may have been implicitly castigating Chase for his failure to recuse himself in *Hepburn*.

It is much easier to find public discontent with Chase's majority opinion in *Hepburn* than with his decision to hear the case itself. There were, of course, many contemporary newspaper articles and editorials that expressed anger, if not outrage, at the Chief Justice's decision. For example, one article vilified Chase for besmirching the honor of the Supreme Court and accused him of making decisions based on party politics.[187]

Conclusion

Salmon P. Chase was an extraordinarily intelligent and complicated man. He left his mark on the nation and played a significant role in some of the defining moments of the nineteenth century. As Secretary of the Treasury, he enacted a measure then deemed to be indispensable to the survival of the Union. As Chief Justice of the Supreme Court, he ruled that same measure unconstitutional and inconsistent with the founding principles of the country. Although Chase's mark is no longer found on our dollar bills, it is still felt in Supreme Court history.

ENDNOTES

*The author wishes to sincerely thank John Paul Callan, Joshua Cumby, Professor Ross Davies, Carol Kendall, Jerome Kendall, and Professor Richard Paschal for all of their assistance with this essay.

[1]Salmon P. Chase, Secretary of the Treasury, "Financial Policy in a Nutshell," Indianapolis, Indiana (Oct. 1863). Printed in W.H. Moore, **Authentic Speeches of Salmon P. Chase, Secretary of the Treasury, with His Speeches at Indianapolis and at the Mass Meeting in Baltimore, October 1863**. Available at http://www.archive.org/stream/goinghometovotea00chas#page/n1/mode/2up

[2]*Hepburn v. Griswold*, 75 U.S. 603 (1870).

[3]"At the South, the Feeling in Maryland—Conservative Sentiments—A General Acquiescence in the Result," *N.Y. Times*, Nov. 8, 1860, at 1.

[4]"How the Result Is Received, Demonstrations and Speculations at Lincoln's Home, Conjectures about the Cabinet, the President's Policy to Be Conservative, Disunion Scouted," *N.Y. Times*, Nov. 9, 1860, at 1.

[5]3 Nicholas John Hay, **Abraham Lincoln: A History** 354 (New York: Century Co. 1890).

[6]*Id.* at 355.

[7]"The Presidential Campaign, Various Views of the Pending Political Struggle, Republican Meeting at Goshen," *N.Y. Times*, Oct. 22, 1860, at 1.

[8]John Niven, **Salmon P. Chase: A Biography** 224 (Oxford University Press 1995).

[9]*Id.*

[10]Hay, *supra* note 5.

[11]Niven, *supra* note 8, at 225.

[12]*Id.*

[13]Letter from Abraham Lincoln, President-elect of the United States of America, to Simon Cameron, prospective Secretary of War, (Apr. 11, 1861) on file with the Papers of Abraham Lincoln Project, Springfield, Ill. Interestingly, Cameron was later forced to resign his post under allegations of corruption and lived the rest of his political life as the U.S. Minister to Russia. *See also* "Gov. Chase of Ohio and Mr. Tuck of New Hampshire at Springfield—Gen. Cameron Not Appointed to Secretary of the Treasury," *Chi. Tribune*, Jan. 5, 1861, at 1.

[14]Salmon P. Chase, **Diary and Correspondence of Salmon P. Chase** 295 (New York: Da Capo Press 1971).

[15]Niven, *supra* note 8, at 222.

[16]*Id.*

[17]Letter from Salmon P. Chase to the Honorable Thaddeus Stevens in Chase, *supra* note 14, at 295.

[18]Letter from Salmon P. Chase to his daughter, Kate Chase, Jan. 4, 1861, on microfilm at the Library of Congress.

[19]*Id.*

[20]*Id.*

[21] *Id.*

[22] Letter from Abraham Lincoln, President-elect of the United States of American, to Lyman Trunchbull, Jan. 16, 1861, on microfilm at the Library of Congress.

[23] "The New Administration," *Chi. Tribune*, Mar. 6, 1861, at 1. Interestingly, although a Senator at the time of his nomination, Chase had not been in session because he was visiting his daughter. His peers unanimously approved his nomination and Chase learned the news upon his arrival in Washington. Niven, *supra* note 8, at 238.

[24] Lincoln to Trunchbull, *supra* note 22.

[25] Niven, *supra* note 8, at 250.

[26] *Id.*

[27] Letter from Salmon P. Chase to his daughter, Kate, June 10, 1861, on microfilm at the Library of Congress.

[28] *Id.*

[29] Timothy A. Canova, "Lincoln's Constitutionalism in Time of War: Lessons for the War on Terror? What Would Lincoln Do? Constitutional Approaches to Wartime Finance and Economics: Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People," 12 *Chap. L. Rev.* 561, 564–70 (2009).

[30] Oscar Lasdon, "Investment and Finance," 76 *Banking L.J.* 365 (1959).

[31] *Id.* at 366.

[32] David P. Currie, "The Civil War Congress," 73 *U. Chi. L. Rev.* 1131, 1135–45 (2006).

[33] Paul E. Lund, "National Banks and Diversity Jurisdiction," 46 *U. Louisville L. Rev.* 73, 76–88 (2007).

[34] *Id.* at 82.

[35] "The Bombardment of Fort Sumter," *Harp. Weekly*, Apr. 27, 1861, at 1.

[36] Niven, *supra* note 8, at 251.

[37] *Id.*

[38] Frank J. Williams, "Abraham Lincoln: Lessons for Lawyers," 36 *N. Ky. L. Rev.* 295, 308 (2009).

[39] Letter from Salmon P. Chase, Secretary of the Treasury, to the Honorable M. Sutliff, May 1, 1861, on file at the American Libraries Internet Archive.

[40] Niven, *supra* note 8, at 251.

[41] "The Hopelessness of the Rebellion," *Harp. Weekly*, Aug. 2, 1861 at 482.

[42] Act of July 17, 1861, ch. 5, § 1, 12 Stat. 259 (1861); Act of Aug. 5, 1861, Ch. 46, § 5, 12 Stat. 313 (1861).

[43] *See, e.g.,* **The Federalist No. 44** (Alexander Hamilton).

[44] Ajit V. Pai, "Congress and the Constitution: the Legal Tender Act of 1861," 77 *Or. L. Rev.* 535, 539 (1998).

[45] Letter from John Jay to Salmon P. Chase, Secretary of the Treasury, Apr. 4, 1861, on file at the American Libraries Internet Archive.

[46] Hay, *supra* note 5, at 228.

[47] Canova, *supra* note 29, at 565.

[48] *Id.*

[49] *Id.*

[50] 9 Nicholas Hay, **Abraham Lincoln, A History** 230 (New York: Century Co. 1890).

[51] Niven's biography offers a very detailed account of Chase's overriding political ambitions, including his unsuccessful campaigns for President. From Niven's perspective, Chase's political ambitions were rarely, if ever, far from his mind. *See generally* Niven, *supra* note 8.

[52] Letter from Salmon P. Chase, Secretary of the Treasury to the Committee of Ways and Means, in *Cong. Globe*, 37th Cong. 2d Sess. 618 (1862).

[53] Alexander Hamilton, **Report on the National Bank** (1791). Available at http://american_almanac.tripod.com/hambank.htm.

[54] Hay, *supra* note 50, at 231.

[55] Letter from Salmon P. Chase to his daughter, Kate, May 10, 1861, on microfilm at the Library of Congress.

[56] Niven, *supra* note 8, at 256.

[57] *Id.*

[58] *Id.*

[59] Hans L. Trefousse, **Thaddeus Stevens: Nineteenth-Century Egalitarian** (UNC Press 1997).

[60] Niven, *supra* note 8, at 257.

[61] Letter from Salmon P. Chase, Secretary of the Treasury, to Thaddeus Stevens, Chairman of the House Ways and Means Committee, Jan. 29, 1862, on microfilm at the Library of Congress.

[62] Niven, *supra* note 8, at 257.

[63] *Id.*

[64] E.G. Spaulding, **History of the Legal Tender Paper Money Issued during the Great Rebellion** (1869).

[65] 31 U.S.C. § 198 (1862). *See also* United States Congress, Act of Feb. 25, 1862, Ch. 33.

[66] *Id.*

[67] Niven, *supra* note 8, at 299.

[68] Salmon P. Chase, diary entry of Sept. 12, 1862, on microfilm at the Library of Congress.

[69] Letter from Salmon P. Chase, Secretary of the Treasury, to Thaddeus Stevens, Chairman of House Ways and Means Committee, Dec. 23, 1862, on file at the American Libraries Internet Archive.

[70] Niven, *supra* note 8, at 299.

[71] *Id.* at 300.

[72] 31 U.S.C. § 198 (1862). *See also* United States Congress, Act of Jul. 11, 1862, Ch. 33.

[73] Salmon P. Chase, **The Salmon P. Chase Papers: Journals, 1829–1872** 173 (John Niven ed., 1993).

[74] *Id.*

[75] Niven, *supra* note 8, at 300.

[76] *Id.*

[77] The National Currency Act was passed in 1863. National Currency Act, Ch. 58, 12 Stat. 665 (1863) (repealed in 1864). It was repealed and replaced by similar legislation in 1864; although never officially titled the National Bank Act, this second legislation has come to be known as such.

Act of June 3, 1864, Ch. 106, 13 Stat. 99. *See also* Howard H. Hackley, "Our Baffling Banking System," 52 *Va. L. Rev.* 565, 572 (1966).

[78]Third Legal Tender Act, Ch. 73, Stat. 2 (1863).

[79]Salmon P. Chase, Secretary of the Treasury, "Financial Policy in a Nutshell," Indianapolis, Indiana (Oct. 1863). Printed in Moore, *supra* note 1.

[80]Chase, "Financial Policy in a Nutshell," *supra* note 1, on microfilm at the Library of Congress.

[81]*Id.*

[82]*Id.*

[83]*Id.*

[84]*Id.*

[85]*Id.*

[86]Donald Grier Stephenson Jr., "Chase, Salmon P.," in **1 Great American Lawyers: An Encyclopedia** 91, 91–93 (John R. Vile ed., 2001). *See also* 6 Nicholas Hay, **Abraham Lincoln, A History** 254 (New York: Century Co. 1890).

[87]Hay, *supra* note 86, at 254.

[88]*Id.*

[89]Chase, *supra* note 14, at 300.

[90]*Id.* at 88 (diary entry of Aug. 7, 1861).

[91]*Id.* at 73 (diary entry of Sept. 10, 1862).

[92]Hay, *supra* note 50, at 95.

[93]Wesley Clair Mitchell, **A History of the Greenbacks with Special Reference to the Economic Consequences of Their Issue 1862–65** 123 (Chicago: University of Chicago, 1903).

[94]"The Death of Roger B. Taney," *N.Y. Times*, Oct. 14, 1864 at 4.

[95]Hay, *supra* note 50, at 386.

[96]*Id.* at 387.

[97]Niven, *supra* note 8, at 374.

[98]Brian McGinty, **Lincoln and the Court** 295 (Harvard University Press, 2008).

[99]Niven, *supra* note 8, at 374.

[100]"News from Washington: Chief Justice Chase," *N.Y. Times*, Dec. 8, 1864, at 1.

[101]"News from Washington, Special Dispatches: Chief Justice Chase," *N.Y. Times*, Dec. 12, 1864, at 1.

[102]Niven, *supra* note 8, at 375.

[103]Letter from Salmon P. Chase to his daughter, Kate, Mar. 3, 1865, on microfilm at the Library of Congress.

[104]*Id.*

[105]*Hepburn v. Griswold*, 75 U.S. 603 (1870).

[106]*Hepburn*, 75 U.S. at 605.

[107]*Hepburn*, 75 U.S. at 603.

[108]*Hepburn*, 75 U.S. at 605.

[109]*Id.*

[110]*Id.*

[111]*Id.*

[112]*Id.*

[113]*Hepburn*, 75 U.S. at 606.

[114]*Id.*

[115]*Id.*; see also David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," 67 *U. Chi. L. R.* 995, 1005 (2000) for a discussion explaining the time delays in the Supreme Court docket in the 1870s.

[116]*Hepburn*, 75 U.S. at 606.

[117]*Hepburn*, 75 U.S. at 626 (Miller, J., dissenting).

[118]Letter from Salmon P. Chase to Thaddeus Stevens, Jan. 19, 1862, on microfilm at the Library of Congress.

[119]Letter from Salmon P. Chase to E.G. Spaulding, Jan. 22, 1862, on microfilm at the Library of Congress.

[120]*Hepburn*, 75 U.S. at 629–30 (citing to *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

[121]*Hepburn*, 75 U.S. at 610.

[122]*Id.*

[123]*Id.*

[124]*Id.*

[125]*Id.*

[126]J.W. Schuckers, **The Life and Public Services of Salmon Portland Chase** 260 (Applewood Press, 2010).

[127]*Hepburn*, 75 U.S. at 638 (Miller, J., dissenting).

[128]Schuckers, *supra* note 126, at 260.

[129]Act of April 10, 1869, 16 Stat. 44. *See also* Charles Fairman, "Mr Justice Bradley's Appointment to the Supreme Court and the *Legal Tender Cases*," 54 *Harv. L. Rev.* 977 (Apr. 1941).

[130]Fairman, *supra* note 129, at 978.

[131]*Id.*

[132]Garrow, 1004, 1009, 1015–16, 1018.

[133]Niven, *supra* note 8, at 478.

[134]Fairman, *supra* note 129, at 978.

[135]*Id.*

[136]*Id.*

[137]*Id.*

[138]Letter from Justice Grier to President Grant, Dec. 11, 1869, in 20 Ulysses S. Grant, **The Papers of Ulysses S. Grant** 52 (John Y. Simon ed., 1967).

[139]Letter from President Grant to Justice Grier, Dec. 15, 1869, in Grant, *supra* note 138, at 52.

[140]Letter from Justice Miller to President Grant, Apr. 16, 1869, in Grant, *supra* note 138, at 53. Note that Justice Miller's letter was in response to the Congressional Act providing for more Justices, not to Grier's letter of resignation.

[141]Grant, *supra* note 138, at 54.

[142]*Id.* at 55.

[143]Members of the Supreme Court of the United States, *available at* http://www.supremecourt.gov/about/members_text.aspx (last visited on June 4, 2011). *See also* Grant, *supra* note 138, at 55.

[144]Members of the Supreme Court, *supra* note 143. *See also* Grant, *supra* note 138, at 55.

[145]Leon Sachs, "Stare Decisis and the Legal Tender Cases," 20 *Va. L. Rev.* 856, 868 (1934).

[146]Fairman, *supra* note 129, at 980.

[147] *Id.* at 982.

[148] *Id.*

[149] *Id.* at 982.

[150] Fairman at 978.

[151] Fairman, *supra* note 129, at 989.

[152] *Shollenberger v. Brinton*, 52 Pa. 9, 56 (1866).

[153] "Editorial," *Springfield Daily Republican*, Apr. 20, 1870, at 2; *see also* Sachs, *supra* note 145, at 868.

[154] "Editorial," *supra* note 153; *see also* Sachs, *supra* note 145, at 868.

[155] Fairman, *supra* note 129, at 977.

[156] Salmon P. Chase, diary entries on Mar. 14, 24, and 26, 1870, on microfilm at the Library of Congress.

[157] Fairman, *supra* note 129, at 979.

[158] Schuckers, *supra* note 126, at 262.

[159] *Id.* at 263; *see also* Fairman, *supra* note 129, at 979–80.

[160] *Legal Tender Cases; Knox v. Lee; Parker v. Davis*, 79 U.S. 457 (1870).

[161] Letter from Judge Samuel A. Foote to Justice Joseph P. Bradley, Mar. 28, 1870, in Fairman, *supra* note 129, at 1135.

[162] Letter from Salmon P. Chase to E.G. Spaulding, Jan. 22, 1862, on microfilm at the Library of Congress; *see also* Schuckers, *supra* note 126, at 266; Robert B. Warden, **An Account of the Private Life and Public Services of Salmon Portland Chase** (Cincinnati: Wilsatch, Baldwin & Co., 1874).

[163] *Hepburn v. Griswold*, 75 U.S. 603, 626 (1870).

[164] *Legal Tender Cases*, 79 U.S. at 575–76 (Chase, C.J., dissenting).

[165] **American Bar Association's Model Code of Judicial Ethics** 19 (ABA, 2008).

[166] 28 U.S.C. 455(b)(3) (2011).

[167] *See* American Bar Association, Center for Professional Responsibility, Judicial Code Revision Project Background Paper, *at* (last visited Apr. 30, 2010) http://www.americanbar.org/content/dam/aba/migrated/cpr/about/landmark_dates_brochure.authcheckdam.pdf (last visited June 25, 2011); *see also* Shelby A. Linton Keddie, "Outsourcing Justice: A Judge's Responsibility When Sending Parties to Mediation," 25 *Penn St. Int'l L. Rev.* 717, 719 (2007).

[168] The timeline concerning Jay's service to his nation is a little confusing. The Articles of Confederation allowed the Confederation Congress to appoint "such committees and civil officers as may be necessary for managing the general affairs of the United States." Articles of Confederation, Art. 9, Cl. 5. On January 10, 1780, the Confederation Congress created the Department of Foreign Affairs, and Jay served in the capacity of Secretary of Foreign Affairs from June 4, 1783, to March 4, 1789. Upon ratification of the Constitution, Washington signed a law that changed the name of Secretary of Foreign Affairs to Secretary of State, and Jay finished his tenure as "Secretary of Foreign Affairs" under the latter title. His position as Secretary of State began on September 15, 1789, and ended on March 22, 1790. Since Washington was elected President in April of 1789 and served in that capacity until March 1797, Jay was in fact the first Secretary of State, having served in that position for six months. James D. Richardson, **A Compilation of the Messages and Papers of the Presidents, 1789–1905** 376 (The Bureau of National and Public Affairs, 1906).

[169] Marshall was Secretary of State from June 13, 1800 to March 13, 1801 and Chief Justice from January 31, 1801 to July 6, 1835. Michael Schoeppner, "Legitimating Quarantine: Moral Contagions, the Commerce Clause, and the Limits of *Gibbons v. Ogden*," 17 *J. S. Legal Hist.* 81, 91 (2009).

[170] Walter J. Walsh, "The First *Free Exercise Case*," 73 *Geo. Wash. L. Rev.* 1, 106 (2004).

[171] Ronald A. Cass and Peter L. Strauss, "The Presidential Signing Statements Controversy," 16 *Wm. & Mary Bill Rts. J.* 11, 25 (2007).

[172] George Lee Flint, Jr., "Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast," 52 *Okla. L. Rev.* 303, 387 (1999); *see also* A.N. Marquis Co., **Who Was Who in America, Historical Volume 1607–1896** 594 (1963).

[173] Legal Affairs, "Elsewhere," 59 *Legal Aff.* 59 (2004).

[174] *Chisholm v. Georgia*, 2 U.S. 419 (1793).

[175] *Marbury v. Madison*. 5 U.S. 137 (1803); *see also* John C. Nagle, "The Lame Ducks of *Marbury*," 20 *Const. Comment.* 317, 318 (2003).

[176] Richard A. Epstein, "Executive Power in Political and Corporate Contexts," 12 *U. Pa. J. Const. L.* 277, 292 (2010).

[177] Jerry L. Mashaw, "Administration and 'the Democracy': Administrative Law from Jackson to Lincoln, 1829–1861," 117 *Yale L.J.* 1568, 1590 (2008).

[178] *Swift v. Tyson*, 41 U.S. 1 (1842); *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[179] 3 Levi Woodbury, **Writings of Levi Woodbury** (Boston: Little, Brown and Co., 1852).

[180] Amanda Frost, "Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal," 53 *U. Kan L. Rev.* 531, 537 n. 20 (2005).

[181] Joseph M. Godman, "Disqualification for Bias of Judicial and Administrative Officers," 23 *N.Y.U.L. Q. Rev.* 109, 110 (1948).

[182] Kendra H. Fershee, "Recent Development: Discretionary Recusal and the Appearance of Partiality through the Eyes of the Fifth Circuit in *Republic of Panama v. American Tobacco Co.*," 77 *Tul. L. Rev.* 517, 518 (2002).

[183] *Liteky v. United States*, 510 U.S. 540, 543–48 (1994) (giving history of federal recusal laws).

[184] *Liteky*, 510 U.S. at 544.

[185] "Legal Tender Act—Congress and the Supreme Court," *N.Y. Times*, Mar. 8, 1870, at 1.

[186] *Id.*

[187] "Chief Justice Chase and the Supreme Court," *N.Y. Times*, Mar. 26, 1870, at 1.

Lochner and Constitutional Continuity

DAVID E. BERNSTEIN*

If you want to raise eyebrows at a gathering of judges or legal scholars, try praising the Supreme Court's 1905 decision in *Lochner v. New York*.[1] *Lochner* invalidated a state maximum-hours law for bakery workers. The Court held that the law violated the right to "liberty of contract," a right implicit in the Fourteenth Amendment's ban on states depriving people of liberty without "due process of law."

Lochner has since become shorthand for all manner of constitutional evils and has even had an entire discredited era of Supreme Court jurisprudence named after it. Over 100 years after their predecessors issued the decision, Supreme Court Justices of all ideological stripes use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. Even Barack Obama has found occasion to publicly denounce *Lochner*, pairing it with the *Dred Scott* case as examples of egregious Supreme Court error.[2] And *Lochner*'s infamy has spread internationally, to the point where it plays an important role in debate over the Canadian constitution.[3]

Legal scholars across the political spectrum have long agreed that *Lochner* and other cases applying the liberty-of-contract doctrine to invalidate legislation were serious mistakes. This is hardly unusual. Many constitutional doctrines adopted by the Supreme Court have come and gone over the last 200-plus years. But the ferocity and tenacity of the liberty-of-contract doctrine's detractors is unique. For over 100 years, critics have argued that *Lochner* and its progeny did not involve ordinary constitutional errors but were egregious examples of willful judicial malfeasance.

Concomitantly, jurists have long assumed that the battle between early twentieth-century proponents of liberty of contract and its Progressive detractors was decisively won by the Progressives. Both liberal and conservative constitutionalists tend to see themselves as part of a generally consistent tradition tracing back to Progressives and New Dealers.

BREAD AND FILTH COOKED TOGETHER

Horrible Conditions Existing in New York and Brooklyn Bakeries.

VERMIN AND DIRT ABOUND

Unclean Men Mix the Dough and Sleep in the Same Rooms.

A STARTLING EVENING JOURNEY

Here Is Matter for the Board of Health to Ponder Over.

DREADFUL HOURS OF LABOR

A Grind That Makes Ambition for Personal Cleanliness Impossible.

THE LABOR MEN IN REVOLT

They Ask "The Press" to Follow Up Its Good Work Among the Tenements with a Battle Against These Enemies of Health and Decency.

To the Editor of The Press:

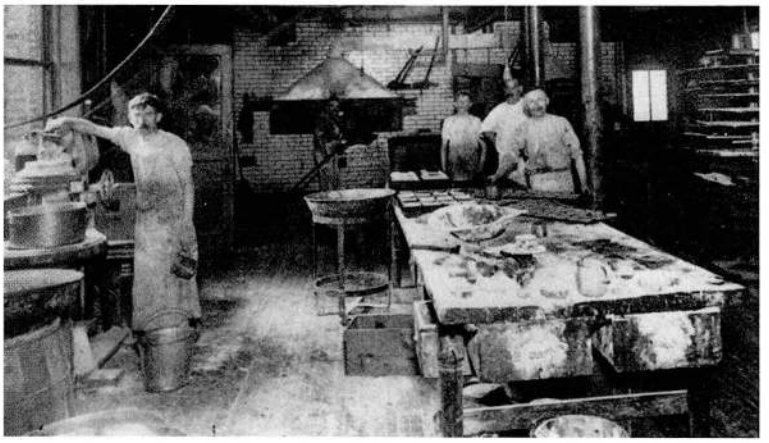
Sir—Being aware of the excellent services rendered the public by your esteemed journal in exposing the terrible condition of New York's tenement houses, permit me to call your attention to an evil still worse and far more dangerous to public health and morality, the terribly filthy and unsanitary condition of the bake shops of New York and Brooklyn and its effect on the public at large and the men employed

In 1895, the New York legislature unanimously enacted the Bakeshop Act, which regulated sanitary conditions in bakeries and also prohibited individuals from working in bakeries for more than ten hours per day or sixty hours per week. An August 1894 article in the *New York Press* warned of the dangerous and dirty conditions in New York bakeries.

The standard liberal version of constitutional history has relied on broad caricatures of the relevant historical actors. The good guys, starting with early twentieth-century Progressive jurists, are said to have been champions of the little guy against the powerful, whether in the form of protecting civil liberties or that of protecting the economically powerless against rapacious corporations. The liberals' historical bad guys are the "reactionary" Justices of the Gilded Age and their successors into the early New Deal era, who are said to have substituted crass class interest or dogmatic laissez-faire ideology for constitutional principle.[4]

Modern conservative constitutionalists, meanwhile, though dissenters in some ways from the orthodox interpretation of American constitutional history, also want to see themselves as part of a seamless jurisprudential tradition, and they venerate some of the same Progressive heroes as their liberal adversaries do. The conservatives' preferred narrative revolves around a tradition of judicial restraint based on textualism, originalism, and respect for longstanding constitutional principle. In this tale, the good guys are Oliver Wendell Holmes, Jr., Felix Frankfurter, and other Justices with Progressive constitutional views who are said to have properly put their political views to one side to enforce the Constitution as written. The bad guys are the Supreme Court's "judicial activists," who purportedly made up the nonsensical doctrine of "substantive due process" to foist their ideology on the American public. The original sin was that of the Supreme Court in the liberty-of-contract era, but the modern Supreme Court has failed to repent. Indeed, it has aggravated matters through additional judicial activism, substituting modern liberal-left social-policy preferences for the laissez-faire prejudices of the earlier period.

For various reasons, including mere happenstance, *Lochner* became the key emblematic illustration of both of these stories, the one case that encapsulates everything about the bad guys' approach. These stories, however—



In 1899, Joseph Lochner, owner of Lochner's Home Bakery in Utica (pictured standing between two of his bakers), was indicted for requiring and permitting an employee to work more than sixty hours in one week and was fined $25. For a second offense in 1901, he drew a fine of $50 from the Oneida County Court.

in terms both of overall narrative and of their specific depiction of the *Lochner* case—are demonstrably false. An accurate and nuanced view of the Supreme Court's pre–World War II due-process jurisprudence does not allow for blithe categorization of Justices who lived in a very different era, replete with ideological and political disputes and assumptions that are foreign and often barely comprehensible to modern scholars, into prescient heroes and narrow-minded villains.

Indeed, the most significant—and perhaps most surprising—aspect of the history of the liberty-of-contract doctrine is that modern Fourteenth Amendment jurisprudence is at least as much a product of the *Lochner* line of cases as of the views of their Progressive opponents. Progressive critics of *Lochner* certainly emerged victorious on one very important issue—the Supreme Court no longer engages in serious review of economic regulations under the Due Process Clause. But despite the calumny heaped on the due-process liberty-of-contract decisions and the Supreme Court Justices who wrote them, modern constitutional jurisprudence implicitly (and sometimes explicitly) draws a great deal from pre–New Deal due-process decisions rejecting novel assertions of government power.

To assess the outcome of the conflict in the early twentieth century between proponents and opponents of the liberty-of-contract doctrine, it is necessary to avoid the tendency to superimpose modern ideological divisions onto the debates of past generations. Early twentieth-century Progressives were not ideological twins of modern "liberals," and liberty-of-contract proponents did not share a common constitutional vision with modern "conservatives."

In sharp contrast to modern constitutional jurisprudence, neither Progressives nor their conservative opponents typically recognized a fundamental distinction between judicial protection for civil rights and civil liberties and judicial protection of economic liberties. Rather, both sides thought that Fourteenth Amendment due-process cases raised three primary issues: whether the party challenging government regulatory authority had identified a legitimate right deserving of judicial protection; the extent to which the courts should or should not presume that the government was acting within its inherent "police power"; and, finally, taking the decided-upon presumption into account, whether any infringement on a recognized right protected by the Due Process Clause was within the scope of the states' police power or whether it was instead an arbitrary, and therefore unconstitutional, infringement on individual rights.

Leading Progressive constitutional scholars believed in strong interventionist government run by experts and responsive to developing social trends, and they were hostile to countervailing claims of rights-based limits on government power. Princeton University president (and later U.S. President) Woodrow Wilson, for example, dismissed talk of "the inalienable rights of the individual" as "nonsense." "The object of constitutional government," according to Wilson, was not to protect liberty but "to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need."[5]

Progressives blamed the "individualist" philosophy of the Constitution, as manifested in its protections for individual rights, for blocking needed Progressive reforms. In his extremely influential book **Progressive Democracy**, Herbert Croly, whose admirers and friends included Frankfurter and Learned Hand, criticized the Bill of Rights for turning the Constitution "into a monarchy of Law superior in right to the monarchy of the people."[6] Morris Cohen, writing in Croly's *New Republic*, questioned the legitimacy of judicial power to invalidate legislation that infringed on individual liberty.[7]

Progressive lawyers' contempt for the United States' individualist natural-rights tradition naturally led to hostility to the Fourteenth Amendment. Frankfurter, writing in the *New Republic*, called for the repeal of the Fourteenth Amendment's Due Process Clause,[8] and Louis D. Brandeis privately urged repeal of the entire Fourteenth Amendment,[9] a position adopted publicly by less prominent Progressives.[10] Brandeis later warned Frankfurter that equal protection "looms up even more menacingly than due process."[11]

Not surprisingly, then, Progressive legal commentators urged the courts to interpret the police power as sufficiently flexible to permit state-imposed racial segregation, sex-specific labor laws, restrictions on private schooling, and coercive eugenics. Progressive jurists, for example, were almost universally hostile to the Supreme Court's 1917 opinion in *Buchanan v. Warley* that invalidated residential segregation laws.[12] A student comment in the *Yale Law Journal*, reflecting broad Progressive sentiment, attacked the Court for concluding that property rights were more important than the public's interest in segregation.[13] Columbia Professor Howard Lee McBain, a prominent Progressive scholar and author of **The Living Constitution**, criticized the Court for destroying whites' right to live in a segregated neighborhood.[14]

Similarly, Progressives excoriated Justice George Sutherland's 1923 opinion in *Adkins v. Children's Hospital*, which invalidated a women-only minimum-wage law, as a violation of liberty of contract.[15] Sutherland, a longtime supporter of women's rights, emphasized that given the recognition of women's civic equality in the Nineteenth Amendment, women were entitled to the same legal rights as men. Justice Holmes replied, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account." Prominent Progressive activist Florence Kelley, reflecting the visceral hostility to *Adkins* felt by many of her compatriots, accused the Court of issuing a "new *Dred Scott* decision."[16]

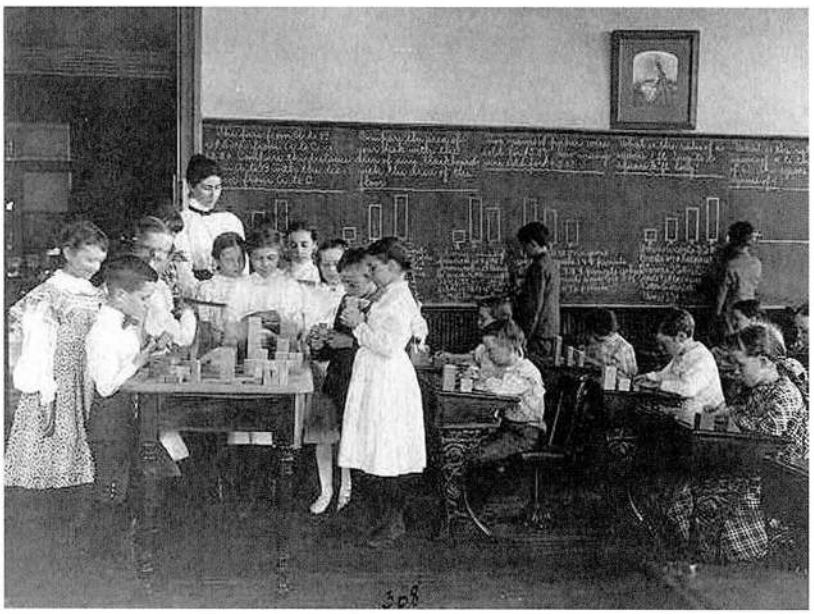
Progressives also opposed the Supreme Court's 1923 ruling in *Meyer v. Nebraska*, holding that private schools had the right to teach their students foreign languages. Justice James C. McReynolds wrote an opinion for the Court, citing and expanding on *Lochner*, that stated that the Due Process Clause protects not just liberty of contract, but also the right "to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience," along with "other privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[17] Frankfurter wrote to Hand that, while he regarded "such know-nothing legislation as uncivilized," he would still have voted

with Holmes in dissent rather than "lodging power in those nine gents in Washington." Hand agreed, adding that "I can see no reason why, if a state legislature wishes to make a jackass of itself by that form of Americanization, it should not have the responsibility for doing so rather than the Supreme Court."[18]

Frankfurter also strongly opposed the outcome in *Pierce v. Society of Sisters*, a 1925 case holding that states could not ban private schools.[19] He argued that Americans were in danger of confusing unwise or unjust legislation with unconstitutional legislation. Frankfurter warned his fellow Progressives that a great deal of "highly illiberal" legislation infringing on freedom of thought and freedom of speech was "clearly constitutional."[20] Justice McReynolds added fuel to Progressive ire in *Pierce* by explicitly rebuking statist Progressive notions of educational reform. The child, McReynolds proclaimed, "is not the mere creature of the state."[21]

Another civil-liberties issue involving government regulation of education arose when Tennessee passed a law banning the teaching of evolution in public schools, leading to the famous Scopes Monkey Trial.[22] Influential journalist Walter Lippmann proposed that liberal attorneys organize a challenge to the law under the Due Process Clause. Thomas Reed Powell, Cohen, Hand, and other leading Progressive jurists responded that the courts should not interfere with the legislatures' prerogative to determine educational policy.[23]

Even coerced sterilization of alleged defectives was more than acceptable to Progressive jurists. Justice Brandeis, who joined Justice Holmes' infamous "three generation of imbeciles" opinion in *Buck v. Bell*,[24] later cited *Bell* as an example of properly allowing the states "to meet modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."[25]



Justice James C. McReynolds' opinion in *Meyer v. Nebraska* held that the Due Process Clause protects not just liberty of contract, but also the right "to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience" along with "other privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." At issue in the case was whether private schools could teach children foreign languages.

The issue of government regulation of education arose when Tennessee passed a law banning the teaching of evolution in public schools, leading to the famous Scopes Monkey Trial in 1925. Pictured, Clarence Darrow defends the teaching of evolution in a Tennessee courtroom.

Professor Robert Cushman praised Holmes' opinion as a "trenchant" explanation of why the "substance of the law" was "a reasonable social protection, entirely compatible with due process of law."[26] Professor Fowler Harper listed *Bell* as an example of welcome "progressive trends" in law.[27]

In short, many Progressives, products of their prejudiced times, actively sympathized with the racism, the paternalistic and often dismissive or condescending attitudes toward women, and the hostility to immigrants and Catholics that motivated the laws mentioned above. But even unusually liberal Progressive jurists—and elite attorneys such as Frankfurter tended to be more liberal-minded than other Progressive intellectuals—generally opposed judicial intervention to support any given rights claim brought under the Due Process Clause. Progressive lawyers argued that the benefits of such intervention would likely be substantially outweighed by the damage additional constitutional limits on the government's police power might ultimately cause to their core agenda of supporting economic—especially labor—regulation.

The most significant exception to the pattern of Progressive hostility to constitutional protection for individual rights was that, during and after World War I, some Progressives vigorously supported greater constitutional protection of freedom of expression.[28] At least among Progressives allied with the political left, wariness of individualistic speech rights was tempered by the trauma of wartime repression of pacifists and other dissenters and the post-war "Red Scare."[29] Brandeis and Holmes eventually took up their cause, though each had significant reservations about using the Fourteenth Amendment to limit states' infringement on freedom of speech. The Court's conservative majority, meanwhile, acknowledged that the Fourteenth Amendment placed significant restrictions on state regulation of speech.

More generally, advocates of liberty of contract believed that the Fourteenth Amendment set inherent limits on the government's authority to regulate the lives of its

constituents. While this belief initially was enunciated by the courts in the context of economic regulation, as early as 1897, in *Allgeyer v. Louisiana*, the Supreme Court announced that the Fourteenth Amendment's Due Process Clause protected an individuals' right to be "free in the enjoyment of all his faculties [and] to be free to use them in all lawful ways."[30] Through the early 1920s, however, with the exception of a few outlier decisions such as *Lochner*, the Supreme Court's majority was generally cautious about limiting the scope of the states' police power via the Due Process Clause.

But, as with their Progressive critics, "conservative" Supreme Court Justices' views on the scope of the government's power to infringe on constitutional protections for civil rights and civil liberties were generally consistent with their views on the government's power to interfere with liberty of contract.[31] Once the Court became more aggressive about reviewing government regulations in the economic sphere in the 1920s, the Justices naturally began to acknowledge the broader libertarian implications of *Lochner* and other liberty-of-contract cases and to enforce limits on government authority more generally. The Court relied on these cases in pioneering the protection of the right of women to compete with men for employment free from sex-based regulations, the right of African Americans to exercise liberty and property rights free from Jim Crow legislation, and civil liberties against the states ranging from freedom of expression to the right to choose a private-school education for one's children.

Consider, for example, the Court's decision in *Buchanan v. Warley*.[32] Generations of legal scholars and historians have treated *Buchanan* as a property-rights case that rested on laissez-faire ideology, of little if any relevance to the later civil-rights revolution.[33] Undoubtedly, the fact that *Buchanan* involved property rights and liberty of contract played an important role in the decision: it allowed the Court to distinguish *Buchanan* from *Plessy v. Ferguson*,[34] which involved what the Court declared were mere social rights.[35] But focusing myopically on the economic-rights element of *Buchanan* misses the fact that even property rights and liberty of contract were subject to the police power. The Court's invocation of property rights did not resolve the issue of whether residential segregation laws were a constitutionally proper exercise of the government's regulatory authority.

Plessy had suggested that any "reasonable" segregation law would come within the police power, and the *Plessy* Court applied a lax—and racism-infused—standard of reasonableness. In contrast, after noting that property rights were subordinate to the police power, the *Buchanan* opinion favorably cited a series of antidiscrimination precedents that no Supreme Court majority had relied upon in almost four decades.[36] The Court specifically invoked the 1866 Civil Rights Act, which stated that African Americans had the same right to make and enforce contracts and own and alienate property as did white persons.[37]

Most significant, for the first time since *Yick Wo v. Hopkins*[38] in 1886, the Court held that discriminatory animus was not a proper police-power justification for laws violating recognized individual rights.[39] The Court reached this conclusion in *Buchanan* even though popular and expert opinion, backed by contemporary social-science evidence, supported the underlying prejudiced rationale for the residential segregation law, and even though the state justified the law as a response to the risk that integrated housing would lead to miscegenation, racial violence, and other real or perceived social ills. And, as noted previously, the Court's opinion flew in the face of dominant "Progressive" opinion.

Even Justices who lacked sympathy for the individuals and groups that were challenging government actions often voted in their favor out of libertarian commitment to a limited police power. Unabashed racist Justice McReynolds, for example, not only voted with the majority in *Buchanan*, he also wrote an

opinion protecting the right of Japanese parents in Hawaii to send their children to private Japanese-language schools.[40] Some of the other Justices had egalitarian reasons for their votes, as with Justice Sutherland's opinion in *Adkins*. And, sometimes, a commitment to limited government seems to have led some jurists to a newfound empathy for groups suffering from what they saw as government overreaching.

When Roosevelt appointees created a growing Progressive/liberal majority on the Court in the late 1930s, the New Dealers had the opportunity to fulfill the old Progressive dream of emasculating the Due Process Clause and limiting its scope to purely procedural rights. But the Court did not abandon what soon came to be known as "substantive due process." Instead, the Court continued to protect freedom-of-expression rights against the states via the Due Process Clause, and it soon incorporated other rights from the Bill of Rights into the Due Process Clause. The Court also continued to review state and local legislation under the Equal Protection Clause, and it eventually used the Clause aggressively to protect African Americans from state-sponsored segregation.

The post-*Lochner* reincarnation of the Supreme Court's fundamental-rights jurisprudence began in 1937 in *Palko v. Connecticut*. All of the Progressive and liberal Justices joined a Justice Benjamin Cardozo opinion stating that the Fourteenth Amendment protects rights mentioned in the Bill of Rights that are "implicit in the concept of ordered liberty."[41]

The famous Footnote Four of the 1938 *Carolene Products* case also reflected the new liberal majority's reluctance to entirely abandon judicial review of purported police-power regulations.[42] Writing for the Court, Justice Harlan Fiske Stone stated that economic regulations would have a very strong presumption of constitutionality, but that a weaker presumption applied when plaintiffs asserted rights that were enumerated in the Bill of Rights. Stone also asserted that laws directed at particular religious, national, or racial minorities "may call for a correspondingly more searching judicial inquiry."[43] The Court creatively reinterpreted—that is, intentionally misinterpreted—*Meyer* and *Pierce* as decisions invalidating laws because the laws discriminated against religious and ethnic minorities. This was the Court's first of several attempts to preserve these precedents by disentangling them from their roots in the now-obsolete liberty-of-contract line of cases. The result was that the Court, following Brandeis' lead, created a formal distinction in American constitutional law between economic rights on the one hand and civil rights and liberties on the other. This distinction allowed liberals to preserve the Court's role in protecting individual rights from overreaching by the government while distinguishing their jurisprudence from that of the dreaded liberty-of-contract era.

The Court refused to completely refrain from using the Due Process Clause to protect individual liberties for several reasons. First, judicial regard for civil liberties allowed New Dealers, within and outside the Court, to plausibly claim they were committed to preserving individual rights even while vastly expanding the size and scope of the federal government. And while by the 1930s the Court's liberty-of-contract decisions were very unpopular, the Court's tentative forays into civil libertarianism, ranging from *Pierce* and *Meyer* to its free-speech cases to protecting the "Scottsboro Boys" from grossly unfair criminal prosecutions, had received general public approbation.[44] These decisions were especially popular among the ethnic groups that formed the core of the New Deal coalition.[45]

Second, judicial restraint always looks better when your side does not control the courts. Once the "left" took over the Supreme Court, the idea that the Justices should always defer to state legislatures became far less attractive to New Dealers. This was especially true because state legislatures were

often dominated by rural, conservative interests with agendas that broadly conflicted with ascendant urban liberalism.

Third, the New Deal coalition included many individuals with a decidedly modern liberal, as opposed to old-fashioned Progressive, ideological bent. While these individuals supported increased government activism in the economic sphere, they were also concerned with civil rights and civil liberties. Some of these New Deal liberals were apostate classical liberals, such as Oswald Garrison Villard, whose *Nation* magazine had praised the *Lochner* decision. Others were Catholics, Jews of Eastern European descent, and African Americans, who had previously been relatively marginal players in Progressive intellectual and political circles and who tended to be much more sensitive than were most Progressives to minority rights and freedom of expression.

Fourth, the enthusiasm for government activism the New Dealers inherited from the Progressives was tempered by the rise of fascism in Europe. Given the fall of liberal democracy in Germany and elsewhere to popular acclaim, or at least acquiescence, the confidence that Progressives such as Croly had expressed in majoritarianism seemed grossly misplaced.[46] German legal positivism, which had strongly influenced Progressives, also lost its attraction under the weight of Nazism.

Fifth, the elite bar received part of its prestige from the prominent role the Supreme Court played in American life. Once it became clear that the old constitutional order based on property rights and limited government was dead, elite attorneys quickly became advocates of an expanded role for the Supreme Court in protecting freedom of expression and minority rights. The Justices' self-interest, meanwhile, required maintaining the Court's significance.[47]

Finally, and for many of the reasons noted above, President Franklin D. Roosevelt's administration encouraged the Supreme Court's emerging civil-liberties jurisprudence. After losing a Court-packing fight in 1937, the administration focused on changing the public's understanding of the Constitution's essence. The Constitution, the New Dealers argued, was not about protecting property and establishing limited government, but about guaranteeing individual civil liberties. Not only was a large and active federal government not a constitutional problem, but Americans needed such a government to protect them from abuses of state and corporate power. FDR ordered federal employees working on ceremonies related to the Constitution's 150th anniversary in 1937 to emphasize the Bill of Rights instead of the original Constitution. By the time the government celebrated the Bill of Rights' 150th anniversary in 1941, the Bill of Rights, consistent with the Court's emerging jurisprudence, had become virtually synonymous with the First Amendment.[48]

While the Supreme Court beat the dead horse of liberty of contract for decades after the New Deal, civil liberties fared far better. The Court not only continued to protect freedom of expression against the states, but eventually also expanded the protections of the Fourteenth Amendment's Due Process Clause to include most of the other rights found in the Bill of Rights. In contrast to the liberty-of-contract era, when Progressive luminaries sought to restrict the Due Process Clause to issues of judicial procedure, the liberal New Dealers on the Supreme Court unanimously agreed that the Court had some obligation to use the Clause to protect individual rights against state legislation.

In the 1940s, Justice Hugo L. Black developed his theory of "total incorporation." Black believed that the Supreme Court should protect individual liberty against the states, but that the liberty-of-contract era showed that courts must be restrained from reading their own policy preferences into the Constitution. To accomplish these twin goals, he argued that the Supreme Court should hold that the first eight amendments of the Bill of Rights were applicable to the states via "incorporation" into the Fourteenth Amendment's Due Process Clause,

but that the Clause did not protect any unenumerated rights.

Justice Frankfurter, meanwhile, thought that Black's incorporation doctrine would "impose an eighteenth-century straightjacket" on the states.[49] Frankfurter, no longer committed to limiting the Due Process Clause to procedural matters, argued that the Court should continue to look to natural law and the heritage of the past to determine the scope of the rights protected by the Clause. He wanted to retain the pre–New Deal Court's protection of rights foundational to Anglo-American liberty, but he thought the Court should exhibit great restraint in identifying those rights.[50]

The Supreme Court ultimately adopted neither Justice's position. The Court gradually applied most, but not all, of the Bill of Rights to the states on a case-by-case basis.[51] To blunt criticism that they were emulating their discredited pre–New Deal predecessors, the Justices and their defenders asserted that the liberty-of-contract cases involved illegitimate "substantive due process," while cases "incorporating" the Bill of Rights against the states did not.

Applying the concept of substantive due process to the liberty-of-contract cases was anachronistic, because no Justice on the pre–New Deal Court adopted the view that substance and procedure were distinct categories under the Clause.[52] But even if the liberty-of-contract cases could accurately be described as examples of substantive due process, exempting the incorporation cases from that moniker was more a matter of rhetoric than one of logic. For example, enforcing the First Amendment right of freedom of speech against the states via the Due Process Clause is literally an exercise in protecting a substantive right through that clause, and therefore is "substantive due process."

The post–New Deal Justices did try mightily to differentiate their due-process jurisprudence from that of their predecessors. For example, Black insisted that incorporation of the Bill of Rights, unlike liberty of contract, was dictated by the original intent of the Fourteenth Amendment. And the Justices generally differentiated between economic *interests,* which they thought could be adequately protected by the political process, and individual and civil *rights*, which were subject to majoritarian suppression. In the end, though, it is hard to escape the conclusion that, in the most fundamental sense, the liberal Justices of the post–New Deal period were emulating their pre–New Deal predecessors: identifying rights they deemed foundational to American liberty and decreeing that the Fourteenth Amendment's Due Process Clause protected those rights against the states.

The Supreme Court also began to aggressively deploy the Equal Protection Clause to protect African Americans from state-sponsored discrimination, most famously in *Brown v. Board of Education.*[53] *Brown* and like-minded cases were a modern version of the Court's old class-legislation jurisprudence.[54] The old Court had interpreted the ban on class legislation narrowly, because it had no reliable or consistent way to differentiate between legitimate classifications with a proper legislative purpose and illegitimate classifications intended to annoy or oppress legislative losers. The Warren Court's answer was to defer to almost all legislative classifications and not meaningfully police economic regulations through the Equal Protection Clause. Classifications based on race and other immutable characteristics, however, would be treated as inherently suspect, and therefore would be subject to strict scrutiny. The Court would only uphold such classifications if they were "narrowly tailored" and served a "compelling government interest." And, in contrast to the pre–New Deal Court, the Warren and Burger Courts took legislative motivation into account when considering whether a law violated the Equal Protection Clause.

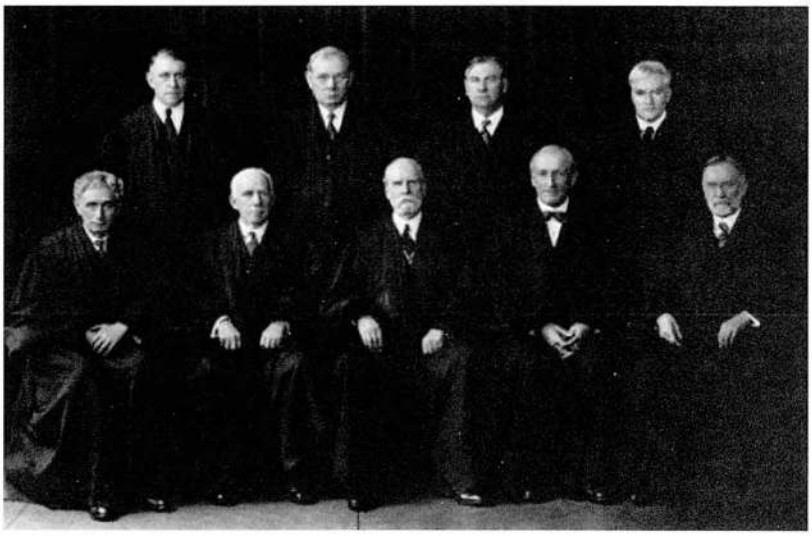
Meanwhile, the longstanding controversy over judicial protection of unenumerated rights through the Due Process Clause seemed to be over. The Supreme Court had not invalidated

a law based on an unenumerated right since 1936. Putting what seemed to be a final nail in the coffin of "substantive due process" in 1963, the Court, overruling a 1917 precedent, unanimously upheld a state law banning the profession of debt-adjustment.[55] Justice Black wrote for the Court that "'a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution.'"[56]

In a dramatic reversal, however, judicial enforcement of unenumerated rights via the Due Process Clause returned just two years later in *Griswold v. Connecticut*.[57] Justice Douglas's plurality opinion for the Court relied in part on *Meyer* and *Pierce* for the proposition that the Due Process Clause protects a right to privacy sufficiently broad to encompass the decision of a married couple to use contraceptives. Douglas denied, however, that he was relying on a *Lochner*-like understanding of the Due Process Clause. He wrote: "Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[58] He argued, in language that has been widely mocked ever since, that the right to privacy was found in "penumbras, formed by emanations" of the First, Third, Fourth, Fifth and Ninth amendments that created a right to privacy.[59] Douglas justified relying on *Meyer* and *Pierce* by treating them as First Amendment cases, even though neither case mentioned the First Amendment specifically or freedom of expression more generally.

Meyer and *Pierce*, and therefore to some extent *Lochner* and other liberty-of-contract cases, are the progenitors of *Griswold* and the Court's subsequent rulings protecting the right to terminate pregnancy and to engage in private consensual sex.

More recently, Justice David Souter, concurring in *Washington v. Glucksberg*,[60] acknowledged modern substantive due process's debt to *Lochner*. He argued that *Lochner* was correct to apply the Due Process Clause to prohibit arbitrary legislation, but was unduly "absolutist" in its implementation of the relevant standard in the context of economic regulations.[61] By contrast, *Meyer* and *Pierce* properly applied heightened scrutiny to truly important interests.[62] Most recently, Justice Anthony Kennedy's opinion in *Lawrence v. Texas*,



Contemporary Fourteenth Amendment jurisprudence owes much to such advocates of liberty of contract as Justices John Marshall Harlan, Rufus Peckham, George Sutherland (seated at right in portrait of 1932 Court), Louis Brandeis (seated at left), and James C. McReynolds (seated second from right).

joined by his four more liberal colleagues, enthusiastically and unabashedly cited *Meyer* and *Pierce* as "broad statements of the substantive reach of liberty under the Due Process Clause."[63]

Conservative judges and scholars, for their part, continue to channel Progressive critiques of liberty of contract and to condemn *Lochner* for improper "judicial activism."[64] But even Justice Antonin Scalia, long the bellwether of elite conservative constitutional thought, has not challenged the incorporation doctrine, even though, like *Lochner*, it involves protecting substantive rights via the Fourteenth Amendment's Due Process Clause. Nor, unlike Justice Black, has Scalia argued that the Due Process Clause only protects rights enumerated in the Bill of Rights' text. Rather, Scalia argues that only rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" are eligible for the Due Process Clause's protection.[65]

Lochner's legacy, then, lives on in American constitutional law in the application of various rights, enumerated and unenumerated, against the states via the Due Process Clause. Justice Rufus Peckham's enunciation of an expansive liberty-protective interpretation of the Clause in *Lochner* (and *Allgeyer*) begot Justice McReynolds' even more expansive opinion in *Meyer*, which in turn continues to serve as the constitutional foundation of various Fourteenth Amendment rights protected by the Supreme Court. Contemporary Fourteenth Amendment jurisprudence owes at least as much to such advocates of liberty of contract as Justices John Marshall Harlan, Peckham, Sutherland, and McReynolds as to Justices Holmes, Brandeis, and Frankfurter and their skepticism of constitutional protection for individual rights.

ENDNOTES

*This article is based on material published in **Rehabilitating *Lochner*: Defending Individual Rights against Progressive Reform** (University of Chicago Press 2011).

[1] *Lochner v. New York*, 198 U.S. 45 (1905).

[2] Senator Barack Obama, Speech re the nomination of Justice Janice Rogers Brown to the D.C. Circuit Court of Appeals, June 8, 2005, available at http://obamaspeeches.com/021-Nomination-of-Justice-Janice-Rogers-Brown-Obama-Speech.htm (last visited June 24, 2011).

[3] *See* Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism," 2 *Int'l J. Const. L.* 1, 15 (2004).

[4] For a recent elaboration of the traditional liberal view, see James MacGregor Burns, **Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court** (2009).

[5] Woodrow Wilson, **Constitutional Government in the United States** 14, 16 (1908).

[6] Herbert David Croly, **Progressive Democracy** 135 (1914).

[7] Morris R. Cohen, "The Bill of Rights Theory," 2 *New Republic* 222, 222 (1915).

[8] Editorial, "An Unseen Reversal," *New Republic*, Jan. 9, 1915, at 7.

[9] Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *Sup. Ct. Rev.* 299, 320.

[10] William G. Ross, **A Muted Fury: Populists, Progressives and Labor Unions Confront the Courts, 1890–1937** 65 (1994).

[11] Urofsky, *supra* note 9, at 330.

[12] *See* David E. Bernstein & Ilya Somin, "Judicial Power and Civil Rights Reconsidered," 114 *Yale L.J.* 591, 623–28 (2006).

[13] Comment, "Unconstitutionality of Segregation Ordinances," 27 *Yale L.J.* 393, 397 (1918).

[14] Howard Lee McBain, **Liberty of Contract** 78 (1927).

[15] 261 U.S. 525 (1923).

[16] Florence Kelley, "Progress of Labor Legislation for Women," in *Proceeedings of the National Conference of Social Work* 114 (1923).

[17] *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

[18] Gerald Gunther, **Learned Hand** 377–78 (1994). *See generally* Note, "Validity of Foreign Language Statutes," 22 *Mich. L. Rev.* 248, 251 (1923) (accusing the majority of reverting to an "individualism now rather generally discredited" and praising Justice Holmes' approach to the Fourteenth Amendment).

[19] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[20] Felix Frankfurter, "Can the Supreme Court Guarantee Toleration?,"*New Republic*, July 17, 1925, at 85, 86.

[21] *Pierce*, 268 U.S. at 535.

[22] *See generally* Edward J. Larson, **Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion** (1997).

[23] Gunther, *supra* note 18, at 582–83.

[24] *Buck v. Bell*, 274 U.S. 200 (1927).

[25] *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (Brandeis, J., dissenting).

[26] Robert E. Cushman, "Constitutional Law in 1926–27," 22 *Am. Pol. Sci. Rev.* 92 (1928).

[27]Fowler V. Harper, "Scientific Method in the Application of Law," 1 *Dakota L. Rev.* 110, 111 (1927).

[28]Justice Brandeis authored a famous dissent in the 5–4 decision in *Olmstead v. United States* contending that the Fourth Amendment prohibits warrantless wiretapping. *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (Brandeis, J, dissenting). However, the most consistent advocates of Fourth Amendment and other constitutional protections against the excesses of Prohibition enforcement were "conservative" Justices Butler, McReynolds, and Sutherland, with Brandeis and Holmes providing consistent votes for the government. Lucas A. Powe, Jr., **The Supreme Court and the American Elite, 1789–2008** 193 (2009).

[29]Mark Tushnet, **The Rights Revolution in the Twentieth Century** (2009).

[30]*Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

[31]Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," 47 *Pol. Res. Q.* 623, 640 (1994).

[32]*Buchanan v. Warley*, 245 U.S. 60 (1917).

[33]For a recent work that dismisses *Buchanan* as a mere property decision with little relevance to the rights of African Americans, see Powe, *supra* note 28, at 189.

[34]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

[35]*See* Carol Rose, "*Shelley v. Kraemer*," in **Property Stories** 169, 174 (Gerald Korngold & Andrew P. Morris, eds. 2004).

[36]Andrew Kull, **The Colorblind Constitution** 139 (1992).

[37]*Buchanan*, 245 U.S. at 78–79.

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

[39]*Buchanan*, 245 U.S. at 74.

[40]*Farrington v. Tokushige*, 273 U.S. 284 (1927).

[41]302 U.S. 319, 325 (1937).

[42]*U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)

[43]*Id.*

[44]*See Powell v. Alabama*, 287 U.S. 45 (1932).

[45]*See* Barry Friedman, **The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution** 221–22 (2009); M.B. Carrott, "The Supreme Court and Minority Rights in the Nineteen-Twenties," 41 *Nw. Ohio Q.* 144 (1969).

[46]William E. Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** 200 (1988).

[47]John Wertheimer, "The 'Switch in Time' Beyond the Nine: Civil Liberties and the Interwar Constitutional Retooling," 53 *Studies in Law, Politics & Soc'y* 3 (2010).

[48]*Id.*

[49]Powe, *supra* note 28, at 227.

[50]The debate between Black and Frankfurter has been analyzed in great detail elsewhere. *See, e.g.,* Jeffrey D. Hockett, **New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson** (1996); Mark Silverstein, **Constitutional Faiths: Felix Frankfurter, Hugo Black and the Process of Judicial Decision-Making** (1984); James F. Simon, **The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America** (1989).

[51]As of this writing, the Supreme Court has not "incorporated" against the states the right to a jury trial in civil cases or the right of a criminal defendant to have a grand-jury indictment.

[52]Conceptually, the liberty-of-contract line of cases involved an exercise of what historian G. Edward White calls "guardian review," policing the limits of state power, not "substantive due process." Although critics complained for decades that the Due Process Clause should be limited to issues of procedure, the concept of substantive due process did not become firmly established in American jurisprudence until the 1950s. *See* G. Edward White, **The Constitution and the New Deal** 245 (2000).

[53]347 U.S. 483 (1954).

[54]*Cf.* V. F. Nourse & Sarah A. Maguire, "The Lost History of Governance and Equal Protection," 58 *Duke L.J.* 955, 995–99 (2009).

[55]372 U.S. 726 (1963).

[56]*Ferguson*, 372 U.S. at 729 (quoting *Tyson & Brother v. Banton*, 273 U.S. 418, 445–45 (1927) (Holmes, J., dissenting)).

[57]381 U.S. 479 (1965).

[58]*Griswold*, 381 U.S. at 481–82 (citation omitted).

[59]*Griswold*, 381 U.S. at 484–85.

[60]*Washington v. Glucksberg*, 521 U.S. 702 (1997).

[61]*Glucksberg*, 521 U.S. at 761 (Souter, J., concurring).

[62]*Glucksberg*, 521 U.S. at 761–62.

[63]539 U.S. 558, 564 (2003).

[64]*See, e.g.*, Steven G. Calabresi, "Introduction," in **Originalism: A Quarter Century of Debate** 13 (Steven G. Calabresi, ed. 2007); A. Raymond Randolph, Barbara K. Olson Memorial Lecture, Federalist Society, Nov. 11, 2005, *available at* http://www.fed-soc.org/publications/detail/5th-annual-barbara-k-olson-memorial-lecture-transcript (last visited June 4, 2011).

[65]*Michael H. v. Gerald D.*, 491 U. S. 110, 122 (1989) (quoting *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)).

"Spreading the Wealth": Justice Tom C. Clark's Wide-ranging Efforts to Open the Doors of the Law Clerk Ranks

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Introduction

Associate Justice Tom C. Clark retired from the Supreme Court at the conclusion of its 1966 term to avoid even the appearance of impropriety when his son, Ramsey, became the U.S. Attorney General. "I believe it would be best for me to retire," Clark wrote one well-wisher, "Litigants have enough problems without having a father-son psychology to face. And while there is no actual conflict the potential is there and the appearance of justice is as important and effective as the real thing."[1] Clark had served on the Court eighteen years, and he began his retirement with a three-month, state-sponsored goodwill trip around the world, which was cut short when he contracted hepatitis in Thailand.

During Clark's absence from the country, a then unknown political science instructor at Hofstra University, Howard Ball, who later became a renowned constitutional scholar, sent a questionnaire to all of Clark's former law clerks. Ball wanted the clerks to rank Clark's attitude towards certain civil liberty claims, a prospect one clerk found "really rather silly," and another described as "extremely result-oriented." Not surprising, none of Clark's clerks cooperated, and one, Charles Phillips, castigated Ball with a "personal observation concerning the nature of your approach." "I must tell you that I think your questionnaire is extremely shallow," Phillips wrote, "and, in the absence of anything to correct this impression, reflective of a premise which appears to be based upon a nearly total ignorance of the judicial process."[2]

Among themselves, Clark's clerks were vociferous in their contempt for Ball's efforts. Larry Temple wrote, "Frankly, I have serious

doubts about the value or validity of what this man is doing," and Donald Turner, considered the "dean" of Clark's former clerks, wrote, "[He] is obviously embarked on a foolish enterprise, and deserves no help from us.... I doubt very much that there is any need for me or anyone else to endeavor to organize a boycott of Mr. Ball."[3]

Scholars like Ball are now familiar with the resistance of former clerks, who often maintain a commitment to secrecy that prevents them from revealing any but the most innocuous descriptions of their service. Certainly, some clerks have been more forthcoming than others, particularly when their contributions remain anonymous.[4] Most former clerks who speak for attribution, however, do so from the benefit of selective memories long after their service has ended. In her biography of Justice Clark, his daughter, Mimi Clark Gronlund, relied on questionnaires sent to his former clerks for descriptions of their relationships with him. This effort yielded answers from at most eight of Clark's forty-seven clerks, whose recollections ranged between eighteen and forty-two years after their clerkships ended.[5]

Similarly, political scientists Todd Peppers and Artemus Ward, in their work on the role of clerks, received the cooperation of about half a dozen of Clark's former clerks, but again this was close to forty years after the clerks' own experiences.[6] This relatively small sampling did furnish fairly accurate depictions of the duties and responsibilities of Clark's clerks when compared with two memos written expressly for that purpose. One memo, written by Martin J. Flynn at the conclusion of his year of clerking, was titled "Background Information for Law Clerks." In it Flynn described in particular detail a clerk's two principle duties: preparing Clark for weekly conferences and assisting him in the preparation of written opinions. The other memo, "Notes to Law Clerks," set out to accomplish similar ends and included "miscellaneous hot poop for law clerks," which emphasized the gravity of checking every citation and quotation of Clark's opinions to avoid error. According to these memos, Clark's clerks were primarily responsible for writing cert memos (summaries of petitions for certiorari) and assembling materials for Clark's review of argued cases (Clark's clerks rarely wrote bench memos). Their role in drafting opinions varied depending on Clark's interest in a case, but generally he composed first drafts, which they then reviewed for stylistic or substantive changes.[7]

Interest in the role of law clerks at the Supreme Court recently led Peppers and Ward to produce a new book on the subject, **Behind the Bench**, which examines the relationships between seventeen different justices and their clerks, including one essay by this author.[8] Focusing on the duties of clerks on the job, though, may overlook how they were hired in the first place: what criteria did individual justices use for selecting their clerks? Justice Clark reputedly had "the most eclectic selection record," but that fails to explain how it occurred. Even Peppers, who included comprehensive lists of all the justices' clerks, admitted, "I was not able to uncover much information regarding how Justice Clark hired his clerks."[9]

The procedures Clark followed and the criteria he employed selecting his clerks evolved and changed substantially throughout his eighteen years of active Court service and continued into his ten years in retired status. Clark's law clerk application files shed considerable light on his hiring practices, and his general correspondence files provide documentary evidence to support Peppers' observation that "some court observers have concluded that the sons of Clark's friends and political allies filled the ranks of his law clerks."[10] These "friends and allies," however, were not the aggregate of Clark's selections; he was willing to give opportunities to literally anyone.

Relying on historical records in the Tom Clark Papers, this article presents the continually changing nature of Clark's clerk selections, highlighting his shifting criteria, his

Tom C. Clark was sworn in as Attorney General on June 30, 1945 by Judge Thurman Arnold. In attendance were Clark's son Ramsey, daughter Mimi, wife Mary, and mother Jennie Falls Clark.

obsession with finding clerks from law schools never represented at the Court, his devotion to personal friends who sometimes made for questionable choices, and what could arguably be the most remarkable scheme for selection—his law fraternity contest. These features of Clark's clerk selections are presented in four chronological, yet occasionally overlapping, time periods to demonstrate the continuity and change in his methods; since Clark's retirement years compose the final period, those eleven clerks are considered equally with the thirty-six he hired as an active Justice (see Table 1).

1949 to 1954 Terms

During Clark's early Court service, his law clerk selections differed little from the ordinary customs of other Justices. He typically sought top students from the best law schools based on the recommendations of faculty, and he acknowledged his preference for Texans. These criteria, had he followed them consistently throughout his Court service, were indistinguishable from his colleagues' practices.

When Justice Frank Murphy died suddenly on July 19, 1949,[11] one of his clerks, William Schrenk, had worked only one day before he lost the job. Murphy's other clerk, Lawrence Tolan, had already served one term and was hired to serve a second.[12] The same day President Harry Truman announced Clark's nomination to replace Murphy, Friday, July 29, 1949,[13] both Schrenk and Tolan wrote to Clark to request they keep their appointments. Tolan's previous experience must have appealed more to Clark because he hired Tolan rather than Schrenk; however, when Justice Wiley Rutledge died unexpectedly on

TABLE 1: **Tom Clark's Law Clerks and their Law Schools**[a]

Term	Name	School	
1949	T. Lawrence Tolan	University of Michigan	
1949	Percy Don Williams	Harvard University	
1950	Donald F. Turner	Yale University	
1950	Percy Don Williams	Harvard	2nd year with Clark
1951	Stuart W. Thayer	Yale (2nd)	
1951	C. Richard Walker	University of Chicago	
1952	Vester T. Hughes, Jr.	Harvard (2nd)	[Only July 2 to 23]
1952	Bernard Weisberg	University of Chicago (2nd)	
1952	Frederick M. Rowe	Yale (3rd)	
1953	Ellis H. McKay	University of Pennsylvania	
1953	Ernest Rubenstein	Yale (4th)	
1954	William Kenneth Jones	Columbia University	
1954	John Kaplan	Harvard (3rd)	
1955	John E. Nolan, Jr.	Georgetown University	
1955	Robert W. Hamilton	University of Chicago (3rd)	
1956	Harry L. Hobson	New York University	First time school
1956	John J. Crown	Northwestern University	
1957	William D. Powell, Jr.	Southern Methodist University	First time school
1957	Robert P. Gorman	Notre Dame University	First time school
1958	Max O. Truitt, Jr.	Yale (5th)	
1958	Charles H. Phillips	University Southern California	First time school
1959	Thomas Cecil Wray, Jr.	Yale (6th)	
1959	Larry E. Temple	University of Texas	
1960	Malachy T. Mahon	Fordham University	First time school
1960	Carl L. Estes, II	University of Texas (2nd)	
1961	James E. Knox, Jr.	Drake University	First time school
1961	Burke W. Mathes, Jr.	Harvard (4th)	
1962	Raymond L. Brown	University of Mississippi	First time school
1962	Martin J. Flynn	University of Indiana[b]	
1963	James L. McHugh, Jr.	Villanova University	First time school
1963	James H. Pipkin, Jr.	Harvard (5th)	
1964	Michael W. Maupin	University of Virginia	
1964	Shannon H. Ratliff	University of Texas (3rd)	
1965	Charles D. Reed	South Texas College (Houston)	First time school
1965	Lee A. Freeman, Jr.	Harvard (6th)	
1966	Marshall Groce	St. Mary's University (San Antonio)	First time school
1966	Stuart P. Ross	George Washington (D.C.)	
1967	J. Larry Nichols	University of Michigan (2nd)	
1969	Jerry W. Snider	University of Houston	First time school
1970	Theodore L. Garrett	Columbia (2nd)	

(*continued*)

TABLE 1 (*Continued*)

Term	Name	School	
1971	Taylor Ashworth	University of Texas (4th)	
1972	Thomas W. Reavley	Harvard (7th)	
1973	Stafford Hutchinson	University of Texas (5th)	
1974	William M. Hannay	Georgetown (2nd)	
1975	Thomas D. Corrigan	Case Western Reserve	
1975	Christy Carpenter[c]	American University	
1976	Thomas D. Hughes, IV	Loyola, New Orleans	First time school
1976	John Thomas Marten	Washburn University	First time school

[a]These names, dates, and law schools were all confirmed using the law clerk applications of the Tom C. Clark Papers.
[b]Gronlund, 271, and Peppers, **Courtiers**, 29 (see endnotes 5 and 6), inadvertently duplicated an error in the Supreme Court's own "Law Clerk Database" (L.C.D.), which indicated that Martin Flynn attended Loyola law school in Los Angeles when, in fact, he went to Indiana University. Whereas Gronlund listed Flynn as attending Loyola, Peppers named Loyola as one of the schools Clark used.
[c]The L.C.D., which the Court's Public Information Office maintains should not be considered authoritative, named someone who did not clerk for Clark but failed to name Christy Carpenter, who served with Clark for six months. Carpenter confirmed her appointment as Clark's clerk in a telephone interview with the author, September 22, 2009. Named the executive vice president and chief operating officer of the Paley Center for Media in 2006, Carpenter still notes her service with Clark on her online vitae at https://www.mtr.org/assets/about/presskit/pdf/Paley-BIO-Christy-Carpenter.pdf. Her name also fails to appear in Peppers, **Courtiers**, 223, Gronlund, 272, and on Ward's & Weiden's table of female law clerks, 90, Table 2.11 (see endnotes 5 and 6).

September 10, 1949, less than two months after Murphy's death, Clark tried in vain to convince Rutledge's successor, Judge Sherman Minton of the Seventh Circuit Court of Appeals, to hire Schrenk.[14]

Clark's second hire went to Percy Williams, a Harvard law graduate originally from Texas. After he left Harvard, Williams taught law at the University of Texas (UT) for two years, and he received recommendations to go to work for Clark from Leon Green, another UT faculty member, and from Clark's brother, Robert, a Dallas lawyer. Green, who previously taught law at Yale and served as dean at both North Carolina and Northwestern, most likely had some pull with Clark, since Clark was one of his students at UT during Green's first teaching stint there. John C. Calhoun, the state chairman of the Democratic Executive Committee of Texas, solicited Clark's brother on Williams' behalf, and Williams himself made a point of visiting Robert Clark about the appointment.[15]

Initially, Clark expected his clerks to stay a second year, but this plan failed to last beyond his second term. Tolan brought one year's experience with him, and Williams stayed a second term, but Clark's third hire, Don Turner, failed to follow suit. Still, Clark expected his 1951 clerks to stay a second term, writing University of Pennsylvania law professor Louis Schwartz, "As you possibly know, both of my clerks are serving their first term and they understood when they came here that they would possibly stay two years." Clark demurred when the dean at the University of Virginia law school, F.D.G. Ribble, wrote to recommend candidates, stating that he hoped to keep both his clerks a second term.[16] This was not an unreasonable expectation at the time, since several Justices hired clerks for consecutive terms. For examples, the year Clark arrived at the Court, two of Chief Justice Vinson's three clerks were returning for their second term, and Vinson rehired one of his clerks in each of the next two terms; both Justices Burton and

Jackson had experience with two-term clerks prior to Clark's arrival—Jackson had different clerks return every term from 1941 to 1948. Clark, however, soon abandoned his plan for two-term clerks, and instead of *limiting* the hiring of clerks he began looking for new ways to *expand* those opportunities.

During this early period, Clark followed what might be considered the standard routine for the Court; his correspondence indicates that generally he made clerk selections for the upcoming term sometime after the first of the year. This was preceded by interviews conducted in December or early January: in 1950 he interviewed a Columbia law student; in 1951 he agreed to interview a Pennsylvania law student; and in 1953 he arranged to interview another Columbia law student (who he hired). This practice continued a few more years—in 1955 he interviewed two female applicants, Barbara Lindeman of Yale and Nancy Goldring of Harvard[17]—but by 1956 Clark began to back away from this procedure, informing potential recommenders that he no longer considered personal interviews mandatory for consideration.[18]

Most of Clark's colleagues favored certain regions or schools when choosing their clerks. For examples, Frankfurter chose Harvard graduates almost exclusively (as did Justice Brennan up until Clark's retirement), and Douglas preferred clerks from the West Coast; Chief Justice Vinson favored Northwestern University (choosing at least one clerk from there every term he served); Justice Burton hired a University of Pennsylvania graduate every term he served with Clark; and Justice Minton favored University of Indiana students. Even Clark's predecessor, Frank Murphy, chose his clerks almost exclusively from the University of Michigan.[19]

Therefore, it was entirely reasonable to expect Clark to favor graduates from his home state of Texas. The dean at Harvard law, Erwin Griswold, assumed as much, writing to Clark, "When Percy Williams wrote me last year, he said, as I recall it, that you preferred a law clerk from Texas, or a graduate of a Texas university." Clark insisted, though, that having a Texas background was not a prerequisite to clerk for him, even if the impression persisted that it was.[20] Clark was well aware of the number of clerks he hired with Texas backgrounds, and he sought to ameliorate this by going to Texas less often. When one of Clark's former clerks, Robert Hamilton, then a UT law professor, wrote to Clark to recommend a UT student, Clark replied, "I doubt that Texas will be in the picture next year as much as I regret it." By his own count, Clark had hired eight Texans already, or 25% of the total, and he was already committed to the idea of choosing schools never represented at the Court: "Too many Texans and so many good law schools," he wrote, "So I feel I must pass it around. I've never had one from Ga. [Georgia] so I plan on taking one from there if a likely one applies."[21] Taking into account all forty-seven of his clerks, Clark hired five UT graduates, and four of his clerks came from other Texas schools; adding Harvard graduates originally from Texas meant about 30% of his clerks had Texas origins. This was still less than might be expected, given that Clark's choices were characterized as being "driven not only by regional considerations . . . but also by political and social bonds."[22]

Initially, Clark's selection criteria was unsurprising, even ordinary. He boasted to law professor Louis Schwartz, "I have 2 Editors in Chief for next year—both from top schools—one is #1 in his class also, while other was #1 at time of graduation last year and has been doing some special research work since."[23] Law clerks were expected to come from the most prestigious schools and be top of their class. The schools that dominated the law clerk cadre at the time were Harvard and Yale,[24] and Clark went to those schools for nearly 30% of his hires. Making the law review also mattered to Clark, who wrote one applicant: "The two boys that I have selected are both Editors in Chief of their respective Law Reviews and their average grades as well are tops in their class. My experience here indicates that clerks who have had intimate connection with law reviews

adopt themselves more easily to our specialized work."[25] Generally, Clark took note of a candidate's school and standing; at the top of one Yale candidate's application Clark wrote, "Yale's Top Man."[26] In that same year Clark wrote at the top of one female candidate's application, "short, dark."

Did this mean that Clark regarded female applicants dismissively? The evidence suggests otherwise. From the beginning of his Court service Clark exhibited a progressive attitude towards female applicants. In his first year as a Justice, Clark received a letter from a fourteen-year-old girl who wanted to know the Attorney General's opinion of female lawyers. Since he was now a Justice and no longer Attorney General, Clark turned the matter over to the Executive Assistant Attorney General, Lee Cadison, for an appropriate response. Cadison's reply to the girl included a separate memo intended for Clark that read, in part, "I would suggest that a postscript be added to this letter advising young Carol to study cooking and sewing and to look for a good husband. She already asks enough questions to qualify as a district attorney." Someone in Clark's chambers highlighted Cadison's remark, and the final reply contained no trace of chauvinism. Clark himself made minor alterations to Cadison's draft, which included changing "someday you will be a fine lawyer" to read, "someday you will be a credit to the law profession."[27]

In Clark's second term, he received an application from Sarah Livingston Davis, a Columbia law graduate who had experience clerking at the Third Circuit Court of Appeals and was reputedly related to the nation's first Chief Justice, John Jay. Although Clark did not hire Davis, his clerk at the time, Percy Williams, offered Davis encouragement: "As you perhaps know, [Clark] gave considerable impetus to the employment of women attorneys during his administration of the Department of Justice."[28] This was 1950, and none of the Justices, including Hugo L. Black, to whom Davis also applied, were yet ready to hire the Court's second female clerk.[29]

William Douglas hired the first female clerk, Lucille Loman, in 1944, and since that time the justices continued receiving applications from women. The next female hire did not occur, though, until 1966 when Black hired Margaret Corcoran, a Harvard law graduate and daughter of the notorious New Deal lobbyist Tommy "the Cork" Corcoran, who was himself a law clerk to Justice Oliver Wendell Holmes, Jr. According to Peppers, Black came to regret his decision to hire Corcoran because she refused to do the work assigned to her, preferring instead to arrive late and sleep through the day after a night of socializing, and this left her co-clerk, Stephen Susman, to pick up the slack.[30] Ironically, Corcoran and Susman both applied to clerk with Clark, but he turned each of them down. Susman was a UT law student, and Clark, at the time, felt he had already gone to Texas enough. Corcoran, on the other hand, was a different matter entirely. It was not her gender that dissuaded Clark—after all, he had interviewed women to be his clerk before then—but, rather, her academic record. As a further irony, Clark may have been responsible for convincing Corcoran that she should clerk at the Court in the first place, which ultimately led to her landing with Black.

Initially, Corcoran sought an appointment for the 1965 term—the year she graduated Harvard. It must have been difficult for Clark to reject her application, because he waited until April to inform her of his decision. In his letter to her, Clark regretted involving Corcoran in the application process and indicated that he had first suggested it to her father. He could not hire her because her scholastic average was too low—lower than all fifty applicants he received that year. "I am sure you will agree," he explained, "it would not be fair to them for me to select a 'C' student as my second clerk."[31] Corcoran waited one year before Black offered her the position she coveted, coincidentally during Clark's last term

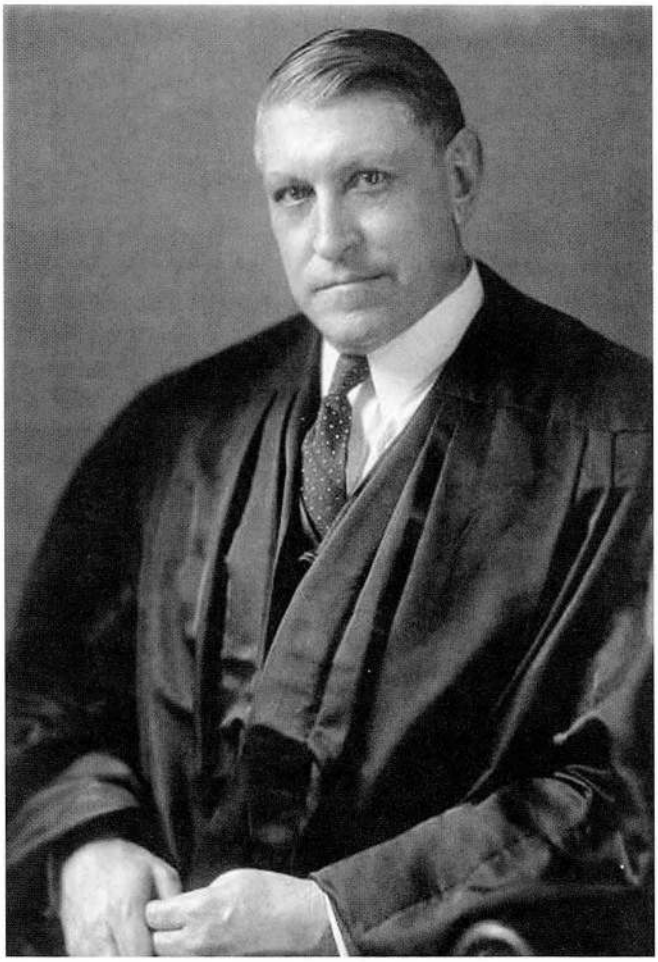
When Margaret Corcoran applied for a clerkship after graduating from Harvard Law School in 1965, Clark, who was considering hiring a female clerk, turned her down because her grade point average was low. Corcoran nevertheless became the second female to clerk at the Supreme Court when her father, lobbyist Tommy Corcoran, persuaded Hugo L. Black to hire her.

In her capacity as Clark's secretary, Alice O'Donnell was responsible for reading inquiries from potential clerks, setting up interviews in some cases, and generally administering the hiring of clerks.

as an active Justice. Had he been willing to lower his standards in this instance (something he was willing to do for other applicants), Clark could have hired the second female law clerk.

One well-established procedure for selecting law clerks at the time was relying on the recommendations of law professors, or, as some Justices preferred, the recommendations of former clerks.[32] Initially, Clark adopted both of these models, indicating to law professors that he sought their counsel, and then, after a few years, relying on the judgment of his former clerks. Clark communicated with law professors at Chicago, Yale, Columbia, and the University of Pennsylvania, each of which contributed a clerk to him by 1954. More importantly, Clark acknowledged that their recommendations were key factors in his decisions. In a letter to Wesley Sturges at Yale, Clark remarked that it was Sturges's "high appraisal" of Stuart Thayer that helped land him the job. A decade later, Clark could still remember the "impressive letter of recommendation from dean Sturges." Another Yale graduate, Cecil Wray, benefited from the recommendation of then Dean Eugene Rostow. Similarly, Clark relied on the opinion of Edward Levi at Chicago to choose Richard Walker from among several Chicago candidates.[33]

In one intriguing proposal to former Justice Owen J. Roberts, then dean of law at the University of Pennsylvania, Clark agreed to appoint clerks from that school but then asked, "Do you have any who are presently working



Clark asked Owen J. Roberts, then dean of University of Pennsylvania's law school, to identify students who had gone on to clerk for appellate judges. The concept of clerking for a lower-court judge before being hired as a Supreme Court clerk was relatively novel at the time.

with any Courts of Appeal? My own feeling is that such experience is helpful here."[34] At the time there was little expectation that clerks gain a year's experience serving on the Courts of Appeals, so Clark's proposal indicated a new direction. Justice Burton, who served with Clark nine years, always selected a clerk with prior experience on the Courts of Appeals, but this was the exception. According to Peppers, this "represented a modification to the existing clerkship model, in which law clerks went directly from law school to the Supreme Court."[35] One of Clark's own clerks from the 1960s told Ward & Weiden that most clerks then still arrived "directly from law school" instead of serving one year on the Courts of Appeals. Clark's idea, though, gained greater acceptance after his retirement and has now "become so commonplace."[36]

In 1963, Second Circuit Judge Irving Kaufman wrote to Clark to propose "some kind of arrangement," whereby Kaufman could send his own clerks to Clark on a more regular basis. Considering it a "tremendous advantage to both of us," Kaufman noticed how Justices Harlan, Brennan, and Goldberg more often chose their clerks from the Second Circuit after they had "matured and had a year's intellectual seasoning." By this time, though, Clark had changed his mind on the matter, and he replied, "Certainly it is helpful to get boys who have served on the C.A. [Courts of

Appeals] but there are 3 to 4 here every term from a C.A. I believe that we have enough."[37]

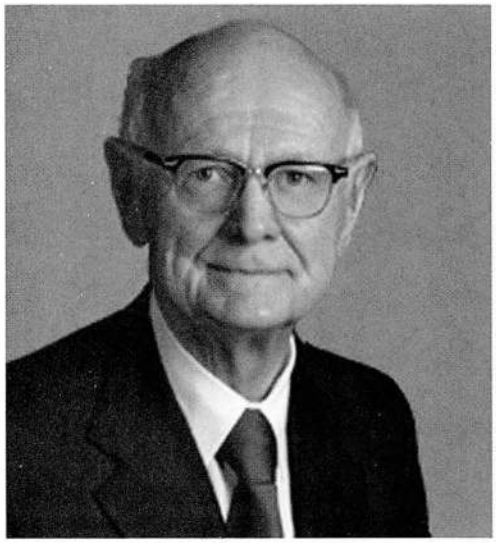
Like many of his colleagues, Clark also received advice and recommendations from former clerks. One of his first clerks, Percy Williams, began advising Clark on clerk hires even before their two years together ended. Williams composed a memo for Clark on one prospect, a law professor at the University of Mississippi, advising Clark not to interview him: "Moreover, some of his letters were downright stupid, tho I hate to say that about a colleague of the teaching profession. We don't think he's too good a fellow, tho we don't know about his professional ability." One decade later, Williams tried to dissuade Clark from hiring Burke Mathes after looking over Mathes's academic credentials. Composed on Harvard stationary, Williams assessed Mathes's record as "good but obviously not distinguished," and concluded, "In short, he is a good student, but you could do much better."[38] Despite Williams's lackluster appraisal, Clark still hired Mathes, most likely because Mathes was the nephew of U.S. District Court Judge William Mathes, with whom Clark maintained a robust correspondence until the elder Mathes's death in 1967.

In time, Clark received recommendations from other former clerks, which generally led to clerk hires. Around 1964, Clark received a phone call from former clerk Larry Temple, who found the qualifications of UT student Shannon Ratliff acceptable. Ratliff was editor-in-chief of the law review and near the top of his class, and, Temple reported, the law school dean, W. Page Keeton, "was unusually enthusiastic."[39] Following Clark's retirement, former clerk and UT law professor Robert Hamilton wrote Clark to recommend Taylor Ashworth, who Hamilton viewed as the best all-around student in the third year. At first, Dean Keeton backed another student, but he later changed his view and endorsed Ashworth. When Ashworth eventually learned that Clark chose him despite never having met one another, he first apologized to Clark for having limited typing skills.[40]

Another clerk recommendation leading to a hire resulted in the only instance where Clark lost a clerk who was drafted. Percy Williams was reviewing clerk applications when he came across one from a fellow Texan and Harvard law student, Vester Hughes. In a handwritten note on Hughes's application, Williams wrote to Clark's secretary, "Alice—This is a good man—do what you can to have the Justice look him over." Clark's brother, Robert, also endorsed Hughes's appointment, writing, "Tom—this boy looks good. You might keep him in mind. Houston Harte is a friend of the family."[41] Harte was the owner of the *San Angelo Standard Times* newspaper who regularly sent fresh salmon to Clark for the Justices' lunches. These recommendations, arriving at the Court almost a year before Hughes did, persuaded Clark to make Hughes an offer, but soon after Clark had to contend with Hughes's request for a military deferment. After working in Clark's chambers for three weeks, Hughes was drafted. Desperate to find a replacement, Clark contacted law school deans, and Edward Levi at Chicago wired back, "Believe Weisberg available."[42]

Grappling with requests for military deferments became a persistent concern for Clark throughout his service on the Court. Doubtless other Justices had similar dilemmas during the 1950s and 1960s when military service for college age men was still so pervasive. Justice Charles Whittaker, for example, who served with Clark for five years, twice had to contact military authorities to prevent one of his clerks from being drafted.[43] Clark, on the other hand, steadfastly refused to intercede for his clerks, which explained Hughes's departure after only three weeks, but his clerks continued to seek his assistance nonetheless. Before hiring Robert Hamilton, Clark explained his policy regarding deferments:

> There would be no objection of course to a statement by you that the



Clark made a point of not asking for military deferments for his clerks. Vester Hughes (left), a native Texan who had excelled at Harvard Law School, came highly recommended but was drafted to serve in the Korean War three weeks after he was hired in 1952. Larry Nichols (right), who clerked for Clark in 1967, managed to secure his own deferment for a year. Hughes became a distinguished tax lawyer; Nichols became CEO of a petroleum company.

> appointment offers a distinct opportunity to a graduate just out of Law School, which opportunity would be a great advantage to you later in your profession and which could not be had after your release from the service. We could not suggest, however, that in your statements to your Board you leave any implication that the appointment warrants a deferment per se; or that the nature of the work at the Court would, because of its importance, call for a deferment once you have entered on duty.[44]

Beginning in 1963, the Selective Service System became more liberal in granting deferments to law clerks, but two years later it reversed that policy due to manpower needs, and Clark became less certain that his clerks could fulfill their appointments. He began notifying law school deans of a new "proviso" regarding their failed recommendations; namely, they might still receive consideration if one of his chosen clerks got drafted.[45] When Lee Freeman requested that his February letter of employment be used as evidence for a deferment, Clark made clear that his policy prohibited this. Furthermore, since Freeman's college deferment expired in October, just in time for the start of the Court term, Clark considered selecting an alternate before all the suitable candidates were gone. Freeman kept the job only because his marriage in June meant a complete deferment.[46]

Several of Clark's clerks had military experience before joining his staff, thereby alleviating any concern they might be drafted, including James Harrington, who served six months in the Marine Corps Reserves when he failed to receive a deferment after law school. Harrington, however, never kept his appointment to clerk because it was contingent upon Clark remaining on the Court, and, when Clark announced his retirement in March, 1967, Harrington lost the job.[47] The first clerk to follow Clark into retirement, Larry Nichols, was granted a one-year leave from the Navy in order to clerk, but Clark was still adamant in his determination that his office not influence: "As I have often said, I have never requested a draft board or the armed

services to defer anyone. I adopted this policy when I became Assistant Attorney General [in March 1943] and have consistently followed it ever since. I make this clear in order that you understand that this letter is not to be filed with your draft board or any branch of the armed services as support for deferment."[48]

During Clark's early years on the Court, the procedures he followed and the criteria he used differed little from those of other Justices. Contending with military deferments and relying on the recommendations of law faculty were a routine part of law clerk applications. Clark had yet to distinguish himself as the Justice who would radically alter the parameters of law clerk selections. That did not occur until the next phase of his Court service, when he struck upon an idea that, although not new, became his legacy for opening wide the doors of the Court.

1955 to 1960 Terms

During this interim period, Clark made significant changes to his law clerk selection practices, beginning with moving up his decision-making time frame. By 1959, he noticed that other justices had moved their selection dates earlier than the first of the year, which gave Clark, in his words, "slimmer pickings."[49] Clark was also concerned about law students making commitments to large firms before they came to the Court, which meant they would face difficulty if a case arose involving that firm. One of his former clerks, Donald Turner, then on the faculty at Harvard, advised him to rectify both issues by moving his clerk selections forward to at least December 15, which Clark implemented in earnest.[50] The following year, some potential candidates were notified that selections had already been made as early as August, and the rest were informed by October.

Another change in Clark's selection procedures—really, in his attitude toward it—was his increasing willingness to allow personal or professional relationships to influence his choices. No longer was class standing the principal measure of merit; if Clark had a personal or professional bond, that bond remained strong and steered him in his decisions. These choices still had the repute to commend them to the position, but now another compelling factor guided those choices. One of the first instances of this occurred in 1955 when Clark hired Robert Hamilton, the son of Walton Hamilton, who worked with Clark in the Department of Justice.[51] Five years later, Clark made a commitment to hire Richard S. Arnold, a Harvard law graduate and the grandson of Lucile Sanderson, who was then married to former Texas Senator Thomas Connally.[52] Initially, Arnold sought to clerk for Frankfurter, what his grandmother described as Arnold's "one ambition" following law school. When Arnold learned that two other Harvard students were chosen instead, he became downcast, leading his wife to appeal to his grandmother, who, in turn, wrote directly to Frankfurter hoping to find "a second place." All of this ended up on Clark's desk—presumably because of the Texas connection—and Clark obliged, writing to one recommender, "I told a Texas lad at Harvard (Mrs. Connally's grandson) that I would select him if he wished to come here."[53] Up to this point, Clark had chosen only three Harvard graduates, all of them originally from Texas.

Arnold declined Clark's offer and instead chose to clerk for Justice Brennan,[54] giving Clark the opportunity to offer the job to the son of a longtime friend, Judge Joe Estes of the U.S. District Court in Texas. Shortly after Arnold turned him down, Clark wrote to Estes, "My clerk—Larry Temple [a UT graduate and native Texan]—tells me that Carl graduates next June [from UT]. Do you think he would be interested in a clerkship?" Estes replied positively one week later, and the next day Clark wrote back, "I am most happy to hear that Carl is interested. It will be wonderful to have him here."[55] Without any letters of application or recommendation, Clark raised the question

and then made the offer. This relatively rapid solicitation strongly suggests that Clark's criteria shifted away from the usual qualifications (class standing, law review) towards personal relationships, and, although there is no evidence that either Judge Estes or his son, Carl, asked for the appointment, it appeared as though Clark was comfortable with the arrangement.

Perhaps the most significant change in Clark's selection criteria during this period was his dedication to choosing clerks from schools that never had representation at the Court. He began to consider this as early as 1953, explaining to Chicago's law dean, Edward Levi, "Strong arguments have been made that we should at least occasionally permit some of the other schools to send students in, however, and of course their requests on this basis have much merit. I feel I should afford them this opportunity from time to time."[56] Other Justices at the Court took notice of the situation and were already hiring from first-time schools. For examples, the year Clark joined the Court it saw its first Stanford student (Douglas), and Albany Law School of Union University had what could be its only clerk (Jackson); the following year, the Court received its first clerks from Cornell (Jackson), State University of New York, Buffalo (Jackson), and the University of Nebraska (Burton). Over the next three years, Douglas hired first-time clerks from the University of Arizona and the University of California, Los Angeles; Black did the same for the University of Alabama and Washington and Lee University; and Reed brought to the Court what may be the University of Louisville's only clerk. Clearly the Court had started to move away, however incrementally, from the dominance of schools like Harvard, Yale, Columbia, Michigan, Chicago, and Pennsylvania, all of which had the largest number of placements and, not coincidentally, were the only schools Clark used until 1954.[57]

During the 1955 Term, the Court saw no new schools added to its roster of clerks (Harvard took seven of eighteen positions), but Clark felt as though he was moving in that direction by hiring a Georgetown student, something he had never done before. In letters to Harvard, Yale, and the University of Pennsylvania, Clark used this Georgetown hire to justify his neglect of those schools.[58] The Georgetown student, John Nolan, had applied to four different Justices (Clark, Warren, Reed, and Burton) but was prepared to forego any appointment to take a job at the prestigious Washington law firm Covington & Burling. One of the firm's partners, Donald Hiss, convinced him to pursue a clerkship instead.[59] Six years later, another Clark hire, Alfred P. Murrah, Jr., declined his appointment because the Oklahoma City law firm that hired him refused to grant him a year's leave of absence to join Clark.[60] Had he chosen instead to clerk, Murrah's alma mater, the University of Oklahoma, would have had its first clerk at the Court, which was undoubtedly one of Clark's principal reasons for offering Murrah the position.

Once Murrah declined the clerkship, Clark quickly fulfilled a pledge he made to another first-time school, Drake University in Iowa. Since Clark generally reserved only one of his two clerk positions for first-time schools, when the Oklahoma spot opened, Clark wrote the dean at Drake, Martin Tollefson, "It appears I shall be able to take one clerk from Drake for this next Term of the Court after all, so if you would make the selection there . . . I am sorry I could not write you more encouragingly last summer but intervening circumstances have changed the picture."[61] At Clark's direction Tollefson chose James Knox, one of two candidates Drake had urged on Clark, and Clark hired him sight unseen.

Clark's effort to open the doors of the Court to what one former clerk called "underprivileged law schools"[62] is best illustrated in Table 2. As indicated, Clark hired from more schools than his colleagues, and he was more willing to go to first-time schools.[63] In 1956,

Justice Clark decided to look beyond the usual feeder law schools and seek clerks from schools such as Drake Law School in Iowa and Notre Dame Law School (pictured) in Indiana.

TABLE 2: **Percentage of First-Time Schools by Justice**

Name	# Years as Justice[a]	# of Schools	First Time	# Clerks	% First Time[b]
Clark	28	27	13	47	28%
Warren	20	17	0	51	0
Brennan	21[c]	15	2	51	4%
Black	35	12	3	51	6%
Reed	38	12	3	48	6%
Douglas	37	8	3	52	6%
Harlan	18	8	0	38	0
Stewart	19[c]	5	1	41	2%
Frankfurter	25	4	0	42	0

[a] Analysis based on years as active Justice and in retirement
[b] Percentage based on individual hires, counting clerks serving two years as one hire
[c] Analysis includes only years up to the 1976 Term, Clark's last year using clerks

Clark became the first Justice to hire from New York University, and he followed that up the next Term by hiring both of his clerks from first-time law schools: Notre Dame and Southern Methodist. In all but two of the next nine Terms (1959 and 1964), Clark hired one of his clerks from a first-time school. This was phenomenal considering that, while Clark adhered to this policy (1956–1966), all the other Justices combined brought to the Court six new schools. To place this in context, during Clark's total years of service (including retirement), fifty-eight different schools sent clerks to the Court, and Clark hired from nearly half of them (47%). Before Clark joined the Court, only twenty-two schools were *ever* used for clerks, and five of those would not send another to the Court during his service. After Clark adopted this new policy and until his death, the number of schools *ever* represented at the Court doubled from thirty-two to sixty-three. Much of this growth can be attributed to Clark's own selections, but it was as likely due to his influence, since other justices added

TABLE 3: **Law School Representation at the Court 1920 to 1976**

Schools that had no representation at the Court during Clark's years of service (listed chronologically by dates of representation)			
1.	Columbian University[a]		
2.	Detroit College of Law	1920–23	
3.	National Law	1930–44	
4.	University of Wisconsin–Madison	1943	
5.	Temple University	1947–48	
Schools that continued to have representation at the Court during Clark's years of service (listed chronologically from earliest, 1920 to 1976)			
6.	Georgetown University[a]		
7.	Harvard University	1920	
8.	Catholic University	1923	
9.	Yale University	1924	
10.	Columbia University	1925	
11.	George Washington University	1929	
12.	University of Pennsylvania	1934	
13.	University of Texas	1938	
14.	University of Washington	1939	
15.	University of California, Berkeley	1941	
16.	University of Indiana	1941	
17.	University of Michigan	1941	
18.	University of Chicago	1944	
19.	Northwestern University	1946	
20.	Case Western Reserve[b]	1947	
21.	University of Iowa	1948	
22.	University of Virginia	1948	
First-time schools during Clark's years of service (listed by year and Justice)			
23.	Stanford University	1949	Douglas
24.	Albany Law School of Union University	1949	Jackson
25.	Cornell University	1950	Jackson
26.	State University of New York–Buffalo	1950	Jackson
27.	University of Nebraska	1950	Burton
28.	University of Arizona	1952	Douglas
29.	University of Alabama	1953	Black
30.	University of California, Los Angeles	1954	Douglas
31.	Washington and Lee University	1954	Black
32.	University of Louisville	1954	Reed
33.	**New York University**	**1956**	**Clark**
34.	**Notre Dame University**	**1957**	**Clark**
35.	**Southern Methodist University**	**1957**	**Clark**
36.	Washington University, St. Louis	1957	Whittaker
37.	**University of Southern California**	**1958**	**Clark**
38.	Ohio State University	1958	Stewart

(*continued*)

TABLE 3 (*Continued*)

39.	University of Kansas	1958	Whittaker
40.	University of Minnesota	1958	Whittaker
41.	University of Colorado	1960	Black
42.	**Fordham University**	**1960**	**Clark**
43.	**Drake University**	**1961**	**Clark**
44.	**University of Mississippi**	**1962**	**Clark**
45.	**Villanova University**	**1963**	**Clark**
46.	University of North Carolina	1964	Reed
47.	**South Texas College of Law**	**1965**	**Clark**
48.	**Saint Mary's University, San Antonio**	**1966**	**Clark**
First-time schools while Clark served in retirement			
49.	**University of Houston**	**1969**	**Clark**
50.	Duke University	1969	Burger
51.	University of Utah	1969	Burger
52.	University of Detroit	1970	Brennan
53.	American University	1970	Blackmun
54.	Dickinson University	1973	Blackmun
55.	Arizona State University	1973	Rehnquist
56.	University of Kentucky	1973	Rehnquist
57.	Vanderbilt University	1974	Blackmun
58.	Boston College	1974	Brennan
59.	Boston University	1974	White
60.	Northeastern University	1975	Burger
61.	University of Illinois	1976	Stevens
62.	**Loyola, New Orleans**	**1976**	**Clark**
63.	**Washburn University**	**1976**	**Clark**

[a]Pre-1920 schools according to Peppers, **Courtiers**, 25 (see endnote 6).
[b]Peppers considered Case Western Reserve a one-time contributor, overlooking Clark's use of it in retirement, even though he acknowledged Clark's use of Washburn University in retirement, **Courtiers**, 25 and 29 (see endnote 6).

twelve new schools to the Court's roster after Clark retired (see Table 3).

Clark's preference, what he called "shopping around," became widely known, and he soon disapproved of the practices of other Justices, particularly those who relied exclusively on one school. In a letter to Eugene Rostow explaining his large number of applicants, Clark wrote, "This is not because they prefer to clerk for me, but because the policy of some of the Justices is such that the applications are handled largely by others and are confined to certain schools or localities. It so happens that this year I have several schools that are urging me to try one of their boys. They all say that they have never had any clerk with the Court. I have often stated that this is very appealing to me and, other things being equal, I would select a boy from a school that has not had that privilege."[64] Clark expressed similar sentiments to Judge Irving Kaufman, writing, "Since so many of the Justices are picking clerks from the East—particularly from Harvard and Yale–I prefer to select my own from another section usually."[65] Clark's commitment never to choose two clerks from the same school in the same Term contributed to his new policy, and, in 1963, his secretary, Alice O'Donnell,

reminded a San Antonio lawyer, "Mr. Justice Clark has adopted a policy of taking at least one of his clerks from a law school which has not to date had an opportunity to place a law clerk at this Court."[66]

This extraordinary new policy brought unintended consequences, such as an explosion in the number of applications Clark received. His application files for 1964 to 1966 are huge, numbering over 100 for the 1966 term, or more than twice what some other Justices received. By August, 1964, Clark's secretary wanted to know if she should offer any encouragement to those applicants not yet presented to Clark: "They are starting to come in already and it's a job to keep up with them and later notify them." Clark replied, "No—just write any more that come in that we are committed."[67] This new policy also meant that Clark had to depend upon first-time schools to choose their best students—the final decision was no longer his to make. When the dean of law at the University of Mississippi, Robert Farley, began petitioning Clark to take one of their students, Clark indicated that he would change his other commitments only if Mississippi had a good candidate, one they could recommend "wholeheartedly and without reservation." Clark then warned: "I place the responsibility on the Deans who make the recommendation, and I shall leave the decision entirely to you, with the admonition that of course if the young man proves unsatisfactory it would not speak well for 'Ole Miss' nor for the future possibility of placing clerks here."[68]

The Mississippi faculty chose Raymond Brown, and Brown brought to the Supreme Court one of the most unusual backgrounds for a law clerk: he once played professional football for the Baltimore Colts. For three seasons (1958, 1959, and 1960), Brown was the Colt's backup quarterback, while the illustrious starter, Johnny Unitas, took the Colts to two national championships. When a knee injury ended his NFL career, Brown went to law school.[69] Two other Clark hires garnered unique accolades *before* their clerkships ended. Michael Maupin, who accepted Clark's offer rather than going to work for a Richmond, Virginia, law firm headed by future Supreme Court Justice Lewis F. Powell, played a small part assisting the presidential commission investigating the assassination of President John Kennedy.[70] Maupin's co-clerk, Shannon Ratliff, had to choose between going to work for Clark or for Vice President Lyndon Johnson. Ratliff's work in Johnson's office in the summer 1963 impressed the Vice President enough that he contacted Clark to see if Ratliff could go to work for him instead of accepting Clark's offer. When Johnson elevated to the presidency following Kennedy's assassination, Ratliff then had the opportunity to go to work at the White House, but in January, 1964, Johnson's office conceded that Ratliff preferred to work for Clark.[71]

In 1961, Clark first expressed an interest in taking a clerk from Villanova University, located just outside Philadelphia, indicating that he might "work out something later" with U.S. District Judge Thomas Clary, who was appointed to the eastern district of Pennsylvania shortly after Clark joined the Court.[72] In a letter to Charles Alan Wright, a UT law professor, Clark noted how Judge Clary agreed to hire a Villanova student on the stipulation that Clark take him the following year. When Clary hired James McHugh, Clark felt obligated to offer Villanova its first clerk. "I have a commitment of very long standing to a boy graduating next June," Clark explained to Wright, "and the other spot will be used to maintain my policy of taking one clerk from a school which has not thus far been able to place a graduate at the Court [i.e. Villanova]."[73] This "commitment of very long standing" exemplified Clark's principal predicament during the final phase of his active service: he wanted to maintain his commitment to first-time schools, but he increasingly found himself beset by obligations of another kind.

Clark agreed to take a clerk from the University of Mississippi if the law school could recommend a student "wholeheartedly and without reservation." The Mississippi faculty chose Raymond Brown as Clark's clerk for the 1962 Term. Brown played professional football for the Baltimore Colts before a knee injury sidelined him and he chose to attend law school.

1961 to 1966 Terms

Clark's final years before retirement were marked by two developments that, oddly enough, complimented and competed with his commitment to first-time schools. Both offered the prospect of using schools that never had, nor ever would have, sent a clerk to the Court, but one raised the specter of the worst kind of favoritism. As to the first, in 1962 Clark implemented a plan whereby a Board of Tribune (consisting of fraternity officers) of the Phi Alpha Delta (P.A.D.) law fraternity sent him the names of student finalists in a nationwide competition. The historical record is unclear as to who initiated this program, but it is clear that, during its four years of operation, it caused considerable antagonism between Clark and the fraternity, particularly over the issue of whether or not Clark was obligated to choose a P.A.D. finalist. The other development led to Clark giving clerkships away to the sons of personal friends, whether or not they met even the minimum criteria for law clerks.

The antagonism between Clark and P.A.D. began when he failed to select one of the eight finalists submitted to him for the 1963 Term. The "rumblings" of Tribune members, though, were quieted the following Term when Clark chose Michael Maupin, one of three finalists presented to him. Relations became strained the next year when Clark notified two of the three finalists in November that they would not be hired. The fraternity was unsure if these rejections meant the applicants were denied the other clerkship or the P.A.D. clerkship, which was presumably set aside and secure. Unconcerned about Clark's other clerkship, the fraternity expected to be advised before he rejected any applicants for their "slot."[74] When fraternity officials asked in February whether their "slot"

In 1962, Clark implemented a plan whereby the Phi Alpha Delta law fraternity sent him the names of student finalists in a nationwide competition to become one of his clerks. The program operated for four years, but caused considerable conflict because Clark did not always hire the finalist.

was filled, Clark failed to reply. He waited until April to make an offer to the third finalist, Charles Reed. The delay suggests that Clark wanted to prove a point to the fraternity, considering that he chose Reed in October—that the final decision was his alone to make. Shortly after choosing Reed, Clark wrote to a Houston lawyer, "I try to spread the appointments around some because there are many, in fact who have never been able to place a graduate here in the entire history of the Court. . . . P.S. Confidentially one of my boys for next year will be from Houston University Law School."[75] Although Clark got the name wrong (Reed attended South Texas College of Law in Houston), his enthusiasm for choosing another first-time school—and one from Texas—was evident. Clearly, the P.A.D. competition furthered Clark's commitment to these schools, although the fraternity's role in selections was never evident outside of law schools.

The ongoing antagonism between Clark and the fraternity revolved around expectations. The fraternity believed that Clark reserved one of his clerkships for their finalists, but Clark was unwilling to give the fraternity such exclusivity. In its newsletter, *The Reporter*, the fraternity informed its members that the nationwide contest resulted in a clerkship with Clark, proclaiming in 1965: "Three applicants were finally selected as finalists from which Justice Clark will personally select his clerk." On his copy of the newsletter, Clark wrote incredulously, "Miss Alice—Did you see?" Clark made his own views clear to one hopeful recommender, Richard Amandes, the associate dean at Hastings College of law, explaining, "I have tried to give special consideration to the schools which have not had an opportunity to place their graduates here, and, in addition, I consider three submitted to me by a board of the Phi Alpha Delta Fraternity. These are not binding policies, however."[76] Clark refused to be beholden to P.A.D., regardless of the sentiments of its Supreme Justice, Elden Magaw, who wrote, "In my travels over the country I find that nothing we have done has been regarded so favorably by the chapters and the Deans in the various law schools. All are waiting for the next issue of the *Reporter* to see who has been chosen."[77]

In his final Term as an active Justice, Clark again neglected to choose a P.A.D. finalist, but this time his reasons for disappointing the fraternity were regrettable. Neither of his hires, Stuart Ross or Marshall Groce, was academically top of their class, and Groce attended what was arguably the most obscure school ever to join the law clerk ranks. Clark chose Ross and Groce in early November, but he waited until February to notify the three P.A.D. finalists that none of them were hired. One finalist, who Clark considered the "top man" of the group, was invited to reapply for the 1967 Term, when Clark intended to hire another P.A.D. applicant.[78] Another finalist that year received less approbation; Clark noted, "This applicant is not in the range of competition we have here. He is not qualified & should not have been selected as a nominee, in my view." Free of any obligation to choose a P.A.D. finalist, Clark informed Magaw, "When

I agreed to the competition I insisted that the three nominees would merely be given consideration, not that one of them would be appointed.... If the literature the Fraternity has sent out left the impression there was a firm commitment, I am not responsible for that."[79]

Stuart Ross's appointment was most likely politically motivated, since Ross was the son-in-law of Dale Miller, a close Texas friend of President Johnson. It certainly was not due to Ross's academic performance, which was poor enough to land him in probation his first year at George Washington law school. When one of his law professors admitted that Ross "got off to a shaky beginning," Clark insisted on seeing Ross's grades.[80] He could not have been impressed. Ross's grades were mediocre at best, and twice he repeated courses for failure to take scheduled exams. This was not, in Clark's own words, "in the range of competition we have here," but Ross's place was secure through his father-in-law's political connections.[81]

Marshall Groce's academic credentials were possibly more suspect than Ross's. Both Marshall and his father, Josh Groce, a San Antonio lawyer, expressed dismay at Clark's unsolicited offer. Fifteen months before his clerkship began, Marshall wrote Clark, "When my father informed me of the possibility... it never occurred to me that the possibility of such an opportunity would be mine."[82] Perhaps Marshall's perplexity related to his attendance at St. Mary's University in San Antonio, which he later admitted did not even have a law review or similar publication;[83] he only went there because, according to his father, while at UT he "just plain goofed off." Perhaps it related to his never having met Clark in person, since his father asked Justice Douglas, who was then visiting San Antonio, to convey to Clark "that Marshall did not have two heads."[84] Groce's attendance at an obscure law school satisfied Clark's interest in choosing first-time schools, but he could have used a P.A.D. finalist for that. Instead, he hired the son of an acquaintance, neither of whom expected it, suggesting that Clark's interest in choosing the most qualified candidates now gave way to finding the most "underprivileged law schools." It also suggests the possibility that Clark's relationship with P.A.D. had deteriorated enough that he intentionally ignored their finalists in favor of an outlier.

In order to give this outlier a chance, Clark took a keen interest in Groce's education, offering advice on which classes to take and concluding, "I might add that it is not so much what courses but what you do with those you take. There is no substitute for good grades."[85] During his last year at law school, Groce, still overwhelmed by Clark's offer six months earlier, wrote to ask, "I wonder if I should make any formal application or furnish any other information. I certainly would hate to lose such a wonderful opportunity through some oversight on my part. Therefore, if there is anything which I should do along this line, I greatly appreciate it if you would let me know just what I am supposed to do."[86] Clark replied by requesting grades—no recommendations or formal application—just grades. Once again, he must have been disappointed; Groce ranked at the bottom of the "upper half." Hiring two candidates with middling grades for the same Term did not sit well with Clark, so just before Christmas he composed a letter of rejection for Groce, which read:

> I hope you will not be too disappointed when I say that I do not feel I can offer you an appointment. Looking over the dozens of applications I have before me from schools throughout the country I find that with very few exceptions they are nearly all first, second or third in their class standing. Most of them are A average and about straight A from their second year on. As I am sure you can appreciate, the work at the Court done by these boys—many of whom

> have by then a year's clerkship in the Circuit Court—becomes quite highly competitive. I sincerely believe that under such conditions you might not enjoy it as much as you might entering the profession through other channels.[87]

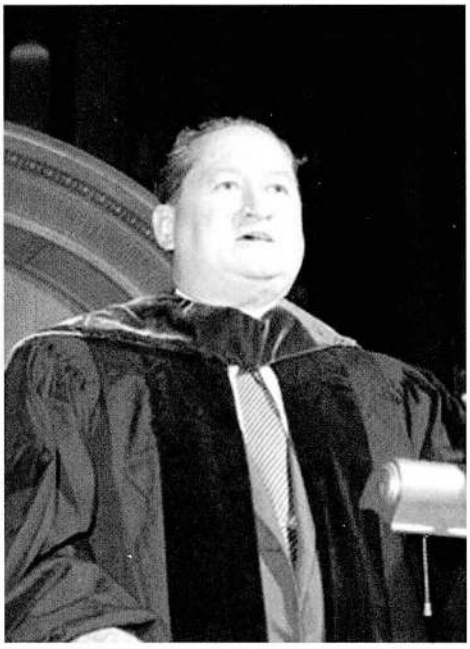
Clark never sent the letter, though; his only copy was marked over with a large X. He fulfilled his pledge to Groce, and P.A.D. lost its anticipated "slot." Elden Magaw, disappointed with the situation, worried about Clark's reputation if he chose Groce: "I have given very careful thought to the problem in connection with the clerkship," Magaw wrote,

> I am worried and deeply concerned because if this is not handled properly it can do us a lot of damage.... Not only do I think our Fraternity will be hurt, but I am fearful that you personally may be hurt. I know that all believe that a firm commitment has been made and the only question is which of the three [finalists] are to be chosen. On the one hand you have the situation as to the father [Josh Groce]—on the other you have 98 active chapters and the various law school administrators to consider. This presents a situation worthy of a Solomon. I hope that you can do something like a miracle. We are in a crucial situation but I think you can solve it.[88]

Clark's solution was to hire Groce and assure P.A.D. of their selection the next Term, which P.A.D. was prompt to announce to its constituents.[89] Of course, Clark had retired from the Court by then, but his retirement did not end the fraternity's chances so much as his capitulation to friends. When P.A.D. transmitted the names of three finalists for 1967 almost a year in advance, at first Clark wondered whether any clerks ever came from Boston University or the University of Missouri (two of the finalists were from those schools). Then he conceded, "Looks like PAD will lose out again—Harrington is pressing and so is Nichols! May be we better notify them now."[90] For a second year in a row, Clark was willing to overlook his arrangement with P.A.D., and again it was due to the importunate requests of close friends. Clark hired James Harrington and Larry Nichols, but his retirement meant only one of them could keep the job.

Although Larry Nichols became Clark's first clerk in retirement, his selection belonged to Clark's active service because Clark proffered the offer ten months before he ever announced his retirement. Indeed, Clark's relationship with Nichols and his father had long antecedents. In college Clark was a fraternity brother with Nichols' father, John, who Clark referred to as "an old Oklahoma friend of mine." When Larry applied to attend the University of Michigan law school, Clark wrote a letter of recommendation.[91] Two years later, Larry had an appointment to meet Clark, who informed Larry's father afterwards, "It was good to see your son today. He is a fine young man and gives every evidence of becoming a learned and effective lawyer.... I gave him the forms—and some suggestions as to the application. With his grades and law review background he should make a clerkship."[92] Clark's message belied the possibility that Nichols' application might receive the same consideration as other candidates, but Clark's blithe rejection of P.A.D.'s finalists indicates that Nichols benefited immensely from his father's long association with Clark.

James Pipkin also benefited from his parents' long friendship with Clark, who attended UT with both of them. Regarded as "an old and highly respected Texas family," the Pipkins were in the oil business; the senior James Pipkin, known to Clark as "Jimmie," became the senior vice president of the Texas Oil Company (i.e. Texaco) by the time his son went to work for Clark. Jimmie Pipkin considered Clark "a very treasured advisor," and Clark reciprocated, "To me our association has been more than pleasant—it has been most helpful."[93]



Clark liked to offer clerkships to the sons of his old friends from Texas. He promised to hire James Pipkin, the son of a University of Texas School of Law classmate, before the young man was even accepted at law school. Pipkin attended Harvard Law School and went on to a distinguished career specializing in transportation and appellate law after his clerkship at the Supreme Court.

When Clark wrote letters of recommendation for Pipkin's son, James, to attend law school at Harvard, Yale, and the University of Virginia, he acknowledged that he knew James from birth and regarded the Pipkins as "warm friends." These letters, though, contained one cavalier condition: "I only add that my complete confidence in him is best evidenced by the fact that I have offered him a clerkship here upon graduation."[94] In this instance, who you knew really did matter. Which school Pipkin attended or how well he performed was incidental—Clark had already made his choice. Grades, in fact, were no longer relevant. Pipkin's father admitted that James was unsatisfied with his school work and not "in the top group he'd been aiming for," but, he continued, "This year his attitude is much better, he is more mature, and he is working hard. He was most encouraged with your statement that top grades were not a pre-requisite."[95]

Clark's criteria for selecting law clerks had evolved dramatically from his early years on the Court. Before, certain schools merited distinction, making law review and being top of the class mattered, and even having prior clerking experience or staying two years seemed like good ideas. Then, Clark opened the doors of the Court to schools never before represented there and turned one of his positions into a contest (at least, temporarily). In the end, though, Clark began appeasing his close friends or his own conscience. He began pandering, using his clerk selections as a bequethal for those who knew him best.

Retirement Years, 1967–1976

Clark's ten years in retired status may best be remembered for serving on all of the Circuit Courts of Appeals (and the Court of Claims, the Court of Customs and Patent Appeals, as well as various district court assignments), where he authored more than 100 majority opinions, and for working on the improvement of judicial administration. Typically, retired Justices of this era received one law clerk (by 1970 active justices had three),[96] and these clerks were often rotated among the active justices as the need arose. For example, when the 1974 Term began Chief Justice Burger indicated in a memorandum to the Conference that Justices Stewart, White, and Blackmun all requested an auxiliary clerk. Referring to retired Justice Reed's clerk, David Becker, Burger planned to let them "divide the pie." The use of Clark's clerk, William Hannay, the memo continued, was at Clark's discretion. Since Clark preferred his clerks to remain in D.C. instead of traveling with him to his circuit court assignments, he agreed to Hannay's rotation: "In my view it is most helpful to my Clerk to participate with and be part of the others, . . . Mr. Hannay is anxious to cooperate in this regard."[97]

Clark did not hire a clerk for his second Term in retirement, opting instead to

hire an additional secretary in lieu of a law clerk.[98] The reasons for this were unclear, considering he hired Jerry Snider for the 1969 Term six months before the 1968 Term began. According to Snider's mother, Jerry was "greatly inspired" by Clark's offer.[99] Undoubtedly, Snider's hire depended upon his parents' friendship with Clark and the prospect of choosing another first-time school. These now familiar criteria were evident throughout Clark's retirement, although at times they were difficult to discern. For example, when Clark hired his first female clerk, Christy Carpenter, in January 1976, it might appear as though he wanted to open yet another door to broaden the clerk pool. But female clerks regularly appeared at the Court since 1971; in fact, when Carpenter served there were four other female clerks working for active Justices. Clark's decision to offer Carpenter a job focused on a different factor: he knew her parents. "He had a habit of hiring people he knew," Carpenter said, "He enjoyed spreading the wealth."[100]

This idea of "spreading the wealth," or giving clerking opportunities to his boundless circle of friends, became the distinguishing feature of Clark's retirement years. Tom Reavley and Tom Marten, who served within four years of each other, both benefited from their familial relationships to state and federal judges within Clark's ambit of friends. Reavley's father was a justice on the Supreme Court of Texas who asked his son to write to Clark about employment. Because clerking at the U.S. Supreme Court did not seem like a "realistic prospect" due to his modest G.P.A. and absence of publications, Reavley had applied to and was hired by another federal judge. Prodded by his father, though, Reavley wrote, "I realize it is late to be thinking of applying to the Court for next year... When I talked with Dad about getting in touch with you, he wanted me to know he hadn't foisted the subject of my career plans upon the conversation during your visit. I think you must have a high opinion of him to initiate an interest in his offspring, sight unseen. I know he thinks a great deal of you." Clark's interest in Reavley prompted him to offer the job within a week of receiving Reavley's application. No other candidates were seriously considered.[101]

At first glance, Tom Marten seemed to fulfill Clark's desire to hire from a first-time school, but there is no indication that Clark considered Washburn University of Kansas in his hiring decision. By 1976, other Justices had already opened the Court to more new schools than Clark had on his own, so that commitment was no longer relevant. Instead, Marten's relationship to Delmas "Buzz" Hill, a judge on the Tenth Circuit Court of Appeals, got him the job (Hill was his great uncle). From 1971 to 1975, Clark and Hill sat together on appellate panels for about thirty different cases; in one 1975 decision, Clark's majority opinion elicited this response: "You certainly did a great job on this case. It was complicated factually and difficult for me. We truly appreciate your help and guidance."[102] In a 1977 tribute to Hill, Clark described their "warm and rewarding friendship of some forty years," saying, "Buzz and I have fought the battles of politics, of government and of the judicial system; and I do not recall any time when our views did not prevail."[103] Clark hired Marten largely because of his family ties to Judge Hill; otherwise, Marten's academic record (like several others) was unimpressive. One Washburn professor even tried to exculpate Marten's lackluster standing because Marten had to work outside school to pay for his classes.[104]

One of the most remarkable hires Clark made in retirement went to Stafford Hutchinson, whose father, Everett, was an Interstate Commerce commissioner and longtime friend of Clark with a home in Austin. Long before completing his undergraduate work at Harvard and law training at UT, fourteen-year-old Stafford received his Eagle Scout award in the Chambers of Justice Clark, who was himself a lifelong supporter of Scouting and one of the first recipients of an Eagle Scout award. Clark's relationship with the Hutchinsons was so close that he offered Stafford

a clerk position as a *high school* graduation gift, and Stafford replied enthusiastically, "Without a doubt your job offer is the dream of all prospective young lawyers. I will say now it is a deal if I decide on law and if I do well."[105] This remarkable offer was made three years before Clark's retirement; he had just started choosing P.A.D. finalists; and his most egregious choices of the 1966 Term were still a year away. In Hutchinson's last year of law school, he wrote Clark, "You may recall that seven years ago in 1964 when I graduated from the Landon School in Washington, you wrote me a nice note saying someday, if I decided to go to law school, I might begin my legal career by serving as your clerk." Hutchinson planned to be in D.C. and wanted to "discuss the possibilities of a clerkship with you."[106] Clark readily agreed to meet Hutchinson, and he did fulfill his seven-year-old pledge, but Hutchinson had to wait one year before taking the position because Clark had also promised it to Tom Reavley.[107]

As a retired Justice, Clark maintained a strenuous schedule, sitting annually for about a dozen appellate sessions all over the country. The 1973 Term was especially burdensome: in November, the Supreme Court assigned him to serve as Special Master in a water boundary dispute between Maine and New Hampshire; in June, he drafted his majority opinion in a significant housing segregation case;[108] and by August he was recovering from gall bladder surgery.[109] The volume of cases became so unmanageable that his 1974 clerk, William Hannay, urged him to hire a second clerk, which eventually led to Christy Carpenter joining Tom Corrigan midway through the 1975 Term. There may have been other reasons, though, for Clark to request a second clerk; one of his hires for the 1976 Term, Tom Hughes, got the job only after his father accused Clark of breaking a promise.

Clark's close relationship with the Hughes family was evident from his numerous letters of recommendation to get "Tommy," as he was known, into law school, including letters to UT, Virginia, and Southern Methodist (the only school to accept him). Instead, Tommy taught history in Australia and Virginia for two years before applying for law school a second time, and Clark obliged with a letter of recommendation to the College of William and Mary. Concerned that his son might fail to be accepted there, Tommy's father (Thomas III) wrote Clark to learn his impression of a relatively new law school at Hofstra University on Long Island; in 1968, one of Clark's former clerks, Malachy Mahon, became the founding dean there.[110] Tommy, it turned out, ended up attending Loyola University in New Orleans, where his grades were undistinguished.

When the time arrived to choose a clerk for the 1976 term from among 25 applicants (including three female students), Clark offered the job to Tom Marten, and Tommy Hughes received the standardized letter of declination. Outraged, Tommy's father wrote Clark:

> Through all these years, I always believed in you and honestly believed we had a gentlemen's agreement when you initiated the idea several years ago of having Tommy as your law clerk when he finished law school. When I spoke to you in August if your intention was for real and you responded in the affirmative, I feel that you should have leveled with me at that time that you had someone else lined up for the position. In this way, you could have prevented a great disappointment.[111]

Attempting to salvage the situation, Clark sent Tommy a handwritten letter, explaining how, since his retirement, he was allowed only one clerk, and he tried to choose them early to get the top students. He really needed two clerks and intended to hire a second, but he failed to mention that to Tommy's father or to his own secretary, who assumed he needed only one.[112] As incredulous as this appeared, Clark was planning to hire two clerks but forgot to

tell anyone. Tommy, it seemed, was his second choice. This rather weak explanation mollified Tommy, who accepted Clark's offer. One month later, Chief Justice Burger authorized Clark to hire a second clerk.[113] This paved the way for Christy Carpenter to serve the second half of the 1975 Term, but Tommy Hughes's clerkship may have had as much to do with broken promises and recriminations as with heavy workloads.

Conclusion

In 2003, one of Clark's former clerks, John Nolan, participated in an interview where he discussed a wide range of topics, including his military and government service and his law practice. Only two questions related to his Supreme Court clerkship: how did he get the job, and what was Justice Clark like? Relying on his memory of forty-seven years earlier, Nolan described Clark as "a wonderful human being; a great person to be associated with." Some nine years earlier, Nolan expressed similar sentiments to Clark's daughter in reply to her questionnaire: "With everyone in his office, the relationship was close, confidential, and mutually supporting. With his law clerks especially he was more open and candid than any other Justice." In both accounts, Nolan emphasized Clark's willingness to share Conference discussions with his clerks.[114]

Just a few months after his clerkship ended, John Nolan composed a letter of gratitude for Justice Clark. In it he mentioned several of Clark's characteristics that made a lasting impression on him:

> I suppose I appreciated most the trust that you seemed to place in me from the very beginning and the responsibility that went with it. I appreciated never being crowded or pushed by you, never being told to be careful, never being cautioned or told to hurry up, no matter how concerned you may have been about what we were working on. I always had the feeling that you were waiting to approve good work or correct with a sure touch that which was not so good. I appreciated your consistent good humor, your frankness, and particularly the calm assurance with which you met everything that looked like a crisis to me.[115]

This heartfelt expression of gratitude, written so soon after leaving Clark's service, in no way diminished Nolan's later recollections, but it does offer a more intimate look at his affection.

Similarly, Shannon Ratliff, who served with Clark a decade after Nolan, wrote Clark at the end of their year together:

> I will never be able to tell you how much my year with you meant. There is no question that the experience will one day stand me in good stead in the practice of law. However, it is my present belief that perhaps the most meaningful portion of my year there was to watch a man in high public office wear his robes with such complete dignity and humility. In working with you I hope I contracted some of those characteristics.[116]

Clark's clerks were steadfast in their devotion to him, as evidenced by their refusal to assist Howard Ball with his dissertation following Clark's retirement. In 1974, at the 25th anniversary of Clark's Court appointment, all but two of his former clerks were on hand to help him celebrate.

Composed of thirteen first-time schools, fourteen Texans, one female, one draftee, and the children of numerous personal or professional friends, Clark's law clerks were, indeed, an eclectic collection of talent and backgrounds. Their own accomplishments were as varied as their law schools. What brought them together were Clark's inconstant selection criteria, which underwent several alterations throughout his tenure as a Justice. Intent on opening the Court to new schools, Clark

sought to "spread the wealth," but his munificence, at times, may have spread it too thinly.

ENDNOTES

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[1]Clark to Lowell Wadmond, March 23, 1967, Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin. Unless otherwise cited, all sources are found in this collection. While the author had unrestricted access to the law clerk application files, as of this writing they are now restricted due to privacy concerns over some sensitive materials.

[2]Ellis McKay to Alice O'Donnell, August 3, 1967, and Phillips to Ball, August 14, 1967.

[3]Temple to Ball, carbon copy to O'Donnell, August 10, 1967, and Turner to Phillips, August 16, 1967.

[4]The classic exposé is Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (1979); see also David Margolik, "The Path to Florida," *Vanity Fair* (October 2004). For one insider account without anonymity, see Edward Lazarus, **Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court** (1998). More recently, Jeffrey Toobin maintained the anonymity of his sources in **The Nine: Inside the Secret World of the Supreme Court** (2007).

[5]Mimi Gronlund, **Supreme Court Justice Tom C. Clark: A Life of Service** (Austin: University of Texas Press, 2010), 214 and 260–61. The questionnaires were returned in 1994.

[6]Todd C. Peppers, **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (Stanford University Press, 2006); Ward (with David Weiden), **Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court** (New York University Press, 2006). Several of the same clerks who responded to Gronlund cooperated with Peppers. Ward & Weiden, on the other hand, maintained the clerks' anonymity.

[7]Compare these memos with Peppers, **Courtiers**, 140, and Ward & Weiden, 192, 206–07, 213–14, and 229–30.

[8]Peppers and Ward, eds., **Behind the Bench: Portraits of United States Supreme Court Law Clerks and Their Justices** (University of Virginia Press, 2011). For further interest in law clerks, see also Todd C. Peppers, "Birth of an Institution: Horace Gray and the Lost Law Clerks," *Journal of Supreme Court History* 32, no. 3 (2007): 229–48; Peppers, "Isaiah and His Young Disciples: Justice Brandeis and His Law Clerks," *Journal of Supreme Court History* 34, no. 1 (2009): 75–97; and Peppers, "The Mystery of Charles Kennedy Poe," *The Supreme Court Historical Society Quarterly* 31, no. 3 (2009): 6–9.

[9]Peppers, **Courtiers**, 29 and 139 [emphasis added]. On his list of Clark's clerks, Peppers overlooked Shannon Ratliff, Jerry Snider, and Christy Carpenter.

[10]Ibid., 139.

[11]Gronlund, 141, mistakenly noted Murphy's death on July 10, 1949.

[12]In 1965 Tolan ran unsuccessfully for the Milwaukee School Board; he died in 1974 at the age of forty-nine, having spent his last years afflicted with multiple sclerosis.

[13]This was the date the public learned of Clark's nomination; Truman's official nomination did not arrive at the Senate until Tuesday, August 2, 1949. Clark was later confirmed by the Senate on August 18, 1949. See http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm. The Supreme Court Historical Society's Timeline of the Justices mistakenly listed Clark's nomination on August 19 and his confirmation on August 24, 1949. These dates, however, are more properly the date of his commission and judicial oath, respectively. See http://www.supremecourthistory.org/history/supremecourthistory_history_assoc_073clark.htm.

[14]Clark to Minton, September 20, 1949. Clark also tried to find work for one of Rutledge's clerks, Louis Pollack, a Yale graduate scheduled to return to the Court for a second term. Clark to John McGoey, September 22, 1949. Rutledge's other clerk, Keith Mann, did go to work for Justice Minton.

[15]**The Correspondence between Leon Green and Charles McCormick, 1927–1962**, edited and annotated by David W. Robertson and Robin Meyer (Littleton, CO: F.B. Rothman, 1988), 155; Calhoun to Robert Clark, August 4, 1949; and Williams to Clark, May 4, 1963.

[16]Clark to Schwartz, December 14, 1951; and Clark to Ribble, December 14, 1951.

[17]Goldring was the second woman to serve on the Board of the Harvard Law Review. Erwin N. Griswold, "The Harvard Law Review — Glimpses of Its History as Seen by an Aficionado," in *Harvard Law Review: Centennial Album* I (1987).

[18]Clark to Howard Nemerovski, October 16, 1956, and Clark to William Mulligan, October 19, 1956. Peppers may have over-generalized by stating, "Interviews were not necessary for a clerkship offer," when he relied on the experiences of one clerk from the 1953 Term and another from the 1959 Term, **Courtiers**, 139.

[19]These preferences were derived from the Supreme Court's "Law Clerk Database" (L.C.D.); see also Peppers, **Courtiers**, 29, and Ward & Weiden, 71.

[20]Griswold to Clark, November 13, 1951, Clark to Griswold, November 6, 1951, and Clark to John Kaplan,

October 19, 1953. See also *Washington Post Potomac*, June 11, 1967, which noted how Clark was partial to Texas backgrounds.

[21]Clark to Hamilton, July 16, 1965, and Clark to Stephen Susman, October 14, 1965.

[22]Peppers, **Courtiers**, 29–30. Since Peppers overlooked one of Clark's UT clerks, Shannon Ratliff, he indicated only four clerks from that school.

[23]Clark to Schwartz, January 4, 1951. Here Clark was referring to Stuart Thayer of Yale and Richard Walker of Chicago.

[24]See Peppers, **Courtiers**, 25, and Ward & Weiden, 73.

[25]Clark to Julien Sourwine, January 2, 1964.

[26]In 1956 Norbert Schlei, "Yale's Top Man," became a clerk for John Marshall Harlan.

[27]Carol MacGregor to Clark, November 7, 1949, memorandum, Cadison to Clark, November 17, 1949, and Clark to MacGregor, November 19, 1949.

[28]Williams to Davis, October 9, 1950.

[29]Davis wrote in her application to Black, "Some judges do not like women in their chambers, but perhaps you have different views on this subject." Black replied, "I should have no objection whatever to appointing a woman clerk provided she met the qualifications desired." Quoted in Ward & Weiden, 88, n. 121.

[30]Peppers, **Courtiers**, 20–21.

[31]Clark to Corcoran, April 17, 1965. Corcoran later became a lawyer on the staff of the Senate Judiciary Committee. She died in 1970 at the age of 28; *New York Times*, January 10, 1970, 31.

[32]In a letter to Florida Supreme Court Chief Justice Elwyn Thomas, April 8, 1961, Clark acknowledged that Frankfurter let a Harvard law professor [Henry Hart] choose his clerks and Douglas relied on former clerks to do the same. Both Chief Justices Vinson and Warren left some hiring decisions to former clerks. See also Peppers, **Courtiers**, 102–47, and Ward & Weiden, 63.

[33]Clark to Sturges, December 16, 1950, Clark to Thayer, December 16, 1960, Clark to Fred Rodell, March 3, 1959, and Clark to Edwin Johnson, December 29, 1950. Peppers notes that two clerks reported their law school deans recommended their names to Clark, but does not indicate if these were influential, **Courtiers**, 139.

[34]Clark to Roberts, November 9, 1950.

[35]Peppers, **Courtiers**, 131.

[36]Ward & Weiden, 78.

[37]Kaufman to Clark, June 6, 1963, and Clark to Kaufman, June 7, 1963. As far as I have determined, five clerks that Clark hired had *prior* clerking experience. James McHugh clerked at the U.S. District Court for the Eastern District of Pennsylvania before he joined Clark; Theodore Garrett clerked at the Second Circuit; and William Hannay served at the Eighth Circuit. Barbara Hauser, who Clark hired before his death, clerked at the Third Circuit before going to work for Justice Potter Stewart in 1977, and George Yearshich, also hired before Clark's death, clerked at the Ninth Circuit. One clerk, Christy Carpenter, went on to clerk at the D.C. Circuit *after* her service with Clark.

[38]Williams to Clark, undated (circa December 1950), and Williams to Clark, November 4, 1960. Clark failed to consider a University of Virginia student who Williams strongly recommended. Williams to Clark, August 2, 1957.

[39]Memorandum, Alice O'Donnell to Clark, undated (circa 1964). Temple served as executive assistant to Texas Governor John Connally (1963–67), and as special counsel to President Lyndon Johnson (1967–69), and was featured in *U.S. News and World Report*, February 5, 1968.

[40]Hamilton to Clark, October 20, 1970, Keeton to Clark, October 29, 1970, and November 5, 1970, and Ashworth to Clark, January 11, 1971. Five years earlier, Hamilton recommended another UT student, Stephen Susman, who went to Justice Black after serving one year as a clerk on the Fifth Circuit Court of Appeal. Hamilton later became the Minerva House Drysdale Regents Chair Emeritus.

[41]Hughes's letter of application, August 2, 1951, and Clark to Robert Clark, August 3, 1951.

[42]Bernard Weisberg, who had already served one year in the military, may be best known as former counsel to the ACLU who filed an amicus brief in *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[43]Craig Smith, "Strained Relations: Charles Whittaker and his law clerks," in **Behind the Bench** (forthcoming). Neither Peppers, **Courtiers**, nor Ward & Weiden examine the draft status or deferment requests of law clerks during this time period.

[44]Clark to Hamilton, April 7, 1955.

[45]Selective Service memorandum, December 1965, and Clark to Phil Neal, October 14, 1965.

[46]Clark to Freeman, February 20, 1965.

[47]Harrington to Clark, February 14, 1967, and Clark to Harrington, March 22, 1967. In June, Harrington's application was forwarded to Clark's replacement, Solicitor General Thurgood Marshall, who did not hire Harrington. Those clerks with prior military experience included: Frederick Rowe (three years); Ellis McKay (seven years); and Malachy Mahon (two years). Kenneth Jones was not subject to the draft due to a physical defect, although he joined the Air Force after clerking for Clark. When Jones developed a condition called "bronchiectasis," Clark contacted the Mayo Clinic for advice. Clark to Dr. Madred Comfort, May 24, 1956.

[48]Clark to Nichols, December 22, 1966.

[49]Clark to Judge Charles Vogel, Eighth Circuit Court of Appeal, December 10, 1959.

[50]Clark to Turner, January 31, 1959, and Turner to Clark, February 4, 1959. Turner received a doctorate in economics from Harvard before his law degree from Yale, and his **Antitrust Policy** (with Carl Kaysen) was regarded as a classic in its field.

[51]Clark to Harry Shulman, March 18, 1955. James Harrington's father apparently also worked with Clark in the Department of Justice.

[52]Sanderson was formerly married to Texas Senator Morris Sheppard, who died in 1941 and from whom Richard Sheppard Arnold derives his middle name. Thomas Connally was a widower as well when he married Sanderson.

[53]Sanderson to Frankfurter, November 12, 1959, and Clark to Morris Ernst, November 17, 1959.

[54]Arnold, who graduated first in his class at both Yale and Harvard, became a judge on the U.S. District Court in Arkansas and later a judge on the Eighth Circuit Court of Appeals. Other popularly known judges and legal scholars who applied to Clark but were not hired by him include Robert H. Bork, former judge of the Court of Appeals for D.C. and Supreme Court nominee (1953); Norman Dorsen, a New York University law professor and scholar (1956, clerked for Harlan in 1957); Alan Dershowitz, a Harvard law professor and scholar (1962, Goldberg); A. E. Dick Howard, a University of Virginia law professor and scholar (1962, Black 1962–63); Laurence H. Tribe, another Harvard law professor and scholar (1967, Stewart); and Kenneth W. Starr, former judge of the Court of Appeals for D.C. and Solicitor General, perhaps best known as independent counsel in the investigations of President Bill Clinton (1973, Burger 1975–76).

[55]Clark to Joe Estes, November 25, 1959, Joe Estes to Clark, December 2, 1959, and Clark to Joe Estes, December 3, 1959.

[56]Clark to Levi, February 7, 1953.

[57]L.C.D., *supra* note 19. This and subsequent analysis of the L.C.D. used only the 1920 to 1976 Terms. Based on these years, the numbers of placements in descending order were Harvard, 266; Yale, 127; Columbia, 57; Michigan, 38; Chicago, 35; and Pennsylvania, 33.

[58]Clark to Erwin Griswold, March 17, 1955; Clark to Harry Shulman, March 18, 1955; and Clark to Louis Schwartz, March 18, 1955. Georgetown seemed like a relatively new school at the time because Justice Reed had used it once in 1953 and again in 1955. Before that Georgetown had not sent a clerk to the Court since before 1920. See Peppers, **Courtiers**, 25.

[59]Nolan interview, *Washington Lawyer*, D.C. Bar, "Legends in the Law," http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/nolan.cfm. Clark's law clerk application files reveal a number of applicants who applied to him but were hired by other Justices, including Robert Cole (1955, Minton), Manley Hudson (1956, Reed), Henry Sailer (1958, Harlan), and Ken Dam (1957, Whittaker); see also *supra* notes 26, 40, and 54.

[60]Murrah to Clark, November 7, 1960. The Oklahoma City federal building bombed on April 19, 1995, was named for his father, a federal judge who served three years on the district bench and 35 years on the Court of Appeals. Judge Murrah was the second director of the Federal Judicial Center, established by Congress in 1967, following Tom Clark.

[61]Clark to Tollefson, November 19, 1960.

[62]Quoted in Ward & Weiden, 71. Gronlund noted that Clark desired "broader representation" on the Court because he had "had his share of Harvard, *Princeton*, and Yale graduates," so "he also selected from lesser-known law schools," 213 [emphasis added]. Two of Clark's clerks, James Pipkin and Larry Nichols, attended Princeton as undergraduates, but Princeton does not have a law school. For a relevant derogation of this popular misconception, see the comment of John Sexton, dean of NYU law school: "If they were asked about Princeton Law School, it would appear on the top 20—but it doesn't exist," in Jan Hoffman, "Judge Not, Law Schools Demand of a Magazine that Ranks Them," *New York Times*, February 19, 1998. Likewise, Texas A & M does not have a law school, but the L.C.D. listed Charles Reed as attending there instead of South Texas College of Law.

[63]Ward & Weiden used Douglas as an example of a Justice who "consciously tried to diversify the pool" of clerks, 75–76; yet, Douglas hired from a third the number of schools as Clark. Similarly, they used Warren to exemplify a Justice who strove "for diversity in school representation," 71; however, none of the seventen schools he used were first-time schools.

[64]Clark to Rostow, December 16, 1958.

[65]Clark to Kaufman, June 6, 1963.

[66]O'Donnell to Eugene Ruf, June 12, 1963. Clark's commitment to never using the same school in the same year found in Clark to Robert Bell, May 18, 1960.

[67]Memoranda, O'Donnell to Clark, August 6, 1964, and undated [fall 1964]. The 100 plus estimate comes from Clark to Phil Neal, October 14, 1965. According to Ward & Weiden, Black received thirty-six applicants in 1964 and sixty in 1968 while Harlan received fifty in 1970, 57.

[68]Clark to Farley, November 20, 1961.

[69]In 1958, Brown was ranked tenth overall in number and total yards for punts, but his passing record, compared to Unitas, was dismal. Comparing salaries, Brown ended his NFL career earning $12,000 a season, but a clerk at the time earned around $6,500. Peppers notes that Justice Byron White was another NFL veteran who clerked at the Court (1946), although White's football career was far better known than Brown's, **Courtiers**, 138–39.

[70]Clark to J. Lee Rankin, November 16, 1964. Powell considered clerking a "sound decision" and advised Maupin to accept the offer. Once Maupin began his service, Powell, then president of the American Bar Association, wrote to Clark regarding Maupin's prospects at the firm: "He made a fine impression here, and we have offered him a position when he leaves your clerkship next summer. I wanted you to know about this in the event Mike should ask you for

advice about his future." Powell to Clark, December 1963, and September 30, 1964.

[71]Memoranda, O'Donnell to Clark, October 1963, and January 5, 1964. Ratliff's application for federal employment indicates Walter Jenkins, assistant to President Johnson, as a reference. Jenkins, who worked with Johnson for 25 years, was considered by some to be one of the best modern political aides until he was forced to resign due to sexual indiscretion in October, 1964.

[72]Clark to Harold G. Reuschlein, March 17, 1961.

[73]Clark to Wright, October 29, 1962.

[74]Clark to Elden Magaw, February 26, 1966, and Donald Moore to Clark, March 8, 1965.

[75]Clark to Charlie Francis, October 24, 1964.

[76]Clark to Amandes, November 3, 1965. [Emphasis added.]

[77]Magaw to Clark, February 15, 1966.

[78]Clark to Robert Lee Anderson, February 26, 1966.

[79]Clark to Magaw, February 26, 1966.

[80]Arthur S. Miller to Clark, December 14, 1965.

[81]The *Washington Post Potomac*, June 11, 1967, claimed that Ross and Margaret Corcoran were both "highly capable." For Black's difficulties with Corcoran, see Peppers, *supra* note 30. Another politically motivated appointment most likely went to Max Truitt, whose father was married to the daughter of former Vice President Alben Barkley. Seven years before hiring Truitt, Clark wrote a letter of recommendation for Truitt's brother, Thomas, to enter a private academy.

[82]Marshall Groce to Clark, April 19, 1965.

[83]Marshall Groce to Alice O'Donnell, December 13, 1965

[84]Josh Groce to Clark, April 19, 1965, and May 3, 1965.

[85]Clark to Marshall Groce, April 26, 1965.

[86]Marshall Groce to Clark, October 19, 1965.

[87]Clark to Marshall Groce, December 20, 1965. According to the State Bar of Texas, in 2000 Groce accepted a three-year, fully-probated suspension for expending the estates of both of his parents without their consent.

[88]Magaw to Clark, February 15, 1966.

[89]Frederick Weitkamp to Clark, March 7, 1966, and Clark to Weitkamp, March 12, 1966.

[90]Handwritten note on letter from Charles Digangi to Clark, September 15, 1966.

[91]Clark to Allan Smith, dean, February 21, 1964.

[92]Clark to John Nichols, May 13, 1966. In 1971, Larry Nichols cofounded Devon Energy, an oil and natural gas company, with his father. He has served as Devon's CEO since 1980 and was president from 1976 until 2003.

[93]Pipkin to Clark, October 26, 1949, and Clark to Pipkin, October 29, 1949.

[94]Clark's letters of recommendation for James Pipkin, Jr., March 21, 1960.

[95]Pipkin, Sr., to Clark, October 13, 1962.

[96]During Clark's retirement, Chief Justice Warren had a clerk from 1970–73 (two in 1970) and Justice Reed had one from 1959–76 (two in 1970).

[97]Memorandum to the Conference, October 29, 1974, and Clark to Burger, October 29, 1974. Clark's policy of not taking his clerks with him on assignment found in Hannay to Clark December 5, 1973, and confirmed in Carpenter interview, September 22, 2009. One of Clark's clerks, Theodore Garret, spent enough time assisting Chief Justice Burger that his vitae at Covington & Burling lists only that experience. See http://www.cov.com/tgarrett/.

[98]Clark to William Barnes, personnel, October 12, 1968.

[99]Kathy May Snider to Clark, April 29, 1968.

[100]Carpenter interview. Carpenter's mother, Liz, was the executive assistant to Vice President Lyndon Johnson and later became the press secretary to First Lady Johnson. Carpenter may not have been the first woman Clark offered a clerkship; in a March 1970 note to four-month-old Christine Lane, he wrote, "Have you noticed how sweet and beautiful your Mother is [Patty McMahon] and along with it talented too. One day I offered her a job as a law clerk but she was smart enough to choose your dad. And what a wise decision. And then she chose to have you."

[101]Tom W. Reavley to Clark, November 6, 1971, Clark to Tom W. Reavley, November 12, 1971, and Thomas M. Reavley (father) to Clark, November 22, 1971.

[102]Hill to Clark, July 18, 1975. The case was *U.S. Fidelity & Guaranty v. Sidwell*, 525 F.2d 472 (1975). Hill's flattery may have been overblown; his Tenth Circuit colleague, James Barrett, wrote, "I marvel at your ability to 'digest' and so succinctly express yourself with such immediacy!" All this because Clark finished his draft opinion in a week.

[103]Clark's tribute to Delmas Hill, May 1977. In 1951, Hill was one of a three-judge district court panel to first decide *Brown v. Board of Education*.

[104]Roy Bartlett to Clark, August 25, 1975. In 1996, Marten became a federal judge for the U.S. District Court of Kansas.

[105]Hutchinson to Clark, June 8, 1964.

[106]Hutchinson to Clark, September 20, 1971.

[107]On December 5, 1971, Hutchinson wrote to Clark, "I certainly understand the situation and really I am delighted that Tom will have the opportunity to clerk for you next fall. It was the fair thing to do. I am very happy about you offering me the position for the following year."

[108]*Gautreaux v. Chicago Housing Authority*, 503 F. 2d 930 (1974). In April, 1975, Clark received a note from his clerk, William Hannay, that read, "I have just seen the news report of the [Supreme] Court's 8–0 decision in *Hills v. Gautreaux* and am delighted that your view has been vindicated.... Your opinion for the CA7 really drew attention to the crucial policy issue at stake here—getting at the root of the ignorant discrimination by striking at segregated housing patterns and thus counteracting 'white flight.'"

[109]See John Paul Stevens, circuit judge, to Clark, September 30, 1974.

[110]Mahon became the Siggi B. Wilzig Distinguished Professor of Banking Law at Hofstra. Two other former clerks, both deceased, also had careers in academia: John Kaplan taught at Stanford as the Jackson Eli Reynolds Professor, and William Kenneth Jones taught at Columbia for forty-two years as the Charles Evans Hughes Professor of Law.

[111]Hughes, Sr., to Clark, October 16, 1975.

[112]Clark to Hughes, Jr., October 27, 1975.

[113]Burger to William Foley, December 8, 1975.

[114]Quoted in Gronlund, 214. See Nolan interview, *supra* note 59. Nolan also participated in Peppers' project, **Courtiers**, 139–41.

[115]Nolan to Clark, September 10, 1956.

[116]Ratliff to Clark, July 12, 1965.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

When the Supreme Court opened its 2010 Term on October 4, the Justices sat with their newest colleague, Elena Kagan. As the 112th Justice, she had been named at age 50 by President Barack Obama on May 10 to fill the seat vacated by retiring Justice John Paul Stevens. As the first Solicitor General to be elevated to the Court since Justice Thurgood Marshall, for whom she had clerked, this native New Yorker and former dean of Harvard Law School was the first nominee in thirty-eight years to reach the High Court with no experience as a judge. Educated at Princeton University and Harvard Law School, she was associate counsel in the Clinton White House following two years in private practice and was on the short list in 2009 for the seat that became Justice Sonia Sotomayor's. Four days of hearings in the Senate Committee on the Judiciary preceded a favorable committee vote (13–6) on July 20. After three days of debate, the full Senate confirmed the nominee 63–37 on August 5, with the oaths then administered by Chief Justice John Roberts at the Court on the same day.

With Justice Kagan's arrival, the Court was approaching a noteworthy date: the 210th anniversary of John Marshall's appointment as Chief Justice in January 1801.

Among those who follow the work of the Supreme Court, it has long been textbook political science that American elections have constitutional consequences, just as it is true that decisions by the Court interpreting the Constitution and statutes can have electoral consequences. A strikingly clear illustration of the first half of that statement was made plainly evident very early in American national history: in the election of 1796, the nation's first truly competitive presidential election. In that sometimes forgotten contest, John Adams, who had served as George Washington's Vice President, received 71 electoral votes to 68 for Thomas Jefferson, who for a time had been Washington's Secretary of State. Adams's victory proved to be particularly significant when viewed in the light of another political reality: the impact of timing on subsequent events. With respect to John Marshall and the Supreme Court, timing seems critical in at least two respects.

First, in August 1798, Justice James Wilson died. Although he was one of Washington's original appointees to the Court, his departure hardly created the first vacancy therein, for in the decade of the 1790s, judicial vacancies seemed more the rule than

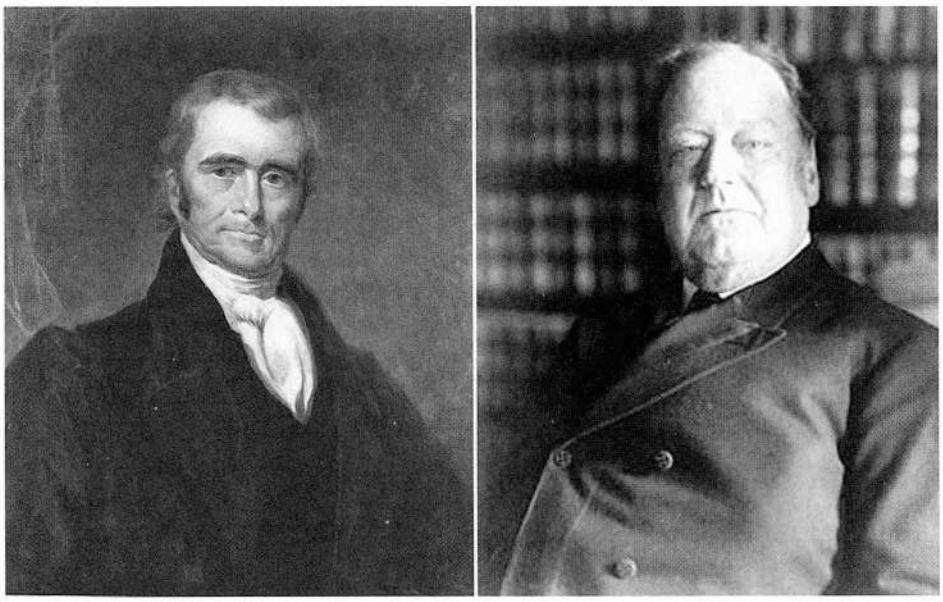
the exception. But his departure did mark the first death of a Justice in harness. To fill Wilson's place, President Adams offered the seat to John Marshall of Virginia, who had recently returned to the United States from a diplomatic mission to France. Marshall, whose judicial experience at that point was limited to his time as recorder of the Richmond City Hustings Court in 1785–81,[1] was reluctant to abandon his lucrative law practice in Richmond, and he declined. Adams then turned to Washington's nephew Bushrod Washington, also of Virginia, who accepted.[2] Had Marshall accepted the nomination for Wilson's seat, it seems arguable, if not probable, as subsequent events suggest, that he might never have become Chief Justice.

That possibility presented itself only after a second critical example of timing. In early December 1800, President Adams received word from Chief Justice Oliver Ellsworth—then in France on a diplomatic mission and in poor health[3] —that he was resigning as Chief Justice.[4] By January 1801, filling this vacancy became urgent. In those pre-Twelfth Amendment days, the Electoral College had yielded a tie vote between Jefferson and Aaron Burr, which, as the matter developed, would not be resolved by the House of Representatives until February. Adams thus did not know who the next President would be, only that he would not be President after March 4. The electoral situation thus counseled against any delay in replacing Ellsworth.

On December 18, the President picked former Chief Justice John Jay for the post, and the lame-duck Federalist-controlled Senate confirmed the appointment on December 19.[5] However, Jay, who had left the Chief Justiceship in 1795, declined to accept, citing deficiencies in the judicial system (partly the onerous circuit-riding duties that, ironically, the Judiciary Act was about to address, if only temporarily). Some advised Adams to appoint former Representative Samuel Sitgreaves of Pennsylvania, while others urged that the nod go to a staunch Federalist such as William Paterson, who was the most senior Associate Justice, or to Charles Cotesworth Pinckney of South Carolina, who had been the Federalist candidate for Vice President in 1800. Instead, on January 20 and with minimal consultation, Adams turned to his 45-year-old Secretary of State, John Marshall, who was Jefferson's second cousin once removed and to whom Adams's successor once referred as "that gloomy malignity."[6] Confirmation by the Senate followed on January 27, 1801 and Marshall received his commission on January 31. The national government had moved from Philadelphia to Washington in the fall of 1800, so Marshall was Chief Justice when the Court met for the first time in the new capital on February 4.[7] Marshall's appointment to the Court thus owes much not only to Jay's disinclination to return to his former post, but also to the election of 1796. Had the voting been the other way around, it seems inconceivable that a President Jefferson in place of a President Adams would have chosen Marshall as Ellsworth's successor.

Marshall's impact on American constitutional law and on the Supreme Court as an institution has been widely acknowledged and documented. What is sometimes overlooked, however, is the link between Marshall's tenure and an important question for democratic politics not just in Marshall's day but in our own: Why are some countries long on freedom and others short? While many factors and conditions incline societies toward one and away from the other, two essential elements stand out: limited government and rule of law. The first stands for the proposition that there are certain policies and practices that government may not pursue, just as the second codifies those restraints independent of those who administer them and lodges them with an institutional guardian. The first places some objectives out of reach, and the second sets the ruler apart from the rules. King Louis XIV's reputed boast "L'état, c'est moi"[8] is as alien to both as it is subversive thereof.

Accordingly, in the U.S. system, limited government and rule of law manifest themselves in the U.S. Constitution and in the judi-



John Marshall (left) had very minimal experience as a judge before being appointed to the Supreme Court in 1801. Not until Edward Douglass White (right) was elevated in 1910 did another candidate chosen to be Chief Justice have significant judicial experience.

ciary, particularly the Supreme Court. The judiciary is an arm of the national government, to be sure, but, thanks to the Constitution, it is sufficiently independent of the Congress and the presidency to qualify as one of the devices that "oblige [government] to control itself."[9] Indeed, one of the identifying trademarks of U.S. government is the long-standing association between the Justices and the Constitution. Even by the early nineteenth century, one could say little about one without mentioning the other. Were the judiciary not the custodian of constitutional limitations, as the Court has long insisted, limited government might be more form than substance. Popular sovereignty left unchecked by the courts would, in Marshall's words, "subvert the very foundations of all written constitutions" and "reduce to nothing, what we have deemed the greatest improvement on political institutions, a written constitution."[10]

These words were a commanding charge not only to Marshall's Bench but also to those Justices who followed. Because the Constitution deals with fundamental subjects such as grants of power, limits on power, and who shall govern, and because the Court since Marshall's day has continued to take seriously its guardianship of the Constitution, the Supreme Court matters politically. The result has, quite understandably, been a literature that is impressive not merely for its volume, but for the variety of methods, perspectives, and themes that writers have chosen in order to convey the Court to the public at large. Each of the books surveyed here represents one or a combination of such approaches. All allow readers to see the members of a richly textured institution and what they do.

Many of Marshall's accomplishments during his thirty-four-year tenure on the Supreme Court find recognition in **Shaping America**,[11] a compact and readable history of the Supreme Court by attorney Edward F. Mannino, who has taught legal history at both Temple University and the University of Pennsylvania. At the outset, the author promises "a detailed study of important decisions, examining both what the justices who decided them said in the texts of their opinions as well as the underlying

contexts in which they were decided by specific justices who were products of their times and political cultures."[12] He makes clear the foundational point of why study of the Court is important: "The influence of the Supreme Court on our daily life is pervasive.... That all this power could be exercised... would have shocked most of the founders."[13]

To tell his story, Mannino adopts an organization for his book that departs from the conventional. He chooses not to structure the book around periods defined by one or more Chief Justices, or to use a single event such as the Constitutional Revolution of 1937 as a watershed or divide between an "old" or "new" Court. Nor does he develop his material entirely topically. Rather, he builds an amalgam from a division of the Court's history into three parts. Part one traces institutional development and cases from the founding to the outbreak of the Civil War. In those years, "the Supreme Court sought to build federal power and encourage the growth of commerce under Chief Justices John Marshall and Roger Taney. It crippled itself institutionally... by embracing a national 'solution' for the problem of slavery."[14] Part two encompasses the vast expanse between the Civil War and 1960 at the height of the Cold War. Those years "began as a period of relative passivity, in which the Court regularly limited federal and state regulation of all forms of commercial activity.... As the New Deal took hold politically..., the pendulum swung toward upholding expansive federal regulation across the entire economy, coupled with a mixed record for protecting civil liberties."[15] Part three reaches from about 1960 to the present day. This segment began with "Court-endorsed and Court-enforced federal regulation, during which the powers of all branches of the federal government became paramount across a broad spectrum of daily activities, threatening the dual sovereignty concept underlying earlier visions of American society." This trend reached a "critical mass in the 1990s, [as] the Supreme Court began a partial retreat from federal supremacy in favor of a new, but limited, federalism."[16] The key word in the author's description of part three is "partial." Hopes that the Rehnquist Court would "overturn the Revolution of 1937 and harpoon once and for all the dreaded decision in *Wickard v. Filburn*... were dealt a shattering blow in *Gonzales v. Raich*... where six members of the Court held that the Federal Controlled Substances Act was a valid enactment under the commerce clause and could be used to prohibit the use of home-grown marijuana for personal medical purposes" even where such use was permitted by state law. In effect, he writes, "marijuana saved the New Deal."[17]

At a different level, each of these parts is divided into a series of chapters and then even further into what might be labeled subchapters, or subunits. For example, part one consists of three such divisions: "Building Federal Power," "The Supreme Court and the Slave Power," and "Making the Nation Safe for Commerce: The Supreme Court and Economic Development." The first of these in turn contains six subunits: "Building Federal Power," "Treason and the Tax Collector," "Judging Sovereign States," "Invalidating State Legislation," Declaring Federal Judicial Supremacy," and " Expanding the Reach of the Federal Government." The subunits are in reality very short stand-alone essays.

This array thus yields a volume that conveniently treats several cases and then links them to a broader theme across time. For example, as illustrations of the growth of national power, the early commerce clause case of *Gibbons v. Ogden*[18] is briefly explored within just a few pages of the fugitive slave cases of *Prigg v. Pennsylvania*[19] and *Ableman v. Booth*.[20] Readers find that they are then only a short hop away from *United States v. Cruikshank*,[21] the *Civil Rights Cases*,[22] and *Plessy v. Ferguson*.[23] It was *Cruikshank* in which the Court reversed convictions under the Enforcement Act of 1870 of two of the perpetrators of the Colfax massacre, in which, on Easter Sunday, 1873, a mob in Louisiana killed over 100

African Americans.[24] In the Court's view, the indictments were defective because they "did not charge that the mass murders were done with the intent to deprive the victims of a constitutionally protected right because of their race." "In what surely must rank with the understatements of all time in a Supreme Court opinion," continues Mannino, "Chief Justice Waite observed that 'we may suspect that race was the cause of the hostility; but it is not so averred.'"[25] The author concludes this subunit with a telling observation by W. E. B. Dubois: "The slave went free, stood a brief moment in the sun, then moved back again toward slavery."[26]

Regardless of the period, Mannino believes, the Court's decisions have "generally reflected a confluence of three factors that interacted in different ways." First were the appointments made to the Court, including individuals the author considers "dominating justices." Second was "the influence of the dominant political cultures of the respective times." Last were the "general attitudes of the general public on specific issues that captured [the Court's] attention at various times."[27] The first of these factors can hardly be disputed. What was true in Marshall's time remains true two centuries later: "the appointment of specific new justices to the Court can be a significant catalyst to changes or refinements in doctrine."[28] The term "political culture" draws more from political science than from history and law and generally refers to the collective political psychology of a country, or, in one standard definition, "a learned pattern of behavior that tends to govern individual lifestyle, beliefs, customs, and values."[29] Thus, in Mannino's application of the concept, the Court's "evisceration" of the Fourteenth Amendment during and shortly after Reconstruction "can be traced to widespread views held in the predominating political culture. Thus the free labor philosophy of Abraham Lincoln and the dominant nineteenth century Republican Party held that equality was guaranteed only in legal treatment of the races but did not extend to the social sphere because social equality had to be 'earned.'"[30]

The second factor is sometimes not easily isolated from the third, however, in that the author uses the first of the Court's two recent rulings on the Second Amendment[31] as an illustration while also reminding readers, in light of the intense unpopularity of some Supreme Court decisions, that he does not necessarily align himself with the fictional Mr. Dooley's assertion that "the Supreme Court follows the election returns."[32] What, then, is the Court to do when the Justices feel compelled to act in situations where there is or might be a large negative opinion? "Cases such as *Brown v. Board of Education*, the school prayer cases, and *Bush v. Gore* must either be avoided completely or decided when presented, even in the absence of public support for their outcome.... [T]he Court must ask whether and why a particular issue must be decided now or whether and why further passage of time will assist the Court in reaching a judgment that will receive greater public tolerance, if not acceptance. In performing this calculus, however, the Court must not abandon a class of litigants to illegal discrimination or unfair treatment.... In selecting justices to serve on this court of last resort, the need for uncommon wisdom is paramount."[33]

"May you live in an interesting age"[34] is a variant of an ancient curse supposed to have been hurled at one's enemies. Stripped of its hurtful implications, "interesting age" might well describe nearly any segment of Supreme Court history. Certainly that could accurately be said of Thomas Campbell Clark's years as Attorney General of the United States (1945–49) and his years on the Supreme Court (1949–67). More than four decades after his retirement, Justice Clark is now the subject of a thoroughly researched, readable, and sometimes revealing biography by his daughter Mimi Clark Gronlund, who was reference librarian for many years at the Alexandria campus of Northern Virginia Community College. With an expected emphasis on his Court service,

Supreme Court Justice Tom C. Clark[35] encompasses much of the Court during Chief Justice Fred Vinson's tenure and almost all of the Warren Court years.

Together, those years do indeed qualify as an "interesting age." As a transitional Bench,[36] the post-war Vinson Court followed the Constitutional Revolution of 1937 by barely a decade. In contrast, Earl Warren's tenure as Chief Justice from 1953 until 1969 proved to be one of the most active, dynamic, 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.[37] Hardly an aspect of life escaped its reach through landmark decisions on race discrimination, legislative districting, privacy, and the Bill of Rights. With the possible exception of the Revolution of 1937, never had so much constitutional jurisprudence been upended, replaced, and reoriented in so short a time. The Warren Bench truly instigated its own revolution, American style, the thrust of which is still felt today.

Gronlund's book, a project that apparently stretched over a twenty-five-year period and grew out of a master's thesis she wrote at George Mason University, makes an important contribution to the literature of the Court. Not only is it the first major book-length treatment of Justice Clark,[38] whom one scholar described as "the most underrated Justice in recent history,"[39] but it also benefits from interviews she conducted with three of her father's colleagues on the Court (Justices William J. Brennan, Potter Stewart, and Byron White), and makes use of her father's papers in the Truman Library, which cover his days at the Justice Department, as well as his Court papers, which are cataloged in the Tarlton Law Library at the University of Texas at Austin.

Clark's opportunity for a career on the Court was occasioned by Justice Frank Murphy's death on July 19 at the age of fifty-nine. As Attorney General, Clark dutifully prepared a list of names for President Harry Truman's consideration, but Truman, apparently without consulting other advisers, had already made up his mind. A few days after Murphy's death, Truman told Clark that he was considering a package appointment: Clark for the Court and Senator J. Howard McGrath of Rhode Island, then also chair of the Democratic National Committee, for Attorney General.

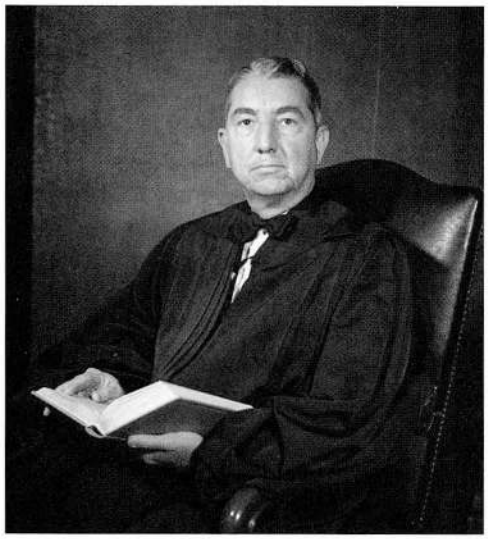
Gronlund's treatment of her father's nomination and confirmation is a reminder that contentious judicial appointments are not an entirely recent phenomenon. There were thirteen nominations to the Supreme Court between Judge John Parker's rejection (39–41) by the Senate in 1930, and Clark's confirmation (73–8) in 1949. Of the nominations that were approved by a recorded vote (as opposed to a voice vote only), only Senator Hugo Black's in 1937 generated more negative votes, with 16 nays.[40] With Democrats in control of the Senate and the nomination in the hands of Senators Tom Connally, Richard Russell, and the recently elected Lyndon Johnson, confirmation, despite some tumult, was probably never in serious doubt.

Nonetheless, criticism of the nomination from some quarters across the political spectrum was pointed. Some claimed that this longest-serving member of Truman's Cabinet owed his selection on July 2 to cronyism. Harold L. Ickes, who had headed the Interior Department in the Franklin Roosevelt administration, maintained that the nominee lacked the "legal learning, the intellectual qualities[, and] the vision needed for the position."[41] Ickes wrote an article for the *New Republic* entitled "Tom Clark Should Say 'No Thanks.'" "[P]erhaps it was in keeping that the least able of Attorneys General of the United States should, as a result of raw political favoritism, become the least able of the members of the Supreme Court."[42] Similarly, "I trust that every person who believes in and is willing to fight for the Bill of Rights and the Constitution will write and wire the Senate Judiciary Committee to oppose this nomination," announced

Henry Wallace, one of FDR's vice presidents and a Progressive party candidate for President in 1948.[43] This being early in the era of loyalty programs and concern about subversive elements, the Blue Star Mothers of America notified the Judiciary Committee that its members "unequivocally charge Tom Clark to be definitely of COMMUNISTIC TENDENCIES."[44] Even though the Justice Department had filed an amicus brief in *Shelley v. Kraemer*[45] opposing racially restrictive covenants in deeds, and even though Thurgood Marshall, of the Legal Defense Fund of the NAACP, supported Truman's choice, William Paterson of the Civil Rights Congress insisted in his testimony that the "nomination of this man must be an indication to Negro Americans of a perilous future."[46] In contrast to today's practice, the Judiciary Committee did not call upon the nominee to testify but forwarded the nomination to the full Senate by a vote of 9–2. After the vote to confirm, the Chief Justice swore in his new colleague at a White House ceremony on August 24.[47]

Justice Clark's eighteen years on the Court proved to be an effective counterweight to the assessments and predictions of his naysayers in 1949. In one scholar's view, Clark's record "is proof of man's inherent ability to grow remarkably in a position of high responsibility and authority."[48] Indeed, one of the strengths of Gronlund's biography is the insights it provides into Clark's own legal thinking, his role in various rulings, and the work of the Court itself during a period of Court history in which the rendering of seminal decisions seemed to be more often the norm than the exception.

For example, soon after his arrival on the Bench, the Court confronted two cases, *McLaurin v. Oklahoma State Regents*[49] and *Sweatt v. Painter*,[50] that were key precursors to the Court's culture-shaking decision in *Brown v. Board of Education*,[51] which overruled *Plessy v. Ferguson* and its long-standing "separate but equal" doctrine. In different ways, each involved racial segregation in graduate-level education: *Sweatt* challenged the whites-only policy at the University of



Mimi Clark Gronlund's new biography of her father, Tom C. Clark (pictured), provides valuable insights into the Justice's legal thinking and his role in various rulings.

Texas Law School, where Clark received his law degree, while *McLaurin* challenged the titular student's segregated status on campus.[52] In each case, the Court struck down the challenged policy, meaning that *Sweatt* marked the first instance in which the Supreme Court ordered the admission of a black student to a previously all-white institution.

What may not be well known is that in April 1950, before the Justices had discussed the cases in Conference, Clark circulated a memorandum to his colleagues: "I hesitate to state my views prior to conference, but in these cases I think my convictions, based in part upon my experience in Texas, might be helpful to the Court. I will not recite all the reasons underlying my conviction that segregated education is unequal education.... My question then is 'how' to reverse [*Plessy*,] not 'whether' or 'why.' There is fear that a flat overruling of the Plessy case would cause subversion or even defiance of our mandates in many communities.... I believe those fears are relevant in resolving Constitutional issues of this type and of this magnitude. I would share those fears should we begin holding, today or tomorrow, that swimming pools may not be segregated; or should we decide that the fourth

grade in schoolhouses in Mississippi must be open to Negro and white alike. But I feel confident that those fears are groundless should we rule that there can be no segregation in the college or graduate schools. There will be no defiance by the school administrators.... I am in accord with the suggestion that we limit our opinion to graduate schools. I do not suggest, however, that we write an opinion reaffirming *Plessy* to all but graduate schools. I would not sign an opinion which approved *Plessy*.... Perhaps the fundamental legal reason for limiting discussion to graduate school is that we should avoid decision of Constitutional questions in advance of the strict necessity for that decision.... How will I vote when the swimming pool and grammar school cases arise? I do not know; that is irrelevant. Should they arise tomorrow I would vote to deny certiorari, or dismiss the appeal, so that we would not feel compelled to decide the issues."[53]

Two years later, while the United States was embroiled in the congressionally undeclared but United Nations–authorized Korean War, *Youngstown Sheet & Tube v. Sawyer*[54] occasioned the most serious clash between the Executive Branch and the Court since the New Deal years. To avert a crippling strike and the presumed national-security emergency that such work stoppages would cause, President Truman directed Secretary of Commerce Charles Sawyer to seize the steel mills. Although the Taft-Hartley Act of 1947, which Congress passed over Truman's veto,[55] provided an injunctive mechanism to deal with such situations, Truman chose to ignore the statute and instead to rely on his constitutional powers alone. In a 6–3 decision, with each of the Justices in the majority—including Clark—filing an opinion, the Court held that the President, who would leave office in January 1953 and whose standing in presidential approval ratings had collapsed,[56] had exceeded his authority.

While Justice Robert H. Jackson's opinion is perhaps the most often cited from this case for its taxonomy of presidential power, it may be that Clark's most closely and clearly articulated the reason why the President's action was constitutionally deficient. Clark acknowledged that "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself... In describing this authority, I care not whether one calls it 'residual,' 'inherent,' 'moral,' 'implied,' 'aggregate,' 'emergency,' or otherwise. I am of the conviction that those who have had the gratifying experience of being the President's lawyer have used one or more of these adjectives only with the utmost of sincerity and the highest purpose.... Where Congress has laid down specific procedures to deal with the type of crisis confronting the president, he must follow those procedures in meeting the crisis."[57] Justice Felix Frankfurter, one of the six in the majority, sent Clark a note on the meaning of what the Court had done "to thoughtful people who are fairly called 'liberals'—New Dealers and Fair Dealers. [The decision] vindicated and restored their faith in law. They feared our Court was like Hitler's court, Stalin's court and Peron's court, merely a political agency of the government. And you, more than anyone else, proved the Court's independence."[58] The "independence" that so pleased Frankfurter in the *Steel Seizure Case* made Truman livid. When Truman learned of the decision, he sounded off with a string of expletives[59] that were unmistakably "Trumanesque." Gronlund writes that her father would never admit that the decision cooled the friendship between the two men, but her own view is that "it had a negative impact on his relationship with a man he revered."[60] Truman may well have had the case in mind when, some years later, he reflected on making judicial appointments: "[P]acking the Supreme Court simply can't be done... I've tried and it won't work.... Whenever you put a man on the Supreme Court he ceases to be your friend. I'm sure of that. Lord knows I've tried."[61]

In addition to separation of powers and racial discrimination, Clark also had a role in some major criminal-justice issues that were beginning to command a larger share of the Court's time. One of the thorniest sprang from situations in which police acquired evidence or made arrests illegally. While evidence obtained by federal law-enforcement agents in violation of the Fourth Amendment had been excluded from trials in federal courts since *Weeks v. United States*[62] in 1914, states were nonetheless free, under the federal Constitution, to use such evidence in their own courts. In 1949, just before Clark joined the Supreme Court, a 5–4 Bench in *Wolf v. Colorado*[63] applied the Fourth Amendment's guaranty against unreasonable searches and seizures to the states by way of the Fourth Amendment, but it did not apply the *Weeks* rule as well, leaving states great latitude to decide what to do about illegally acquired evidence. *Irvine v. California*[64] gave Clark an opportunity to confront the conundrum in a situation in which the defendant had been convicted of violating state gambling laws after police planted a microphone in his home. As Gronlund describes the case, Clark initially voted to reverse. In a memo seen only by his law clerks and Justice Jackson, Clark wrote: "I cannot tolerate this burglary on the part of the police.... Shall we, must we, accept lawlessness on the part of the police as a solution to the lawlessness of the criminal?... Certainly *Wolf* was not then thought to be a carte blanche for the states." Based on the recollections of his clerks, "Clark took the memo into Jackson's office. Jackson was writing the opinion in favor of affirming the conviction. There were no witnesses to the conversation that took place, but when my father returned to his office more than an hour later, he announced that he was withdrawing his dissent and voting to affirm the conviction. His vote gave Jackson a majority. No explanation was offered to the law clerks, but my father's concurring opinion—he did not join the one written by Jackson—explains his reasoning: 'Had I been here in 1949, when *Wolf* was decided, I would have applied the doctrine of *Weeks*... to the states. But the Court refused to do so then, and it still refuses today. Thus, *Wolf* remains the law and, as such, is entitled to the respect of this Court's membership.'"[65]

Seven years after *Irvine* came down and seven years after Justice Jackson's death, the Court heard arguments in *Mapp v. Ohio*.[66] Initially, the case was argued as a First Amendment case as to whether a state could criminalize possession of obscene materials in the home. According to Gronlund, Justice Douglas then floated the idea at Conference of using the case to apply the exclusionary rule to the states. In Dollree Mapp's situation, after all, police had used high-handed methods in a warrantless search that had turned up the evidence used for her conviction. But Douglas's idea attracted little support. Following that Conference, however, Justices Brennan, Black, and Clark discussed Douglas's plan at lunch, and a majority soon coalesced around Douglas's plan, with Warren eventually assigning the opinion to Clark. After Justice John Marshall Harlan was sharply critical of Clark's first draft in its departure from *Wolf*, Clark responded forcefully. "It is true that *Wolf* has been adhered to in several cases, but in each in which a full dress opinion resulted it was done grudgingly... I think the trouble stems from *Wolf* which enunciates a constitutional doctrine which has no escape clause mitigating against the inexorable result, i.e., if the right to privacy is really so basic as to be constitutional in rank and if it is to be really enforceable against the states... then we cannot carve out of the bowels of that right the vital part, the stuff that gives it substance, the exclusion of evidence. I hope you will restudy the opinion, John, and find logic and reason in it."[67]

The presence or absence of what Clark called an "escape clause" seems also to have been dispositive for him in *Baker v. Carr*,[68] the groundbreaking legislative-districting case the Court decided in 1962. When Earl Warren retired as the fourteenth Chief Justice of the United States in 1969, journalists asked him to identify his major contribution. The question was potentially difficult, given the series of

landmark rulings the Court had erected across the landscape of American constitutional law during Warren's sixteen years as Chief. Yet Warren's apparently surprising answer to the reporters' question was categorical: the redistricting and representation cases, of which *Baker* was perhaps the most important.[69]

In this watershed 6–2 decision, the Supreme Court announced that numerical disparities among state legislative districts presented a justiciable issue—that is, a question appropriate for judicial consideration—under the Fourteenth Amendment. Prior to *Baker*, the Court had steered clear of involvement in the politics of redistricting. With almost all states having population imbalances in at least one house of the state legislature and with population disparities also present in the congressional districts of most states, *Baker* signaled that federal courts would now become intricately entangled in politics in new ways. The decision, however, set no standard for federal courts to apply in such cases. That standard—one person, one vote—was not forthcoming until the later decisions of *Gray v. Sanders*,[70] *Wesberry v. Sanders*,[71] and *Reynolds v. Sims*.[72]

Gronlund shows how *Baker* was almost a very different decision and therefore offers insight into the Supreme Court's decision-making process. When *Baker* came down on March 26, 1962, William J. Brennan's majority opinion spoke for six members of the Court. Concurring opinions by William O. Douglas and Clark indicated that they would reach the merits of the case if the allegations of inequality in the suit could be sustained. Stewart also concurred, stating that the merits of the case were not before the Court for review. Frankfurter and Harlan dissented, and Charles Whittaker did not take part. When the case was initially argued during the 1960 Term, however, the vote in conference vote was four to four, with Clark, initially, and Whittaker joining Frankfurter and Harlan.

Stewart, it seemed, was undecided on the issue of jurisdiction—that is, whether the issue of legislative districting was justiciable. And it was at his urging that the case was carried over for re-argument in the following Term. Stewart thus seemed to hold the swing vote and was courted by both sides. As Harlan insisted in a memo to Stewart, "From the standpoint of the future of the Court, the case involves implications whose importance is unmatched by those of any other case coming here in my time."[73] Stewart then came around to the view that the Court could take jurisdiction, thus giving a 5–4 vote in favor of the Tennessee plaintiffs.

As is now known from other accounts,[74] Warren, Hugo L. Black, Douglas, and Brennan wanted to do more than simply to acknowledge jurisdiction. Going to the merits, they would hold that the Fourteenth Amendment required Tennessee to provide "approximately fair distribution or weight in votes." This was *not* the numerical-equality rule the Court imposed in later cases. Moreover, the four Justices were prepared to impose that standard only on one house of a state legislature. To keep Stewart's vote, however, Brennan, to whom Warren had assigned the opinion in *Baker*, had to stick to jurisdiction and leave standards alone. After Frankfurter circulated his dissent, Clark quickly indicated agreement. Frankfurter then suggested to Clark that he write a concurring opinion laying out alternative remedies, outside the federal courts, that Tennessee voters could pursue to redress their grievances. Presumably, Frankfurter wanted to make sure that Clark's vote held tight by nudging him to convince himself that Tennessee voters had other channels for relief. But the suggestion backfired. As Clark wrote Frankfurter, "I have checked into the record and I am sorry to say that I cannot find any practical course that the people could take in bringing this [fair representation] about except through the Federal courts."[75] He then changed his vote and wrote a concurring opinion explaining that "I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee."[76]

Clark's concurring opinion meant that Stewart's vote was no longer necessary to give Brennan's opinion majority status and that *Baker* could reach beyond the jurisdictional point. But because of Stewart's earlier insistence that the Court go no further, the opinion Brennan announced in the courtroom was largely the opinion he had written before Clark switched his vote. Had Clark sided with Brennan initially, or shortly after re-argument, it seems plausible that *Baker* would ultimately have reached the question of standards as well as the question of jurisdiction. And the standard might therefore have been the one of "approximately fair weight" for only one house of a state legislature. Had the case worked out this way, one can only speculate whether the same Justices would have changed their minds to adopt the nearly inflexible rule of numerical equality (one person, one vote) imposed shortly afterwards.

Clark's own change of mind thrilled Brennan. "Your father was sick at home," Brennan related to Gronlund much later. "He called me up and said 'Look, I've been trying to dissent... but I can't, and I think I'm going to join you.' I remember running out of here [the Supreme Court Building] grabbing a car driving out to the apartment and discussing his concurring opinion. That was an enormous contribution to a very difficult field, and he brought along, when he changed, a lot of people who were on the fence."[77] In Brennan's view, one of Clark's "most important contributions to the Court was his success in building public support for controversial decisions."[78] With *Baker* in particular, Brennan must have supposed that there was a huge difference in the public's perception between a 6–3 decision and one that was 5–4.

In addition to Clark's role in some memorable cases, Gronlund also addresses her father's departure from the Court in 1967. His retirement after eighteen years on the Bench has been described as "self-imposed."[79] A less kind characterization would be that Clark's departure was "forced,"[80] or even engineered, after President Lyndon Johnson named Clark's son Ramsey as Attorney General, replacing Nicholas Katzenbach, who had become Deputy Secretary of State. Gronlund explains that "the decision to retire was an easy one for [Clark]... I truly believe that Ramsey's appointment brought my father more satisfaction and happiness than any of his own achievements."[81]

Augmenting Gronlund's assessment of her father's retirement is the volume's "Foreword," written by Ramsey. Ordinarily, a foreword in a book is purely ornamental. This one is substantive.[82] Ramsey had become Acting Attorney General by law when Katzenbach became Under-Secretary of State in September 1966.[83] "Within a day or so, President Johnson called me on the telephone and said that he would not appoint me attorney general" because there "were too many Texans in high positions, and the office of attorney general was too sensitive for another one."[84] In January 1967, "out of the blue," Johnson telephoned Ramsey and told him "that my father would have to retire from the Court if I were appointed attorney general" even though "scores of cases from the Lands Division, where I had served as assistant attorney general and while I was deputy and from the entire Department of Justice were decided by the Court while I was in office, and Dad had participated in the proceedings.... Appearance, however, would be a great problem. The interests of justice would clearly be best served if the attorney general were someone other than the offspring of a sitting justice."[85] Then at the end of February 1967, "I was asked to come to the White House to meet with the president for no stated purpose—a frequent request. When I arrived, I was sent into the Oval Office, where I found the president sitting at his desk alone. We chatted briefly, then the president said he had changed his mind and was announcing my appointment as attorney general. He then reached under his desk and pressed a button, and the press poured in.... As I was leaving the Oval Office, I was told that the Supreme

Court had announced my father's retirement at the end of the Court's term. My father and I had not discussed the subject before and did not discuss it after my appointment."[86]

At the very least, this vacancy gave the President, through his nomination of Thurgood Marshall, the opportunity to name as Clark's successor not only an ideological soulmate, but also the first nonwhite to the Supreme Court, in a situation in which there had been neither an existing nor an anticipated vacancy on the Bench. One is then left wondering whether Johnson's principal objective in these maneuverings was to have Ramsey Clark as Attorney General or Thurgood Marshall on the Supreme Court. Whatever the reality, Johnson was able to ensconce both.

Within eight years of Marshall's arrival, the Court experienced an unexpected and unusual number of changes in its roster through Justice Abe Fortas's resignation and the retirements of Chief Justice Warren and of Justices Black and Harlan. There was also an anticipated vacancy after Justice Douglas, at seventy-six, was stricken by a stroke on New Year's Eve, 1974. Although seriously disabled, Douglas, the longest-serving member of the Court, was reluctant to leave the Bench. Ignoring or eluding pressure from whatever source, Douglas reached his own decision to depart almost a year later, on November 12, 1975. For Douglas's seat, President Gerald Ford nominated John Paul Stevens, a fifty-five-year-old appeals court judge from the Seventh Circuit and a former clerk to Justice Wiley Rutledge. The Senate quickly confirmed, 98–0, and on December 19, 1975, he was sworn in.

Stevens, only the second future Justice to clerk at the Supreme Court[87]—he clerked for Justice Wiley Rutledge in the October 1947 Term—is now the subject of **John Paul Stevens: An Independent Life**,[88] an admiring volume by Bill Barnhart and Gene Schlickman. Barnhart is a former columnist for the *Chicago Tribune*. Schlickman is a retired lawyer and Illinois state legislator. Their book, which was published in April 2010, reflects nearly uncanny timing in light of the fact that it was on April 9, 2010, that Stevens, just eleven days shy of his ninetieth birthday, announced his intention to retire when the Court "rises for the summer recess this year."[89] Theirs is the first book-length treatment of Stevens since Robert Judd Sickels' **John Paul Stevens and the Constitution: The Search for Balance**, which appeared in 1988, and Kenneth A. Manaster's **Illinois Justice: The Scandal of 1969 and the Rise of John Paul Stevens**, which was published in 2001. Befitting their title, Barnhart and Schlickman report that their subject "remained impartial—one might even say independent—throughout the process of our research and writing of this book. While he did not sit for extensive interviews, he provided anecdotes, made himself available when questions arose, and was, throughout, a gracious and interested spectator."[90] Their

The authors of the new biography *John Paul Stevens: An Independent Life* made use of the Papers of Justices Marshall and Blackmun at the Library of Congress, the Charles H. Percy Papers at the Chicago History Museum, resources at the Gerald R. Ford Presidential Library, and on-record interviews with law clerks of Stevens. Stevens (pictured) was photographed in uniform while serving in World War II.

experience as authors therefore seems very different from what the biographer of Justice White experienced, where the subject remained greatly detached from the project throughout.[91]

Books about Supreme Court Justices that collectively and loosely may be called judicial biographies typically present their subjects in the context of several different types of information and related perspectives. One emphasizes the personal and encompasses, but is not limited to, the individual's upbringing and professional life path to the high Bench, including any prior judicial service. Such treatment is essential for understanding the person who becomes the Justice. Because each individual is a product of her or his home life and various experiences, knowledge of this dimension of a Justice's past, including the maturation of thinking and the education and shaping of the Justice's mind and values, holds out the potential for opening a window of explanation into the Justice's behavior on the Bench. One would also expect to find an analysis of the appointment to the Court in both the nomination and the confirmation phases. The Justice's jurisprudence—constitutional jurisprudence in particular—as revealed in judicial opinions, speeches, and other writings is a second category. A third focuses on the individual's work as a Justice in terms of the Court's day-to-day decision-making. The goal, especially of the third element, is to achieve not only further knowledge of the particular Justice but also a more comprehensive understanding of the Court itself.

Thanks to the use the authors made of the Papers of Justices Marshall and Blackmun at the Library of Congress, the Charles H. Percy Papers at the Chicago History Museum, resources of the Gerald R. Ford Presidential Library, and on-record interviews with law clerks of Stevens, among other sources, the reader has glimpses of the Justice at work on several key cases, including the flag-protection cases of *Texas v. Johnson*[92] and *United States v. Eichman*,[93] where Stevens wrote memorable dissents. Also noteworthy is the authors' treatment of Stevens' role in influencing the opinions that were issued in the major election-year abortion decision of 1992.[94] Comprehensive evaluation of Stevens' constitutional jurisprudence as it took shape over his long career seems to have been outside the scope of this book and so remains a task that will have to be addressed by others.

It is with respect to information relating to the first category outlined above, largely slighting only the formative role that Stevens' education may have had, that Barnhart and Schlickman make their major contribution. The reader comes away from the book with the impression that probably no other Supreme Court Justice in the modern era grew up with a more comfortable and privileged background. Indeed, it was more than comfortable; it was well heeled. Stevens' father developed and operated one of the grander hotels—the Stevens—along South Michigan Avenue in Chicago, a city that by the 1920s had no shortage of fine hotels. While the authors make clear that the family encountered its share of financial and legal troubles, the future Justice, whose family had a compound in Lakeside, Michigan, encountered no hardscrabble beginnings of the sort experienced, for example, by William O. Douglas as a youngster.

"Stevens's Hyde Park neighborhood roots were English, not Irish, and he was a Republican. But he was not political," explain the authors. "William J. Bauer, one of the Chicago area's most politically astute Republicans and a Seventh Circuit judge, quipped that Stevens's only political expression in the 1960s was on occasion 'to applaud vigorously' when his former University of Chicago classmate Charles Percy ran for office as a Republican. On the other hand Democrat Abner Mikva recalled that Stevens sent him a small check when he first ran for the Illinois legislature in the 1950s. More problematic to many, Stevens rooted for the North Side Chicago Cubs in the core fan base of the South Side Chicago White Sox."[95] Given the authors' theme, which they fold

into part of the title, that Stevens was always very much the independent (as reflected even in the trademark bow tie that he, like Justice Clark, typically preferred), his comfortable and well-connected origins, coupled with a fine intellect and solid legal skills, clearly did much not only to encourage that independence, but to make it possible. Scattered about the book are short tours into the professional and political worlds Stevens inhabited as an attorney before becoming a judge. One is served generous portions of, and given insights into, squabbles of varying intensities in a city and state in which electoral politics and bar-association machinations, not just baseball and football, are principal pastimes. Politically squeamish readers are hereby forewarned.

The authors provide, for example, a detailed and multilayered account of Stevens' appointment to the Seventh Circuit in 1970. Indeed, had he not gone on the appellate bench at this point, and in another illustration of the role that timing has played in shaping the Supreme Court, it seems reasonable to conclude that he would never have been named to the Supreme Court. The story merits at least a brief recounting here.

With the need to fill a vacancy on the appeals bench, choice of a nominee initially became a contest between the state's two Republican senators at the time, Everett McKinley Dirksen and Charles Percy, both of whom were vying for the greater influence over the White House of President Richard Nixon. At the beginning of the selection process, Stevens, who was in private practice at the time, seemed to be on no one's list. When Dirksen put forward the name of Chicago attorney Charles Bane for the seat, Nixon formally nominated Bane in May 1969. That nomination, however, was later withdrawn. "Bane almost immediately was damned by two of the most fearful antagonists a public figure in Chicago ever encountered: the Internal Revenue Service and *Chicago Daily News* columnist Mike Royko."[96] Dirksen died in September 1969. His seat was filled by former Illinois House speaker Ralph T. Smith, who was appointed by the state's Republican Governor, Richard Ogilvie. Dirksen's death and Smith's appointment meant that Percy now possessed whatever influence might radiate from being the senior Senator from Illinois. Still, "[t]he files of Senators Percy and Smith contain no evidence that Stevens put his name forward for a judicial post or that anyone else recommended him."[97]

Yet, by February 1970, a group of attorneys advising Percy gave their Senator a list of names, and Stevens' was among them. No doubt helping to push Stevens' name into view was the work he had done in leading an investigation for the Greenberg Commission following allegations of improprieties by justices of the state supreme court. Besides, Stevens was already "nationally known in the legal community as a major league baseball lawyer."[98] Percy later recalled that he and Stevens had been friends and classmates at the University of Chicago.[99] "In our senior year he was chairman of the men's honorary society, and I was chairman of the interfraternity council. He was the smartest senior in our class."[100] As the authors explain in trying to draw conclusions from a mass of facts, personalities, and twisting turns of events, "[t]he best story, which happened to be true, would be that Stevens was simply a highly qualified lawyer who had not sought a patronage job. If [Percy] could place Stevens on the federal appeals court, one step below the Supreme Court, Percy knew he could inaugurate a new regime for making judicial appointments in Illinois." Indeed, "Percy's perspective on the judiciary was that anybody who applied would not be considered."[101] The new senior Senator then recommended Stevens to Attorney General John Mitchell in February, with Nixon waiting until September 1970 to make the appointment.

Even though Washington politics might be less convoluted and sometimes less entertaining than Illinois politics, the authors lay out

nearly as much detail on Stevens' appointment to the Supreme Court to replace Justice Douglas as they do on his selection for the Seventh Circuit. As the authors describe the process in the Ford administration, where Richard B. Cheney was White House Chief of Staff and where the First Lady was particularly insistent that a woman be named, the leading contender for much of the time was Philadelphia's Judge Arlen Adams of the Court of Appeals for the Third Circuit.[102] Adams enjoyed strong support from Pennsylvania Republicans, led by Senator Hugh Scott. Ford's Attorney General, however, was Edward Levi, formerly of the University of Chicago, who held Stevens in particularly high esteem. As Levi laid out his appraisals in a memo to the President,

> Judge Stevens has proven to be a judge of the first rank, highly intelligent, careful, and energetic. He is generally a moderate conservative in his approach to judicial problems, and in cases involving the attempted expansion of constitutional right and remedies. He has shown particular ability in antitrust and other matters of federal economic regulation and would add strength to the Court in his area. Overall he is a superb craftsman. His opinions lack the verve of Judge Adams, but are more to the point and reflect more discipline and self-restraint.[103]

In contrast, Levi seemed to damn Adams with faint praise:

> His opinions have considerable flair and reach, which give them interest and can suggest an influential member of the Court, but revealing a certain weakness, not so much in analytical skills—which he has—but in being willing to sometimes bypass or go beyond the most careful analysis. This is the ultimate question about a judge, of course, but my guess is he has the potential to be a strong and good appointment.[104]

Given his long congressional experience, Ford surely knew that Adams's name had been floated in the Nixon years as a possible replacement for Justice Harlan, so in the authors' view, "Adams's 'sell by' date had come and gone."[105] If one continues that merchandising analogy, Stevens was far removed from any "sell by" date, as the 98–0 vote to confirm reflected.

The section on Ford's decision concludes with a fact that many may have forgotten about Stevens' appointment. Any "assessment of Ford as merely an expedient political calculator [in selecting a nominee whom no Senator could oppose] is contradicted by his appearance before the eight remaining justices" in the Courtroom on December 19, 1975, where the President, who was a member of the Bar of the Supreme Court, moved the seating of his nominee.[106] "The symbolism of Ford's 'request' to the third branch of government was not lost on Stevens. 'Despite the critical role played by the executive and legislative branches in the appointment process, the fact that the conclusion of the process [took] place in a judicial proceeding symbolizes the independence of the judiciary,' he said. 'I was particularly moved . . . when President Ford . . . appeared in Court to introduce Attorney General Levi, who in turn delivered my commission to the clerk of the Court.'"[107]

In reflecting on Stevens' Supreme Court career, the authors emphasize the value of judicial independence. The "enormous power of the Supreme Court and each member to apply personal judgment to evolving social concerns and thereby alter the lives of Americans deserves public attention," they note, but "making things simpler by etching rules for judging on a tablet somewhere in order to 'mediate' the creative mine of a judge is a fool's errand. . . . Rather than limiting independence by artificially defining the job of judging, the story of Justice Stevens demonstrates

the value of selecting the most independent-minded men and women to wear the robes, roll up their sleeves, decide cases, and learn on the job. This solution has an enormous advantage over any exogenous judicial rulebook, no matter how carefully it might be vetted by law scholars."[108]

Happily, the transcript of an interview with Justice Stevens, conducted on June 24, 2009, is one of sixteen now made available in **The Supreme Court**,[109] a volume sponsored by C-Span that features the Justices in their own words. An abbreviation of Cable-Satellite Public Affairs Network, C-Span is a U.S. cable television outlet that is owned and operated by the cable industry. Given the variety of public-affairs programming that C-Span regularly telecasts daily and principally from Washington, including proceedings of the House of Representatives and the Senate, it may be difficult to recall that this video resource, so ubiquitous today, has been airing programs only since 1979.[110]

Edited by C-Span executives and/or producers Brian Lamb, Susan Swain, and Mark Farkas, **The Supreme Court** brings to the printed-page and electronic-book formats a true treasure: the written record of a series of televised interviews with all nine Justices who were sitting in the fall of 2009,[111] plus retired Justices Sandra Day O'Connor and David Souter.[112] The additional transcripts are derived from interviews with persons such as journalist Joan Biskupic; former Solicitor General Drew Days III; Scotusblog reporter and veteran journalist Lyle Denniston; and William Suter, Clerk of the Supreme Court. The book concludes with a series of helpful tables and some biographical data.

The value of this collection should be immediately apparent. Even though the video recordings of the interviews are archived and have been televised on more than one occasion, the published transcripts in book form actually make the Justices' words much more widely available, even for those who may have had the opportunity, time, and foresight to have made a video recording at the time of the initial telecast. It is far easier to turn pages in a book or to move about on an electronic reader than to move forward and backward in a video recording, even one that has been digitally preserved. Without publication, the risk would be great that the interviews would effectively soon become lost treasures of the Court.

The interview with Justice Stevens occupies nineteen pages of **The Supreme Court** and nicely complements the portrait that appears in Barnhart and Schlickman's book. When asked whether he thought he would serve as long as he had on the Court, Stevens replied "No. In fact I had a law clerk . . . who was with me in my second or third year here. I asked him to prepare a memorandum for me on the ages of retirement of all my predecessors and to suggest the age at which I should plan on retiring. I thought then—and I still sometimes think—that you're not the best judge of when you should retire. I thought it would be helpful to have that kind of guidance. Well, I didn't follow the recommendation." When asked the year that was recommended, Justice Stevens replied, "I can't remember exactly, but the year has long gone by."[113] When asked his estimate of great Supreme Court Justices, he named obvious ones such as Benjamin Cardozo, Louis Brandeis, and Oliver Wendell Holmes, but he also added Stewart and White to the list.[114] His answer to the question of what he had learned from Justice Wiley Rutledge, for whom he had clerked, contains good advice for any writer: "I learned an awful lot. . . . I learned to take the time to write out your own draft opinion, so you're sure you understand the case before you turn it over to someone else to work on."[115]

Stevens also spoke candidly about whether he had ever changed his mind in a case after oral argument. "I can't tell you the number but it has happened. It has happened when I've been writing an opinion, for example. And that's one reason I think it's important for the justice to do the first draft. When you try to write something out, you sometimes learn things about the case that you didn't fully

appreciate or understand before. There has been more than one case on which I changed my views when I was writing the opinion."[116] Similarly, when asked about his participation in oral argument, he explained that his "philosophy is to ask questions when I think the answer might give me a little help in deciding a case. I don't view the participation of a justice as an opportunity for the justice to advocate one point of view. I think, rather, the questioning should be designed to help understand what the arguments on both sides are in order to enable the justice to reach a decision on his or her own views."[117]

As one senses from this collection and the other volumes surveyed here, the Court of today and its Justices, now more than 210 years after John Marshall's appointment as Chief Justice, reflect a powerful continuity with the past and the American tradition of the rule of law.

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

BARNHART, BILL, and GENE SCHLICKMAN. **John Paul Stevens: An Independent Life** (DeKalb: Northern Illinois University Press, 2010). Pp. xiii, 311. ISBN: 978-0-87580-419-4, cloth.

GRONLUND, MIMI CLARK. **Supreme Court Justice Tom C. Clark: A Lifetime of Service** (Austin: University of Texas Press, 2010). Pp. xvi, 320. ISBN: 978-0-292-71990-3, cloth.

LAMB, BRIAN, SUSAN SWAIN, and MARK FARKAS, eds. **The Supreme Court: A C-Span Book Featuring the Justices in Their Own Words** (New York: Public Affairs, 2010). Pp. xviii, 381. ISBN: 978-1-58648-835-2, cloth.

MANNINO, EDWARD F. **Shaping America: The Supreme Court and American Society** (Columbia: University of South Carolina Press, 2019). Pp. xxiv, 321. ISBN: 978-1-57003-857-0, cloth.

ENDNOTES

[1]According to a biographer of Marshall, the "hustings court handled minor civil and criminal cases and acted as the city's executive. It appointed and supervised the work of the city officials, granted licenses, and set prices for taverns and other public houses. The trial court itself met monthly, and Marshall served as magistrate for three years." Jean Edward Smith, **John Marshall: Definer of a Nation** (1996) 105.

[2]With a tenure lasting until 1829, Justice Washington became known as one of Marshall's staunchest allies after the latter's designation as Chief Justice. Indeed, Jefferson appointee William Johnson would later refer to Marshall and Washington together as "one judge." Letter from Johnson to Jefferson, December 10, 1822, in Donald G. Morgan, **Justice William Johnson: The First Dissenter** (1954) 181–82.

[3]Michael Kraus, "Oliver Ellsworth," in Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789–1969: Their Lives and Major Opinions**, vol. 4 (1969) 234.

[4]The date of Ellsworth's resignation is officially recorded as September 30. Presumably, that is the date of his letter, which then had to make its way from France to the United States.

[5]Although the Federalists had lost control of Congress in the 1800 elections, Jefferson's Democratic-Republicans would not fully take control until the new Congress convened in December 1801. This awkward thirteen-month gap between national elections and the convening of the new Congress was not effectively eliminated until ratification of the Twentieth Amendment in 1933.

[6]Quoted in Henry J. Abraham, **The Judicial Process**, 6th ed. (1993) 305–6.

[7]Marshall's exceedingly minimal judicial experience seems almost to have established a pattern for nearly a century: after Marshall, no person with judicial experience would be appointed Chief Justice until President William Howard Taft picked Associate Justice Edward Douglass White for the center chair in 1910. Among Marshall's predecessors, however, significant judicial experience was the norm. Chief Justice John Jay had served as chief justice of the New York Supreme Court of Judicature, 1777–78; Chief Justice John Rutledge not only served briefly as an Associate Justice on the U.S. Supreme Court but had previously been a judge of the Chancery Court of South Carolina, 1784–90, and chief justice of the South Carolina Court of Common Pleas, 1791–95; and Chief Justice Oliver Ellsworth was a judge on the Connecticut Superior Court, 1784–89.

[8]"The state is myself," or "I am the state." R. R. Palmer, **A History of the Modern World**, 2d ed. (1960) 158. The attributed remark was made before Parlement in 1651.

[9]**The Federalist, No. 51**.

[10]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

[11]Edward F. Mannino, **Shaping America** (2009) (hereafter cited as Mannino).

[12]*Id.*, 1.

[13]*Id.*

[14]*Id.*, 2.

[15]*Id.*, 3.

[16]*Id.*

[17]*Id.*, 267.

[18]22 U.S. (9 Wheaton) 1 (1824).

[19]41 U.S. (16 Peters) 539 (1842).

[20]62 U.S. (21 Howard) 506 (1858).

[21]92 U.S. 542 (1876).

[22]109 U.S. 3 (1883).

[23]163 U.S. 537 (1896).

[24]See Charles Lane, **The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction** (2008).

[25]Mannino, 73.

[26]Quoted in *id.*, 74.

[27]*Id.*, 3.

[28]*Id.*, 4.

[29]Jack C. Plano and Milton Greenberg, **The American Political Dictionary**, 10th ed. (1997) 9.

[30]Mannino, 5.

[31]*District of Columbia v. Heller*, 554 U.S. 570 (2008).

[32]Mannino, 5.

[33]*Id.*, 279.

[34]Frederic R. Coudert, "Preparation and Foreign Policy," 18 *Proceedings of the Academy of Political Science* 3 (May 1939).

[35]Mimi Clark Gronlund, **Supreme Court Justice Tom C. Clark** (2010) (hereafter cited as Gronlund).

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

[37]Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 16th ed (2011) 7 (hereafter Mason and Stephenson).

[38]While still a high-school student, Evan A. Young wrote **Lone Star Justice** (1998), which Amazon.com classifies as "young adult" reading.

[39]Bernard Schwartz, **Super Chief** (1983) 58 (hereafter Schwartz, **Super Chief**).

[40]Data come from the United States Senate, "Supreme Court Nominations, 1789–Present," *available at* http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited June 4, 2011).

[41]Gronlund, 143.

[42]Henry J. Abraham, **Justices and Presidents**, 3rd ed. (1992) 247 (hereafter Abraham, **Justices and Presidents**).

[43]Gronlund, 143.

[44]*Id.* (use of uppercase letters in the original).

[45]334 U.S. 1 (1948).

[46]Gronlund, 145.

[47]A photograph of the White House ceremony graces the front of the dust jacket of Gronlund's book. Chief Justice Vinson, holding a Bible in his left hand, is facing Clark, who has his right hand raised. A solitary iconic Western Electric cardioid microphone stands between them. Truman, perhaps two steps from the microphone, looks on. A larger version of the same photograph falls between pages 168 and 170 in a series of photographs of Clark and family members at different periods of his life. In the less cropped larger version of the ceremony photograph, one also sees Secretary of State Dean Acheson and Postmaster General Jesse M. Donaldson along with several unidentified individuals.

[48]Abraham, **Justices and Presidents**, 249.

[49]339 U.S. 637 (1950).

[50]339 U.S. 629 (1950).

[51]347 U.S. 483 (1954).

[52]Because state law banned the education of blacks and whites together, University officials had provided McLaurin (who was pursuing a doctorate in education) with a special table in the cafeteria, a designated desk in the library, and a desk just outside the classroom doorway.

[53]Gronlund, 152–53.

[54]343 U.S. 579 (1952).

[55]When the Taft-Hartley Bill was before Congress, organized labor labeled it a "slave labor law." "Taft Hartley Act," in Paul S. Boyer, ed., **The Oxford Companion to United States History** (2001) 761.

[56]As measured by Gallup, Truman's presidential approval rating reached its low point of 22% in February 1952. Gallup Presidential Job Approval Center, *available at* http://www.gallup.com/poll/124922/Presidential-Job-Approval-Center.aspx (last visited on June 4, 2011).

[57]*Youngstown*, 343 U.S. at 663 (Clark, J., concurring), quoted in Gronlund, 156.

[58]Quoted in Gronlund, 157.

[59]Abraham, **Justices and Presidents**, 247–48.

[60]Gronlund, 157.

[61]Abraham, "Can Presidents Really Pack the Supreme Court?" in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991) 46.

[62]232 U.S. 383 (1914).

[63]338 U.S. 25 (1949).

[64]347 U.S. 128 (1954).

[65]Gronlund, 200.

[66]367 U.S. 643 (1961).

[67]Gronlund, 202.

[68]369 U.S. 186 (1962).

[69]Mason and Stephenson, 179.

[70]372 U.S. 368 (1963).
[71]376 U.S. 1 (1964).
[72]377 U.S. 533 (1964).
[73]Gronlund, 210.
[74]Schwartz, **Super Chief**, 410–23.
[75]Gronlund, 210.
[76]*Id.*, 211.
[77]*Id.*, 210.
[78]*Id.*, 209.
[79]Abraham, **Justices and Presidents**, 249.
[80]Gronlund, 227.
[81]*Id.*
[82]The foreword appears in *id.*, vii–xvi.
[83]The same position is now called Deputy Secretary of State.
[84]*Id.*, xii.
[85]*Id.*
[86]*Id.*, xiii.
[87]Byron White, who clerked for Chief Justice Vinson in the October 1946 Term, was the first.
[88]Bill Barnhart and Gene Schlickman, **John Paul Stevens: An Independent Life** (2010) (hereafter cited as Barnhart and Schlickman).
[89]Letter, Justice John Paul Stevens to President Barack Obama, Apr. 9, 2010, *available at* http://www.supremecourt.gov/publicinfo/press/JPSLetter.pdf (last visited on June 4, 2011).
[90]Barnhart and Schlickman, ix.
[91]Dennis J. Hutchinson, **The Man Who Was Once Whizzer White** (1998) 5–6.
[92]491 U.S. 397 (1989).
[93]496 U.S. 310 (1990).
[94]*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[95]Barnhart and Schlickman, 140.
[96]*Id.*, 146.
[97]*Id.*, 153.
[98]*Id.*, 143.
[99]Indeed, Justice Stevens' education at the University of Chicago extended from kindergarten through his senior year of college. *Id.*, xi. He received his law degree from Northwestern University.
[100]*Id.*, 154.
[101]*Id.*
[102]Judge Adams was born in 1921, a year after Stevens. He sat on the Third Circuit bench from 1967 until his retirement in 1987.
[103]*Id.*, 190.
[104]*Id.*
[105]*Id.*
[106]Chief Justice Warren Burger later informed Ford that it appeared to be the first time that an incumbent President had moved the seating of his nominee. *Id.*, 197.
[107]*Id.*
[108]*Id.*, 271–72.
[109]Brian Lamb, Susan Swain, and Mark Farkas, eds., The **Supreme Court** (2010) (hereafter cited as Lamb).
[110]C-Span-2 originated in 1986, and C-Span-3 began its telecasts in 2001.
[111]Thus, Justice Elena Kagan, who joined the Court in 2010, is not included.
[112]The transcript of the interview with Justice O'Connor is printed in full. Only a single paragraph of Justice Souter's comments appear, although given his reflections on the intimacy of oral argument in the Courtroom, one wishes there were more. As Swain explains in the book's introduction, "Unfortunately, you won't be able to read more of David Souter's comments in this book as he was the only justice to graciously, but explicitly, decline our request to publish the full text of his [20-minute] interview." Lamb, xv.
[113]*Id.*, 47. After his retirement in 2009, Justice Souter noted that Justice Stevens had "deputized" him "to tell him if he had stayed too long." David J. Souter, "Tribute to John Paul Stevens," 35 *Journal of Supreme Court History* 195, 195 (2010).
[114]Lamb, 49–50.
[115]*Id.*, 38.
[116]*Id.*, 51.
[117]*Id.*

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Illustrations

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Page 170, Collection of the Supreme Court of the United States.

Cover image: Tom C. Clark was photographed at the White House on the day he was appointed Attorney General in 1945. His son Ramsey, daughter-in-law Georgia, daughter Mimi, and wife Mary accompanied him. This issue contains a review of Mimi Clark Gronlund's new biography of her father.