Introduction

Melvin I. Urofsky

Every time I write an introduction to a new issue of the *Journal,* I am amazed at the variety of topics that are included. In the past I have noted, and will note again, that when I was in college and even in graduate school, courses in constitutional and legal history consisted almost entirely of cases. One might read *Lochner v. New York* (1905), for example, and spend all of the time on Rufus Peckham's majority opinion and Oliver Wendell Holmes' dissent (one sort of dismissed the Harlan dissent, although in jurisprudential terms it is far better than that of Holmes). No one paid attention to the Progressive Era campaigns to secure better working conditions and limits on how long a person labored, or how *Lochner* and other cases affected the politics of the time.

Even when I went to law school in the early 1980s, the history surrounding cases was absent in nearly all classes. As Judge Posner once remarked in dismissing judicial biographies, it did not matter where a Justice came from or what elements in his or her background led to a particular opinion. For lawyers and judges, the only thing that mattered in a case was the bottom line—what did the court say the law was, and how would this affect future litigation or prosecutions?

Were we still in this era, none of the articles in this issue would have seen the light of day. Tony Freyer and Daniel Thomas do have an article on the 1849 *Passenger Cases,* but they are looking at that decision not so much in light of internal jurisprudential logic as in the far broader context of transatlantic commerce. In doing so, they are joining a new wave of historians who, while still interested primarily in American history, argue that, not only during the colonial times but afterwards, the United States has to be seen in the larger context of the Atlantic region—of the commercial, cultural, social, and economic interactions between the United States, on the western side of the ocean, and Great Britain and other European powers to the east.

Dale Yurs finished his master's degree in history at the University of Northern Iowa, and his mentor, John Johnson, suggested that he send part of it to us so we could consider it for publication. We liked what we saw, and suggested that his chapter on circuit-riding and its hardships would be interesting to our readers.

Everyone knows that, for a century, the Justices complained about what they saw as the most onerous part of their duties, and Dale tells us why.

Another piece written by the author during student days is Chris Hickman's examination of how Richard Nixon targeted the Supreme Court and its decisions in the 1968 presidential election. That article is the winner of this year's Hughes-Gosset Student Prize. The Court as an object of political condemnation is not unusual in American history: Thomas Jefferson condemned the Marshall Court, Abraham Lincoln attacked the *Dred Scott* decision, and both Theodore Roosevelt and his cousin Franklin had some harsh things to say about the High Court. Nixon, however, took the criticism to a new level.

The case of *Bradwell v. Illinois* continues to serve as a teaching tool for understanding the status of women in the latter part of the nineteenth century. Myra Bradwell herself was an extraordinary woman, and, despite the prejudice she faced, she became one of the leading legal figures in the Midwest. John Lupton's research uncovered interesting documents concerning her work, and we are pleased to be the venue in which they come to light.

In some ways, the remaining articles this month are somewhat "internal." Peter Bozzo and Lilit Sheymajash "Shimmy" Edwards are former judicial interns at the Supreme Court, while April Christine is a former Supreme Court Fellow. Their manuscript caught my attention because I am currently working on a book on dissent, and their article on the origins of dissent in the High Court is chock-full of the type of information that is not only useful to me, but also interesting to anyone who follows the Court's history.

Clare Cushman, of course, is our managing editor, the person that both Tim and I recognize as the engine that gets this publication out three times a year. However, Clare has done a great deal of writing and editing in her own name, as it were, and her books are intended to make the history and workings of the Court understandable to nonlawyers. Her latest book, **Courtwatchers: Eyewitness Accounts in Supreme Court History** (Rowman & Littlefield) includes stories starting with the early days of the Court and covers a multitude of topics, including famous feuds and stepping down. We are pleased to have a chapter on the spouses and children of the Justices for this issue.

Although I thank Grier Stephenson every time he writes "The Judicial Bookshelf," I really cannot thank him enough. Grier has been doing this job since before I took over as editor in 1993, and he is the type of contributor every editor cherishes—on time, professional, and with the added bonus that he writes well.

So, as usual, a varied feast. Enjoy!

The Early Supreme Court and the Challenges of Riding Circuit

DALE YURS

The ratification of the United States Constitution ushered in a new system of government. No longer did the thirteen states merely hang together by the threads of a confederation; they now bonded to each other as one nation. Organized chiefly by the first three articles of the Constitution, a federal government began to take shape. The Framers expressly laid out the functions and duties of the first two branches in the first two articles—the legislative and executive. However, Article III, which organized the judiciary, remained short and ambiguous. The Founders charged the First Congress with the task of organizing the federal judiciary. Even after Congress created the judiciary, however, questions still plagued the system. This essay argues that the actions taken by the Justices of the early Supreme Court to ease the burden of circuit riding expanded and further defined the judiciary's role as a branch of government.

The many sources left by the Justices provide an insight into the sentiment of the Supreme Court. The issue of circuit-riding played a pivotal role in the lives of those early Justices. The correspondence between Justices, formal documents sent to Congress, and pieces of legislation show how the Justices' actions further defined the role of the judiciary. Both Chief Justice John Jay and Associate Justice Thomas Johnson expressed strongly negative feelings toward circuit riding in their resignation letters. Those who remained on the Bench privately praised the relief brought by the Judiciary Act of 1793 through personal letters, as Justice William Cushing did to Justice William Paterson. The remonstrance to Congress, sent by the Justices, shows the unanimous disapproval of circuit riding. The legislation passed by Congress indicates that the Justices could collectively persuade the legislature. These sources show the eagerness the Justices felt to end the practice of circuit riding.

Creating the Judiciary

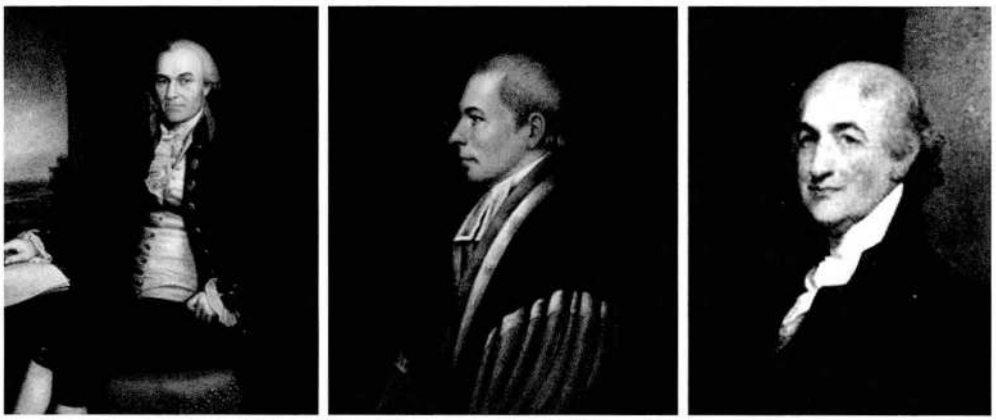
In March 1789, the First Congress gathered in New York City.[1] The United States Senate took the lead in the creation of a federal judiciary. On April 7, 1789, the Senate

appointed and assigned a committee the task of establishing the judiciary.[2] The committee consisted of men such as Oliver Ellsworth of Connecticut, William Paterson of New Jersey, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Few of Georgia, Paine Wingate of New Hampshire, Ralph Izard of South Carolina, and Charles Carroll of Maryland. Of these, Ellsworth, Paterson, and Strong made up the core of the committee.[3]

These three senators—Ellsworth, Paterson, and Strong—had compiled the most experience of the group. Each had served as a delegate to the 1787 Constitutional Convention and as delegates to their respective states' ratification conventions. Out of the three, Ellsworth became the principal author of the bill to organize the judiciary. Ellsworth attained leadership because of his strong personality and his ability to advocate, which he exhibited in his "Letters of a Landholder."[4]

On September 24, 1789, the Senate received word that George Washington had signed the "Act to establish the judicial Courts of the United States."[5] The Supreme Court established under the Judiciary Act of 1789 did not have the same appearance that the Court has today. The Act called for six total Justices, one Chief Justice and five Associate Justices.[6] Also, it required the Supreme Court to hold two sessions a year in the nation's capital.[7] The first of these sessions was to take place on the first Monday of February, followed by the second on the first Monday of August.[8] This same section of the Act prescribed the seniority of the Justices, stating that seniority was to be "according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages."[9] Lastly, the Act defined the Supreme Court Court's appellate jurisdiction. This gave the Court the authority to "re-examine" cases "and [reverse] or [affirm]" a previous ruling.[10]

Justice James Iredell prevailed on his brother-in-law, North Carolina Senator Samuel Johnston (above), to propose a bill in 1792 protecting a Justice from riding the same circuit twice.



Senators Oliver Ellsworth (left), William Paterson and Caleb Strong (right) were the core members of the ten-man committee appointed by the Senate to create the federal judiciary in 1789.

Aside from creating the Supreme Court, the drafters of the Judiciary Act of 1789 created the federal district and circuit courts. The Act stated that the United States "shall be, and they hereby are, divided into thirteen districts"[11] Each of these districts held one court with one judge. The district courts were required to hold four sessions each year. The Act gave the district courts original jurisdiction in all cases in which the district court had authority, "[a]nd the trial of issues in fact, in the district courts, in all cases except civil causes of admiralty and maritime jurisdiction, shall be by jury."[12]

The division of the district courts into three areas created the circuit courts, named the eastern, middle, and southern circuits.[13] A circuit court then consisted of one district judge and two Supreme Court Justices. The Judiciary Act of 1789 required that two sessions of the circuit court were to take place in each district annually.[14] The circuit courts had original jurisdiction, much like the district courts; in addition, circuit courts also had appellate jurisdiction over cases from the district courts.[15]

The Burdens of Riding Circuit

Not long after the enactment of the Judiciary Act of 1789, the requirement of circuit riding became burdensome to the Supreme Court. The task of riding circuit caused a number of men nominated either to decline their appointments or to resign their offices. Robert H. Harrison, appointed by George Washington to the first Supreme Court, declined the offer from the President. In a letter to Washington, Harrison confided that the "duties required by the [1789] Act for establishing the Judicial department, will be, from the limited number of Judges, considering the great extent of the States & and the frequency of the Courts, extremely difficult and burthensome to perform."[16] In another letter to President Washington, Harrison claimed the requirements of a "Judge of the Supreme Court would be extremely difficult & burthensome, even to a Man of the most active comprehensive mind; and vigorous frame."[17] Washington replaced Harrison with James Iredell, who quickly became another ardent opponent of circuit duties.

In March 1791, John Rutledge, one of the original members of the Supreme Court, resigned because his home state of South Carolina offered him the position of chief justice for the state's highest court.[18] To fill the seat opened by the resignation of Rutledge, President Washington appointed Thomas Johnson in July of the same year.[19] However, Johnson did not accept the President's nomination right away. The issue of riding the circuit played a determining role in his decision to accept.

After receiving his letter of nomination from the President, Thomas Johnson wrote back expressing his reservations. Although honored by his selection by Washington, Johnson did not feel as though he could ride the southern circuit. He wrote to Washington that if "the southern Circuit would fall to me . . . at my Time of Life and otherwise circumstanced as I am it would be an insurmountable Objection."[20] Johnson had also written Chief Justice John Jay regarding the same matter. Early that August, Washington wrote to Johnson telling him that he had spoken with the Chief Justice and the Associate Justices and that they "agreed upon that [Johnson] might be wholly exempted from performing this tour of duty."[21] Washington went further to say that he hoped the next congressional session would reconsider the requirements of riding circuit for the Justices of the Supreme Court.[22]

The United States Senate confirmed the nomination of Thomas Johnson on November 7, 1791. He took his seat on the nation's highest bench on August 6, 1792.[23] However, Johnson did not remain on the Bench long. On January 16, 1793, Johnson wrote to President Washington to inform him of his decision to resign. He cited the duties of circuit-riding as the determining factor for his decision:

> The Experience we have had of the little that has been or could be done under the present System though excessively fatiguing to the Judges would I thought have insured their Discharge from Circuit Duty.... I have not Self consequence enough to blame others for not thinking as I do as to wish Arrangements for my Accomodation[_] I have measured Things however and find the Office and the Man do not fit. I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed.[24]

Johnson's comments on circuit riding show the stressful nature of the position: time away from family, hard travel, and bad conditions.

The duties of riding the circuit did not only strike those who left the Supreme Court as burdensome; rather, the whole Court held the same opinion. The amount of travel required of the Justices created many logistical issues. Travel conditions sometimes made reaching a quorum on the Court difficult, as it did for the 1792 February Term of the Supreme Court. William Cushing had trouble reaching the Court because of weather, and two other Justices, Blair and Johnson, had not yet arrived either. Without these Justices in attendance, Justice Wilson had no choice but to adjourn daily.

The travel concerns of the Justices did not come merely because of the long days on horseback or on the stage, but rather because of the severe conditions in which they had to travel. Justice Iredell often wrote to his wife Hannah, who remained in New York. In his letters home, Iredell lamented to his wife about the conditions he faced. While on the road, the Justices encountered dangers from multiple sources–especially those who went on the Southern circuit.

The Justices may have resented the very idea of having to ride the circuits, yet the act of travelling proved even more burdensome. While on the circuit, Justice Cushing experienced adverse travel conditions. In the midst of correspondence concerning the rotation of the circuits, Justice Cushing wrote to Justice Iredell that "The Northern is not without its troubles its green woods rocks & mountains."[25] In another letter, Cushing tells how the crossing of a ferry gave him "inauspicious forebodings" because of "the violence of the wind & current & disagreeable appearance of the rocks..."[26]

Justice Iredell also told tales of the precarious travel conditions. While voyaging through the State of Georgia, Iredell wrecked his rig.

> ... I was going on at my ease, when part of the rein getting under [the horse's] tail, [the horse] ran away, the chair struck against a tree, and overset, throwing me out, and one of the wheels went over my leg. I was able to proceed however (as the chair was not broken) about ten miles, but then was in so much paint, I was under the necessity of staying very inconveniently at a house on the road.[27]

The Justices also had to face all weather conditions during their journeys on the road. As stated earlier, conditions could make reaching quorum difficult. The weather interrupted Justice Johnson in the course of his travelling to Savannah, Georgia. Another judge, waiting for his arrival, wrote "Judge Johnson has not arrived, nor have I heard of him on the road. There have been such violent freshes that it is not unlikely they may have obstructed him."[28]

Disease, another one of the hazards of the Southern circuit, threatened those who embarked on the journey through the Southern states. In a letter to his wife, Justice Iredell wrote "On Tuesday morning, when I had intended to set off from here, I was taken very unwell, and in the course of the day I had a slight fever... and a severe head ach."[29] In

practically every letter that Iredell wrote to his wife, he went great pains to assure her that he remained in good health or had fully recovered to quell her fears.

Accommodations of the Justices also proved to create hardship for the travelling justices. On a good trip, prominent members of the community, such as marshals or judges, offered their homes to the Justices. However, more times than not, the Justices stayed in taverns or other public housing. Justice Thomas Johnson alluded to these conditions in his resignation letter mentioned earlier. He wrote "I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed..."[30]

Justice Iredell expounded upon Johnson's statement with more specifics. Again, in a letter to his wife, Iredell protested the conditions he endured. Through his words, Iredell described his lodging: "The accomodations [sic] were in some places very bad, particularly at a very rascally house where I had the misfortune to be obliged to put up on Saturday night, a parcel of worthless young Fellows_ sitting up drinking gaming & cursing & swearing all night. I think I never had a more effectual lesson against swearing, and hope to profit by it..."[31] Iredell wrote of another negative experience while in North Carolina, where he claimed he "suffered very much the first night, having to sleep in a room with five People and a bed fellow of the wrong sort, which [he] did not expect..."[32] Justice William Cushing also expressed some of the difficulties he faced concerning accommodations. In a diary entry, Cushing also told of how he had to share a room with twelve other men, a situation quite similar to Justice Iredell.[33]

These circumstances the Justices worked under provide only part of their opposition to circuit riding. They travelled dangerous roads, stayed in dirty and loud lodging houses and taverns, and encountered harmful diseases. Even though these hardships played a prominent role in the Justices' hopes for the abolition of circuit duties, they also had professional concerns with the practice. The legal and constitutional scruples felt by the Justices came to the forefront when they began to take action in the early 1790s.

The Justices Take Action

Among those who remained on the Bench, Justice James Iredell became the most outspoken critic of circuit duties. Iredell corresponded with his Brethren regularly on the topic, hoping he could spur the Court into action. In a lengthy letter to a number of his colleagues, Iredell stated his beliefs on the issue and argued on behalf of a remedy to ease some of the burden. Iredell mentioned two elements linked to riding circuits that he found most disagreeable. First, he lamented the conditions under which the Justices must work. The arduous travel required by Justices on the southern circuit not only threatened the Justices' health, but also limited their ability to perform their duties as prescribed by law. He asked, "Can any Man have a probable chance of going that distance twice a year, and attending a particular place punctually on particular days?"[34]

Iredell also believed that circuit-riding created problems for the execution of justice. If the circuits assigned the Justices became permanent, he feared the integrity of the law might suffer. He advocated a concept popularized by William Blackstone, an English legal forefather, called "prudent jealousy." Prudent jealousy means "that no Man shall be a Judge of Assize in the County wherein he was born, or wherein he is resident."[35] In other words, a person who resides in the region where the judgment shall take place cannot retain the impartiality required of a judicial officer. Therefore, Justice Iredell strongly supported the proposal from Justice John Blair that the Justices rotate the circuit assignments.[36]

Iredell felt that the proposal of a rotation did not receive adequate attention from

the members of the Supreme Court. He believed the Chief Justice did not fairly offer the question of rotation. Both Iredell and Blair claimed they did not understand that the Court had made a decision regarding the rotation of the circuits. Iredell expressed this confusion in his letter to Chief Justice Jay and Associate Justices Cushing and Wilson, while Blair confided his misunderstanding of the situation privately to Iredell.[37] Iredell also argued the fairness of presenting the question in the absence of Justice Rutledge. Iredell believed that, if Rutledge had had the chance to vote, no majority would have been reached because the Justices would have been split equally.[38]

In his response, the Chief Justice began by sympathizing with Iredell and agreeing that "[t]he Inconveniences [Iredell mentioned] are doubtless great and unequal."[39] Jay then argued that only the legislature had the authority to create a remedy for these burdens. Justice Cushing, much like Jay, believed the legislature had the authority to solve the problems plaguing the Supreme Court. Cushing also argued against Iredell's use of prudent jealousy and countered that such a rotation would only cause "inconvenience to citizens by delay of causes."[40]

Although the more senior Justices on the Supreme Court, including Chief Justice Jay and senior Associate Justice Cushing, disapproved of Iredell's proposal of rotating the circuits, Iredell did not abandon his plan. North Carolina Senator Samuel Johnston, Iredell's brother-in-law, sought to assist in the cause of reducing the stress created by the circuit courts. As a member of the United States Senate, Johnston introduced a bill written by Iredell that protected a Justice from riding the same circuit twice in a row without his consent. Essentially, this piece of legislation called for the rotation of the circuits. This bill, the Circuit Court Act of 1792, became law on April 13, 1792.[41]

The legislative victory of the Circuit Court Act of 1792 allowed the members of the Supreme Court to seek some relief from the hardships imposed upon them by the Judiciary Act of 1789. However, this taste of liberation only encouraged the Justices to request more from the legislature. A record of the collective attitude of the Justices toward riding the circuits reached back at least as far as 1790. Collectively, the Justices wrote to President Washington expressing their concerns pertaining to the Judiciary Act of 1789. However, it is uncertain whether the President received this correspondence. In the letter, Jay argued that, because the circuit courts remain inferior to the Supreme Court, the Justices of the latter should not be officers of the former.[42] Two years later, the Justices again took it upon themselves to create change and wrote to both President Washington and the Congress.

When the Justices wrote to the President in August 1792, they laid out their feeling bluntly. They protested, "We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong explicit terms."[43] The Justices wrote to the President of the United States because they understood the influence Washington had among the other branches of government: "Your official connection with the Legislature and the consideration that applications from us to them, cannot be made in any manner so respectful to Government as through the President."[44] This unified and unprecedented step, taken by a Court normally confined by self-restraint, shows the fervent disapproval of circuit riding requirements felt by virtually every member of the High Court.

Equally unprecedented, the Justices also wrote a remonstrance to the Congress. The phrasing chosen by the Justices sheds even more light on the earnestness with which they pleaded for relief. They began by respectfully chastising Congress for not authorizing earlier any alterations of the Judiciary Act of 1789. They scolded the second branch, asserting "that the Act then passed was to be considered rather as introducing a temporary expedient, than a permanent System, and that it would

be revised as soon as a period of greater leisure should arrive."[45] After reminding Congress of the need to modify its earlier document, the Judiciary Act of 1789, the Justices proceeded to assist them in determining what changes needed to be made.

Without reservation, the Justices made their plea against the circuit duties prescribed in the 1789 Act. As Justice Iredell had argued earlier to no avail, the Justices declared to Congress that the circuits caused too much hardship due to travel conditions and impeded the flow of justice.

> That the task of holding twenty seven circuit Courts a year, in the different States . . . besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task . . . too burthensome. . . . That the distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in once capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice . . . [46]

Consistent with the tone of the first half of the remonstrance, the Justices declined to use the contemporary letter etiquette and signed with a demand rather than as "humble and obedient servants."[47]

The bold action of the Supreme Court proved fruitful during the 1793 congressional session. In the spring of 1793, Congress passed the Judiciary Act of 1793—often overlooked by historians. The Judiciary Act of 1793 attempted to ease the burdens of the Justices by reducing the number of circuits each Justice needed to attend from two to one. During the February Term of the Supreme Court in 1794, the Justices wrote to Congress a second time. In this document, the Justices took the opportunity to thank the legislature for affording them some of the relief they sought.[48] Appreciation for the congressional act also appears in the private correspondence of the Justices. William Cushing wrote to William Paterson, congratulating him on his appointment to the Supreme Court, and assured him that "An Act, passed this week, eases of near half the difficulty."[49]

The Election of 1800

Issues surrounding the circuit courts remained fairly quiet for close to a decade. However, the political climate that followed the election of 1800 thrust the issue back into the national spotlight. The federal judiciary became caught in the crossfire of the political fight between John Adams and Thomas Jefferson. The judiciary became the battleground for the greatest fight the young nation had experienced since independence.

After the election of 1800, Adams understood what had happened and turned to the judiciary to ensure a federalist voice in the federal government. Even before the election of 1800, Adams wanted to expand the judiciary. However, the flood of Republican victories enhanced the importance of the expansion of the judiciary.[50] The politically savvy Adams understood that he could block Jeffersonian policy with a Federalist-stacked judiciary. To reach this end, Adams pressed the lame duck Congress to pass the Judiciary Act of 1801.

Passed by the Senate on February 7, 1801, the Judiciary Act of 1801 became law six days later.[51] The main elements of the Act included eliminating circuit duties for Supreme Court Justices, creating six new circuit courts, and reducing the number of Supreme Court Justices from six to five.[52] The elimination of circuit duties for Supreme Court Justices and the creation of new circuit courts gave Adams sixteen new appointments. The reduction of the number of Justices on the Supreme Court delayed any Republican nomination until the retirement of two sitting Justices.[53]

Many Republicans believed that some appointments violated Article I, Section 6 of the Constitution. That section forbade Adams to fill any of the new circuit court judgeships

with sitting members of Congress because the courts had been created during their tenure of office. Nevertheless, the President found a way around the law: he filled the new vacancies by promoting sitting judges and then filled their seats with the members of Congress.

The votes cast during the election of 1800 did not produce a clear winner. Therefore, the House of Representatives decided the presidency. The Representatives had a choice between Thomas Jefferson and Aaron Burr; Adams did not receive enough votes for consideration. The House of Representatives, still held by Federalists, chose Jefferson. The Federalists preferred Jefferson over Burr because they felt Jefferson was more politically moderate. Alexander Hamilton spoke on Jefferson's behalf, saying that "[t]o my mind a true estimate of Mr. Jefferson's character warrants the expectation of a temporizing rather than a violent system."[54] Other Federalists saw the decision as a choice between the lesser of two evils. Marshall alleged that "[t]he democrats are divided into speculative theorists & absolute terrorists. With the latter I am not disposed to class Mr. Jefferson."[55] Jefferson defended his own moderation when he wrote that "[t]he greatest good we can do our country is to heal its party divisions & make them one people. . . . [B]oth sects are republican, entitled to the confidence of their fellow citizen."[56]

William Cranch (pictured in his later years), the nephew of John Adams, received an appointment for the District of Columbia court after Congress passed the Judiciary Act of 1801, which created new circuit courts. There were many other examples of partisanship and nepotism in President Adams' appointments.

The Federalists hoped that Jefferson's moderation would extend to the judiciary when Jefferson took the oath of office on March 4, 1801.[57] In the early days of the Jefferson administration, it seemed as if Jefferson would keep his promises. Originally, he believed that the judges that had been appointed by his predecessor could not be removed. However, he also did not want the Federalists to have absolute control of the judiciary. To achieve this end, Jefferson ordered that all of the attorneys and marshals be removed from office and replaced with Republicans.[58] Not until William Marbury, Dennis Ramsay, Robert R. Hooe, and William Harper brought suit against the government for their commissions did Jefferson favor a total repeal of the Judiciary Act of 1801.[59]

Jefferson and the Republicans viewed the Supreme Court's decision to hear the case brought by Marbury and the others as a direct seizure of power. This fear of infringement united the Republicans in a movement to repeal the Judiciary Act of 1801. Senator Stevens Thomas Mason from Virginia exclaimed that the action by the Supreme Court "has excited a very general indignation and will secure the repeal of the Judiciary Law of the last session about the propriety of which some of our Republican Friends were hesitating." Jefferson also felt the need to express his displeasure when he wrote "that the Federalists 'have retired into the Judiciary as a strong-hold . . . and from that battery all the works of Republicanism are to beaten down and erased.'"[60]

Debate on the repeal act began in January of 1802. While discussing the legislation in the Senate, the Republicans expressed their fears

of an overly powerful judiciary. Senator Mason argued "that the Supreme Court judges, with only ten suits then on their docket, would have little to do to earn their salaries, and that for want of employment they might do mischief in areas in which they should not be engaged." During the debate, the Senate also discussed whether or not courts could be eradicated for the sole reason of eliminating judges. The answer to that question came on February 3, 1802, when the Senate passed the repeal bill.[61] Just one month later, on March 3, 1802, the House of Representatives voted to pass the Repeal Act.[62]

Republicans rejoiced in their victory over the Federalists. The March 5, 1802 edition of the *National Intelligencer* stated, "Judges created for political purposes, and for the worst of purposes under a republican government, for the purpose of opposing the national will, from this day cease to exist."[63] James Blair wrote to a Republican ally "congratulating him on 'the happy termination of your labours . . . [N]othing can equal the applause and credit you univerally [sic] receive throughout this State by the People.'"[64]

The cheering of the Republicans, however, did not completely quiet the opposition. The Federalists made known their disgust with the Repeal Act. The *Washington Post* declared "that Jefferson had 'gratified his malice towards the judges . . . and laid the foundation of infinite mischief.'" The *Post* went even further as it called for the judges to declare the new act unconstitutional.[65] Senator William Plumer also expressed his unhappiness with the bill when he wrote that "[t]he Judiciary that bulwark of our rights, is to be placed in a state of dependence; the tenure of the judges office . . . is to depend upon the whim & caprice of a theoretical President, & his servile minions."[66]

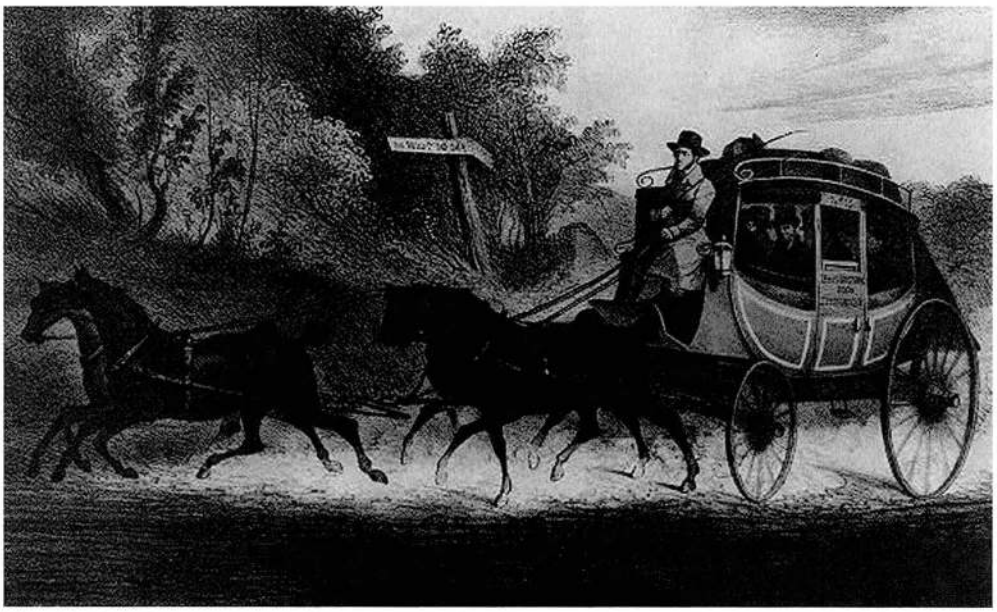
Aside from the partisan parts of the Repeal Act, how did it logistically change the federal judiciary? The new act restored the judiciary to what it had looked like shortly after the passage of the Judiciary Act of 1789. Once again the Supreme Court consisted of six members. The Repeal Act also restored the original district and circuit courts. Furthermore, the restoration of the judiciary created under the 1789 Act forced the Justices to resume riding circuits.

Lastly, Jefferson delivered one more blow to the Federalists by signing the Judiciary Act of 1802. Jefferson feared the decisions scheduled to come from the Supreme Court in its next Term. He also realized that the Repeal Act did not take effect until July, which meant the Court would have to meet in June. The Judiciary Act of 1802 immediately restored the Court Terms set under the Judiciary Act of 1789, but abolished the August Term. This meant that the Supreme Court would have to wait until February of 1803 to convene.[67]

After the Repeal Act and the Judiciary Act of 1802, it looked as if the system of separation of powers might crumble. The Republican administration, due to fears of excessive judicial authority, silenced the Supreme Court by abolishing its August Term.[68] In turn, members of the judiciary saw this action as a threat to their sovereignty as a branch of government. Members of the High Federalist faction, the party's right wing, approached the Court with a plan to negate the Repeal Act. These Federalists suggested that members of the Court refuse to ride the circuits. If the Justices agreed, the circuit court judges appointed under the Judiciary Act of 1801 would hold the court sessions.[69]

The Justices needed to remain united for a plan such as this to succeed. Justice Samuel Chase advocated strongly that the Court proceed with the plan presented by the High Federalists. Chase adamantly argued against the constitutionality of the Repeal Act. In a letter to Marshall, Chase laid out his reasoning as to why he questioned the constitutionality of the Repeal Act. He argued that, when the judges took their positions under the Judiciary Act of 1801, they "immediately thereupon . . . become *constitutional judges*; and hold *their Offices*, and *Commissions* under the Constitution."[70]

The decision as to how the Supreme Court should act in this regard rested on the



When the right wing of the Federalists suggested that members of the Supreme Court refuse to ride circuit to protest the Repeal Act, Chief Justice John Marshall polled his Brethren and decided that the Justices would go ahead and hold circuit.

leadership of John Marshall. In a letter to Associate Justice Paterson, Marshall acknowledged that he, like Chase, had "some strong constitutional scruples."[71] He expressed his views further in a letter to Justice William Cushing when he wrote "For myself I more than doubt the constitutionality of this measure & of performing circuit duty without a commission as a circuit Judge."[72] Marshall used this correspondence to poll his Brethren on their thoughts regarding the situation. In a reply to Marshall, Paterson wrote "I think with you, we must abide by the old practice."[73] Justice Cushing also sent a reply stating "we must" hold the circuit court sessions.[74] With a majority of the Court in support of riding the circuit, Marshall acted in accord with his colleagues and followed the old rule of law.

The decision to ride the circuit came with its share of consequences. Marshall understood that abiding by the Repeal Act would portray the Supreme Court as weak, but he also knew he had to pick his battles. Riding the circuit allowed Marshall to avoid a direct confrontation with the Republican administration. This could have been damaging to the judiciary. Marshall, knowing the cases before the Court, led the judiciary down a path that averted confrontation, but also asserted the strength of the judiciary. The Court used the case of *Stuart v. Laird* to achieve Marshall's goal.[75]

The 1803 case of *Stuart v. Laird* brought an important question before the Supreme Court.[76] This case originated as nothing more than a property dispute between Hugh Stuart and John Laird. However, *Stuart v. Laird* also presented a key constitutional question. In December of 1801, the newly created federal circuit court in Virginia had ruled in favor of Laird, but the decision had to be validated the next Term. By the time the next Term came, Congress had repealed the Judiciary Act of 1801 with the Repeal Act of 1802. The Repeal Act made it so once again Supreme Court Justices had to ride the circuits, which allowed Chief Justice Marshall to hear the case at the circuit level.

After Marshall's circuit court decision, Stuart appealed to the Supreme Court on a writ of error. He argued the constitutionality of the Repeal Act of 1802 on the premise that the Constitution calls for judges to serve for a term of good behavior and therefore Congress

did not have the authority to abolish formally established inferior courts. Due to his participation at the circuit level, Marshall recused himself from the case in the Supreme Court, and Justice Paterson wrote and delivered the opinion of the Court.[77]

In his opinion, Justice Paterson authoritatively declared the Supreme Court's decision. The Court affirmed the constitutionality of the Repeal Act of 1802. Justice Paterson wrote, "Congress has constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power."[78] The Court used a strict constructionist view of the Constitution. Justice Paterson sought to end the debate when he concluded his opinion with "Of Course, the question is at rest, and ought not now to be disturbed."[79]

Conclusion

Not until the late nineteenth century did Congress completely abolish the circuit requirements for the Justices. Not until 1891, did the Court finally win its fight to end the practice of circuit riding. The growing docket of the Supreme Court did not allow the Justices the time to travel the circuits and keep up with their work in Washington.[80] The fact that the Court had to ride the circuits up until the 1890s should not downplay the importance of the actions taken by the members of the early Court.

The debate over riding the circuits gave the Justices the opportunity to assert the authority and further define the role of the federal judiciary. The Justices themselves spearheaded the movement to end the practice of circuit riding. They sought refuge, not only to ease the burdens of travel, but also to ensure the integrity of the judiciary. The Justices fought to end circuit requirements because they did not feel it was appropriate to correct their own errors. Without guidance from the Constitution, the Justices had to determine how to modify their positions.

The Justices of the Supreme Court further defined their role when asked to decide the constitutionality of riding the circuits. At this point in history, the Court had to walk a fine line. The tense political climate of the early nineteenth century did not allow for any mistakes. Although the Court eventually upheld the constitutionality of riding the circuits, it asserted its authority by offering the last word on the subject.

ENDNOTES

[1]Linda Grant De Pauw, **Senate Legislative Journal, Documentary History of the First Federal Congress, 1789–1791**, vol. 1 (Baltimore: The Johns Hopkins University Press, 1972), vii.

[2]Goebel, **Antecedents and Beginnings to 1801**, 458.

[3]*Ibid.*, 458–59.

[4]*Ibid.*, 459.

[5]Pauw, **Documentary History of the First Federal Congress**, 190.

[6]Judiciary Act of 1789, S. 1, 1st Cong. (1789).

[7]*Ibid.*

[8]*Ibid.*

[9]*Ibid.*

[10]*Ibid.*

[11]*Ibid.*

[12]*Ibid.*

[13]*Ibid.*

[14]*Ibid.*

[15]*Ibid.*

[16]Robert H. Harrison to George Washington, Annapolis, October 27, 1789, in **Appointments and Proceedings: The Documentary History of the Supreme Court of the United States, 1789–1800,** vol. 1, ed. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 38.

[17]*Ibid.*, 36.

[18]John Rutledge to George Washington, Charleston, March 5, 1791, in Marcus and Perry, **Appointments and Proceedings**, 23.

[19]George Washington to Thomas Johnson, Philadelphia, July 14, 1791, in *ibid.*, 72.

[20]Thomas Johnson to George Washington, Spurriers, Maryland, July 27, 1791, in *ibid.*, 173.

[21]George Washington to Thomas Johnson, Philadelphia, August 7, 1791, in *ibid.*, 76.

[22]*Ibid.*

[23]Confirmation by Senate, November 7, 1791; Record of Oaths, August 6, 1792, in Marcus and Perry,

Appointments and Proceedings, in Marcus and Perry, **Appointments and Proceedings**, 77, 79.

[24]Thomas Johnson to George Washington, Frederick, January 16, 1793, in *ibid.*, 80.

[25]William Cushing to James Iredell, Philadelphia, February 13, 1791, in **The Justices on Circuit, 1790–1794: The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 2, ed. Maeva Marcus (New York: Columbia University Press, 1988), 137.

[26]*Ibid.*, William Cushing to Theodore Sedgwick, New York, February 21, 1791, 139–140.

[27]*Ibid.*, James Iredell to Hannah Iredell, Savannah, Georgia, April 26, 1792, 272.

[28]*Ibid.*, James Iredell to Hannah Iredell, Savannah, Georgia, April 28, 1792, 274.

[29]*Ibid.*, James Iredell to Hannah Iredell, Petersburg, Virginia, September 16, 1791, 210.

[30]Thomas Johnson to George Washington, Frederick, January 16, 1793, in **Appointments and Proceedings: Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 1, ed. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 80.

[31]James Iredell to Hannah Iredell, "Col° Burton's," Granville County, North Carolina, September 19, 1791, in **The Justices on Circuit, 1790–1794: The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 2, ed. Maeva Marcus (New York: Columbia University Press, 1988), 210.

[32]*Ibid.*, James Iredell to Hannah Iredell, Salisbury, North Carolina, October 2, 1791, 212.

[33]Ibid., 3.

[34]James Iredell to John Jay, William Cushing, and James Wilson, Philadelphia, February 11, 1791, in **The Justices on Circuit, 1790–1794: The Documentary History of the Supreme Court of the United States, 1789–1800**, vol. 2, ed. Maeva Marcus (New York: Columbia University Press, 1988), 132.

[35]*Ibid.*, 133–134, 134n.

[36]John Blair to John Jay, New York, August 5, 1790, in Marcus, **Justices on Circuit**, 83–84.

[37]James Iredell to John Jay, William Cushing, and James Wilson, Philadelphia, February 11, 1791, in *ibid.*, 133–134; John Blair to James Iredell, Williamsburg, July 25, 1791, in *ibid.*, 196.

[38]Iredell to Jay, Cushing, and Wilson, February 11, 1791, in *ibid.*, 132.

[39]John Jay to James Iredell, Philadelphia, February 12, 1791, in *ibid.*, 135.

[40]William Cushing to James Iredell, Philadelphia, February 13, 1791, in *ibid.*, 137–38.

[41]James Iredell to Thomas Johnson, Philadelphia, March 15, 1792, in *ibid.*, 248n.

[42]Justices of the Supreme Court to George Washington, New York, ca. September 13, 1790, in *ibid.*, 89–91.

[43]Justices of the Supreme Court to George Washington, Philadelphia, August 9, 1792, in *ibid.*, 288.

[44]*Ibid.*

[45]Justices of the Supreme Court to the Congress of the United States, Philadelphia, August 9, 1792, in Marcus, **Justices on Circuit**, 289.

[46]*Ibid.*

[47]*Ibid.*

[48]Justices of the Supreme Court to the Congress of the United States, Philadelphia, February 18, 1794, in Marcus, **Justices on Circuit**, 443.

[49]William Cushing to William Paterson, Philadelphia, March 5, 1793, in *ibid.*, 345.

[50]Kathryn Turner, "Federalist Policy and the Judiciary Act of 1801," *The William and Mary Quarterly*, third series, vol. 22, no. 1 (January 1965), 19.

[51]*Ibid.*, 20–21.

[52]Richard Ellis, **The Jeffersonian Crisis: Courts and Politics in the Young Republic** (New York: Oxford University Press, 1971), 15.

[53]*Ibid.*, 15.

[54]Quoted in Ellis, **The Jeffersonian Crisis**, 26.

[55]Quoted in *ibid.*, 27.

[56]Quoted in *ibid.*

[57]R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (Baton Rouge: Louisiana State University Press, 2001), 148.

[58]Ellis, **The Jeffersonian Crisis**, 33.

[59]*Ibid.*, 43.

[60]Quoted in *ibid.*, 44.

[61]Haskins and Johnson, **Foundations of Power**, 163–64.

[62]*Ibid.*, 164.

[63]Quoted in *ibid.*

[64]Quoted in *ibid.*, 164–65.

[65]Quoted in *ibid.*, 165.

[66]*Ibid.*, 166.

[67]Ellis, **The Jeffersonian Crisis**, 59.

[68]Newmyer, **John Marshall**, 153.

[69]Ellis, **The Jeffersonian Crisis**, 60.

[70]Samuel Chase to John Marshall, Baltimore, April 24, 1802, quoted in Haskins and Johnson, **Foundations of Power**, 173.

[71]John Marshall to William Paterson, Richmond, April 6, 1802, in **Marshall Writings**, ed. Charles F. Hobson (New York: The Library of America, 2010), 221.

[72]John Marshall to William Cushing, Alexandria, April 19, 1802, in Hobson, **Marshall Writings**, 222.

[73]Quoted in Haskins and Johnson, **Foundations of Power**, 177.

[74]Quoted in *ibid.*

[75]Newmyer, **John Marshall**, 154–57.

[76]*Stuart v. Laird*, 5 U.S. 299 (1803).

[77]*Stuart*, 5 U.S. at 308.

[78]*Stuart*, 5 U.S. at 309.

[79]*Stuart*, 5 U.S. at 309.

[80]Joshua Glick, "On the Road: The Supreme Court and the History of Circuit Riding," The Cardozo Law Review, April 2003.

Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court

PETER BOZZO, SHIMMY EDWARDS, AND APRIL A. CHRISTINE*

Introduction

E pluribus unum—out of many, one—is the phrase emblazoned on the Seal of the United States, which refers to the notion that a single American voice emerges from the many diverse groups that constitute the nation. The legislative and executive branches of government often act as one voice through legislative bills and executive acts, aggregating diverse interests that reflect the national will. The notion of e pluribus unum, however, is not often applied to the judiciary, a branch of government the members of which are viewed, not as outlets for the will of the people, but as gatekeepers of the rule of law. But while the Supreme Court may not speak directly for the people, its opinions speak to the people, and the methods used by the Justices to express those opinions have revealed changes in the conception of the Court's voice throughout history.

The voice of the Supreme Court is expressed most clearly in its opinions, where the Justices convey their decisions and discuss their rationales. In recent years, the Court's voice has become fractured, as Justices file an increasing number of concurring and dissenting opinions with each decision.[1] This was not always the case. In the early years, the Court issued *seriatim* opinions, in which each Justice presented his own decision, typically without conferring with the other Justices.[2] It was not until the tenure of Chief Justice John Marshall that the Court began to speak unanimously, which had the effect of strengthening the Court's institutional position in the early American republic.[3] History has looked favorably on John Marshall's leadership, which helped stabilize the structure of the Court and increase the influence of the Court's decisions.[4] Yet Marshall's

efforts also gave rise to a historical paradox: if a unanimous Court speaking with one voice is a powerful Court, why have the Justices in recent years chosen to file an increasing number of dissenting opinions, potentially diluting the Court's institutional authority within the federal government?

The answer to this question lies in an examination of the Supreme Court's legitimacy, which emerges in part from Americans' belief that the Court's decisions conform to the rule of law.[5] Judicial opinions that uphold the rule of law have two principal characteristics: they rely on objective and well-established legal rationales, and they are not influenced by personal biases or predispositions.[6] In other words, the Court's legitimacy rests on the extent to which citizens believe that the Justices are enunciating consistent legal opinions in conformity with the fundamental belief that ours is a "government of laws, not of men."[7]

Legal theorists have developed two approaches, the institutional and the interpretive, to explain the connection between the Court's legitimacy and the rule of law, and the effect of dissents.[8] The institutional approach suggests that the Court's legitimacy is founded on the belief that its public pronouncements are the product of a collective Court, rather than of individual Justices.[9] However, under this approach, dissenting opinions can be seen as undermining the legitimacy of the Court's voice.[10] Since dissents are written by an individual Justice or group of Justices who openly disagree with the majority, dissenting opinions shatter the illusion of a unanimous Court pronouncing a collective opinion with one voice.[11]

The interpretive approach argues that the Court's legitimacy emerges from the public's confidence that judicial opinions enunciate objective, determinate, and consistent legal interpretations.[12] Again, however, dissents do not seem to fit with this model of the Court's authority, since dissenting opinions directly challenge the belief that the Justices are expressing an objective legal viewpoint.[13] By conveying disagreement with the majority's decision, dissenting opinions suggest that the law can be interpreted in alternative and irreconcilable ways, and dissents cause the Court to speak with many—and sometimes contradictory—voices.[14]

If dissents cannot be rationalized under the institutional and interpretive approaches as enhancing the connection between the Court's legitimacy and the rule of law, then they must increase the Court's political legitimacy in another way.[15] This gives rise to a third approach, which suggests that the Court gains legitimacy not only by adhering to the rule of law, but also by operating in a way that is consistent with fundamental democratic values.[16]

Americans, in particular, are committed to a form of democracy that regards dialogue among equals as the ideal means of reaching a collective decision.[17] As such, dissents become an expression of judicial dialogue as well as of individual Justices' voices.[18] This is particularly significant in light of historical shifts in the way the Court has delivered its opinions. Beginning with the tenure of Chief Justice Marshall and extending throughout the nineteenth and early twentieth centuries, the Justices concealed their private disagreements by publicly joining the majority view and delivering unanimous opinions.[19] While Justices at times dissented from the majority view, they did so in an apologetic manner and under compelling circumstances.[20]

In more recent times, the Justices have used dissents to expressly publicize their disagreement with the majority, illustrating for the public the conversations that occurred when the Justices discussed the case in conference.[21] Thus, the modern Court has maintained its legitimacy because of the public's ability to observe that the Justices develop their opinions by deliberating with one another in a way that conforms to Americans' views of how democracy should function. Under this approach, dissents represent the deliberative process and the means by which the Court

speaks with authority, rather than a method of undermining the power of its voice.[22]

While this alternative approach may explain the relationship of dissents to the Court's institutional legitimacy as it stands today, it does not fit with the Court's early history, where only by eliminating dissent and creating unanimity was Chief Justice Marshall able to increase the Court's legitimacy. Thus, one must also explore the historical shifts that occurred between the tenure of Chief Justice Marshall in the early nineteenth century and Chief Justice Harlan Fiske Stone in the mid-twentieth century to understand how the Court's importance as a deliberative body became a salient measure of its legitimacy, and how dissents became a reflection of the Court's deliberation.

This article examines how those historical shifts caused the Court to change its opinion-delivery methods in two ways: first, the Court began to direct its opinions to the broader American public, rather than to the specific litigants before it; and second, the Justices began to value ideological consistency and their individual voices to the same extent that they valued the unified voice of the Court. The examination begins with an analysis of the practice of delivering opinions in English legal institutions and how this practice carried over to early American courts. The examination continues with a discussion of Chief Justice Marshall's contributions to the Court's expression of its collective voice, and it looks at key factors that shaped changes in the Court's opinion-delivery methods between the end of Chief Justice Marshall's tenure and the beginning of Chief Justice Stone's leadership. The examination concludes by analyzing the modern practice of dissent and speculating on the effect of dissent in the future.

England's Method of Delivering Opinions

Judicial opinions in England date back to the time of the Norman Conquest.[23] After the Normans conquered England in 1066, William of Normandy, known as William the Conqueror, and his successors sought to unify the country under the rule of the monarchy.[24] One way was by establishing the King's Court.[25] Disputes had been traditionally resolved according to local customs and traditions.[26] The King's Court sought to establish a uniform set of rules for the country as a whole, leading to what is known as "common law," meaning law that applied throughout England.[27] The courts had developed the common law from principles underlying judges' decisions in actual controversies.[28] Judges attempted to be consistent and, whenever possible, based their decisions on earlier cases.[29] They tried to decide similar cases in similar ways because they knew each decision would make new law and each interpretation would serve as a legal precedent for deciding future cases.[30] At this point, administration of the law in England was mostly local and confined to county and township courts with no overarching judiciary.[31]

In the 1160s and 1170s, Henry II instituted a system of "assize," under which judges rode on circuit from the royal bench, thus taking over much of the jurisdiction that had previously been in the hands of barons and local courts.[32] This allowed for greater consistency and uniformity in the law.[33] The 1215 Magna Carta, England's charter, was built upon this reform, mandating trials by jury and more fairness in judicial decision-making.[34] In the mid-thirteenth century, England's first Parliament was summoned, not long before the first appearances of unofficial Common Law Court opinions.[35]

The coming centuries saw more political upheaval in the civil wars for the English crown, and changes in monarchy necessarily effected changes in other areas of the government. For almost a thousand years, judicial decisions in multi-judge courts were delivered orally by each judge without any prior consultation among the individual judges.[36] These judicial opinions were not officially published until the early seventeenth century.[37] From

about 1268 to 1535, before the formal publication of opinions, scribes recorded court proceedings and the orally delivered opinions of the judges as best they could.[38] These case reports were originally published as unedited and unabridged compilations, and were used by lawyers as a source of legal precedents, but they did not portray a coherent sense of the law and it was difficult to figure out the legal rule announced in a case. Even after official reports of judicial opinions began to issue in 1609, judges continued to use the *seriatim*, or separate, method of delivering opinions until William Murray, known as "Lord Mansfield," was appointed as Lord Chief Justice of the King's Court in 1756.[39] Mansfield introduced a procedure for gaining agreement and consensus among the judges and then delivering an anonymous and unanimous "opinion of the court." [40] This change was particularly important in the area of English commercial law, where the lack of clarity in the law reached a crisis with the unprecedented growth in trade and commerce in the eighteenth century.[41]

The English government of the mid-eighteenth century was in many ways a fragile one. The Kingdom of Great Britain had only just been officially established by the "Treaty of Union"—known as the Acts of Union—in 1707 that joined England and Scotland.[42] England was at this point no longer simply a sovereign nation, but a country within a kingdom.[43] The monarch's authority was checked by a Parliament that had legislative power, but there was no independent judicial authority.[44] Though the Privy Council and the House of Lords together constituted England's courts of last resort, most appeals were decided in the lower appellate tribunals of the Common Law Courts.[45] Although the law courts were technically intermediate appellate courts in English judicial hierarchy, the Exchequer Chamber, the Court of Common Pleas, and the King's Bench collectively had the final say in most cases during the eighteenth century.[46]

As Lord Chief Justice of the King's Bench, Lord Mansfield sought to increase the use of law courts to resolve commercial disputes.[47] To do so, he needed to make the decisions of his court more attractive to litigants—an important potential source of revenue for the court, especially given the rise of the Industrial Revolution.[48] He encouraged the development of legal and general principles adopted from best practices of competitors and rival courts.[49] He believed that legal rules should be understood by those who must obey them, and that the object of the law court should be certainty.[50] To achieve certainty, he looked to the opinion of the court in asserting judicial power through a unified court speaking in a single voice.[51] Rather than having multiple courts and numerous judges issue different opinions subject to nuance and ambiguity, he called for one single court to hear and decide the fundamentals of commercial law and, through a unified opinion, provide the certainty and stability needed for commercial transactions.[52]

Though successful in many respects in harmonizing merchant customs with the common law, Lord Mansfield's reform in shifting from seriatim to unanimous opinions was short-lived.[53] Upon Mansfield's retirement, Lord Kenyon ended the practice, and the judges returned to issuing *seriatim* opinions until very recently.[54]

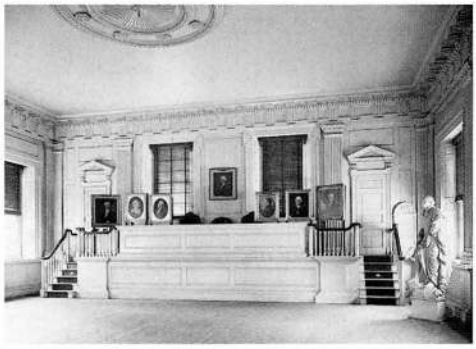
The Supreme Court's Voice in the Early Years

America's earliest courts largely adopted the institutions of their English forebears. This included the practice of delivering *seriatim* opinions.[55] Many American state courts were founded prior to Lord Mansfield's introduction of the "opinion of the court" and thus might not have been used to any style other than the *seriatim* practice.[56] However, once Lord Mansfield's innovation was made known to American jurists, some experimented with its application.[57] For example, Judge Edmund Pendleton, appointed as chief judge of the Virginia Court of Appeals (now the

Supreme Court of Virginia) in 1778, adopted Mansfield's model and delivered unanimous "opinions of the court" after the judges had convened to discuss the case in private.[58] Pendleton's practice was roundly condemned by the Republican party, most prominently by Thomas Jefferson, and when Judge Spencer Roane took Pendleton's seat on the Virginia Court of Appeals in 1794, the judges returned to issuing *seriatim* opinions.[59]

One of the earliest recorded dissents was issued in the Pennsylvania supreme court in 1786, in *Purviance v. Angus*, a case involving an American ship's wrongful capture of a British vessel that had already been seized by another American ship.[60] After the plaintiffs—the owners of the ship whose captain had committed the wrongful capture—were required to pay for damages inflicted on the British vessel, they sued the captain for reimbursement.[61] In an opinion authored by Chief Justice Thomas McKean, the majority rejected the captain's claim that he had been misled into believing the British vessel was a legitimate prize to be captured and concluded that, even if he was unaware of the vessel's status, he had been negligent in not confirming that it was an enemy vessel before aiding in its capture.[62]

Justice Jacob Rush disagreed and wrote in a separate opinion that the defendant should not be required to reimburse the plaintiffs for damage to the British vessel because he acted on their authority, and, therefore, the plaintiffs should not punish their captain for actions they permitted.[63] Justice Rush's ambivalence towards dissents was evident when he concluded that "[h]owever disposed to concur with my Brethren in this cause, I have not been able to do it. Unanimity in Courts of Justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment."[64] Although Justice Rush acknowledged what would soon become the prevailing view—that courts should speak with one voice—his dissent expresses the belief that judges should not sacrifice their individual opinions to achieve unanimity. This



Jacob Rush of the Pennsylvania supreme court (pictured) issued one of the earliest recorded dissents in 1786 in a case involving the wrongful capture of the ship Purviance.

early ambivalence characterizes the tension between a unanimous court speaking with one institutional voice and a divided one speaking through individual judges' voices.

Justice Rush's dissent illustrates the fact that American jurists were familiar with the practice of dissents, though the practice was not adopted by the Supreme Court when it first sat in 1790. Initially, the Supreme Court employed two formats in delivering opinions: *per curiam* opinions (delivered "by the Court" with no authorship attributed to a specific Justice) and *seriatim* opinions.[65] The earliest signs of Supreme Court dissents appeared in *seriatim* opinions, since these opinions allowed Justices to express their individual voices and convey disagreement with the majority view.[66] This is evident in the first case in which the Supreme Court issued a complete opinion, *Georgia v. Brailsford*, in which the Justices granted the state of Georgia an injunction that stayed money paid by one of its citizens in the hands of the Marshal of the State until several conflicting legal claims to the funds could be resolved.[67]

In *Brailsford*, four of the Justices, including Chief Justice John Jay, supported the injunction, while the remaining two believed that the injunction should not issue.[68] The Justices each delivered their opinions, beginning with the most junior Justice, Thomas Johnson, and proceeding in order of seniority.[69] The significance of these early *seriatim* opinions

The Court's earliest *seriatim* opinions were delivered beginning with the junior Justice and then proceeding in order of seniority. The Justices did not explicitly acknowledge their disagreements with one another. Above is the old Supreme Court Chamber in the basement of the Capitol building, where the Justices heard arguments and announced opinions after they had made the transition away from issuing *seriatim* opinions. The Court met in the Chamber from 1819 to 1860, when the Court moved upstairs into the room vacated by the Senate.

is that their language indicates the Justices' attitudes toward dissent.[70] The Justices did not explicitly acknowledge their disagreement with one another. Instead, they concluded their opinions with a procedural statement on whether or not they believed the injunction should be granted. The final words in Justice Johnson's opinion state, "[I]t is my opinion that there is not a proper foundation for issuing an injunction."[71] In contrast, Justice John Blair concluded his opinion by noting that "the injunction ought, I think, to issue till we are enabled by a full inquiry to decide upon the whole merits of the case."[72] In this regard, *seriatim* opinions allowed individual Justices to openly disagree with each other without explicitly dissenting.

A foreshadowing of the Court's shift away from the *seriatim* method of delivering opinions occurred during the short reign of Chief Justice Oliver Ellsworth (1796–1800).[73] In at least three cases (*Brown v. Barry*, *Clarke v. Russel*, and *Sims v. Irvine*),[74] Chief Justice Ellsworth authored an "opinion of the Court."[75] The Ellsworth Court's sporadic practice of issuing an "opinion of the Court" was significant because it would later be adopted by Chief Justice Marshall, who frequently announced opinions for the Court as Chief Justice.

The Unanimous Voice of the Marshall Court

John Marshall was confirmed as the fourth Chief Justice of the United States on January 27, 1801. At the time he assumed leadership,

the Court had little prestige and even less authority.[76] As noted by Alexander Hamilton in **Federalist No. 78**, "the judiciary is beyond comparison the weakest of the three departments of power."[77] Indeed, it was almost eighteen months into the commencement of the Court's first Term in 1790 before the Court issued its first opinion, and in the sixteen Terms between 1790 and 1800, only sixty-three opinions were reported.[78] The Court was not viewed as the final arbiter, the decisions of which were binding on the other two branches of government, and its authority to interpret the Constitution was unsettled and unclear.[79]

Part of the problem stemmed from the fact that the Court was plagued by rapid turnover and poor attendance, likely due in part to the Justices' simultaneous obligation of presiding over circuit courts, a requirement that began with the Judiciary Act of 1789 and continued until the early twentieth century.[80] In addition, the Court lacked stable leadership.[81] In the eleven years prior to Marshall's appointment, the Chief Justiceship resembled a revolving door. John Jay, the first Chief Justice, served six years, resigning in 1795 to become Governor of New York.[82] John Rutledge, a recess appointment, served only five months before his nomination was rejected by the Senate on partisan grounds.[83] Oliver Ellsworth presided over the court for six Terms after he was confirmed in 1796, but resigned because of ill health in October 1800.[84] Jay declined an offer for a second Term as Chief Justice because the Court had been unable to "acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[85]

Marshall believed in a strong national government and in a union governed by the Constitution.[86] One way of ensuring this goal was by strengthening the judiciary and establishing the authority of the Court as the final arbiter, particularly on constitutional issues.[87] He accomplished this by changing the way the Court delivered its opinions.[88]

Like Judge Pendleton, Marshall believed that the Court should speak through one voice, that of the Chief Justice, thereby adding to its aura of authority.[89] In his first reported opinion delivered as Chief Justice, *Talbot v. Seeman*, a case involving Marine salvage rights in the time of war,[90] Marshall showed a unique ability to find a middle ground; he encouraged his colleagues, who were used to expressing their views in *seriatim* opinions, to work through complex issues in private to reach a unanimous decision that they allowed Marshall to report.[91] And it was his landmark decision in *Marbury v. Madison* that settled the role of the Court as the final judicial arbiter and cemented the judiciary as a coequal branch of government.[92]

Marshall disliked dissents and went to great lengths to avoid the public expression of disagreement, even to the point of modifying his own opinion in order to obtain acquiescence in his opinions for the Court. In an early case, he said: "I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren."[93] In a letter to the *Philadelphia Union* under a pen name, he defended his practice by explaining: "The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all."[94]

Indeed, separate opinions were rare in the early years of the Marshall Court. Between 1801 and 1806, the Court delivered opinions in sixty-seven cases.[95] Marshall delivered the opinion of the Court in sixty of the cases, with only two opinions delivered by Justices other than Marshall, and in one (possibly both) of those cases Marshall did not participate in consideration of the case.[96] During the same period, the Court reverted to the *seriatim* method of delivering opinions in only five cases.[97] In each of these instances, the Reporter noted that

Marshall had either recused himself or was absent.[98] By 1808, the Justices began to abandon the practice of delivering opinions *seriatim*, even in Marshall's absence.[99] By 1814, the Court had developed the practice of delivering nearly all of its opinions by an individual Justice speaking for the entire Court.[100]

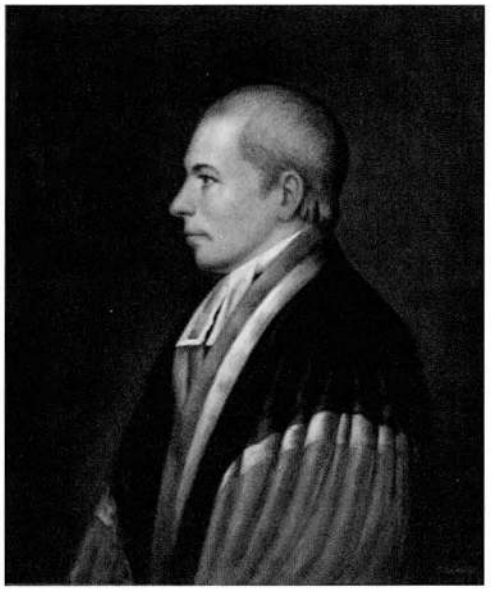
Although Chief Justice Marshall was a strong leader with a noble purpose, the drastic shift from delivering *seriatim* opinions to a single unanimous opinion of the Court, in which Justices were encouraged to publicly suppress their disagreements in order to speak with one voice, was not without its critics. One of Marshall's most vocal critics was Thomas Jefferson.[101] Jefferson maintained that the public was entitled to hear each Justice's opinion.[102] In a letter to Justice William Johnson, whom he appointed to the Court in 1804, Jefferson criticized Marshall's opinion in *Marbury v. Madison* as overstepping his bounds and argued that his practice of delivering a unanimous opinion of the Court would weaken the Union because it shielded the Justices from individual accountability for their decisions.[103] He was concerned that "some of the cases have been of such importance, of such difficulty, and the decisions so grating to a portion of the public as to have merited the fullest explanation from every judge seriatim, of the reasons which had produced such convictions on his mind."[104] He feared that one unified opinion would insulate Justices from public criticism by allowing them to hide behind a single opinion, and he thought there should be a rule requiring them to issue separate opinions in each case.[105] He urged Johnson not to bow to Marshall's practice of delivering unanimous opinions, writing: "It would certainly be right to abandon this practice in order to give our citizens one and all, that confidence in their judges which must be so desirable to the judges themselves, and so important to the cement of the union."[106]

Justice Johnson, who was used to *seriatim* opinions from his service on South Carolina's Court of Common Pleas,[107] chafed at the practice of unanimous opinions.[108] He wrote to Jefferson about a case in which he differed from the other Justices and felt compelled to deliver a separate opinion. He said: "But during the rest of the Session I heard nothing but Lectures on the Indecency of Judges cutting at each other, and the Loss of Reputation which the Virginia appellate court had sustained by pursuing such a Course."[109] Even so, he readily displayed his independence, issuing one of the earliest separate opinions on the Marshall Court in *Huidekoper's Lessee v. Douglass*.[110] Although his opinion was styled as a concurrence because he agreed with the Court's judgment, Johnson discussed an issue he felt had been ignored by the Court's opinion.[111] Over the course of his tenure on the Court, Johnson accounted for nearly half of the seventy dissenting opinions recorded.[112] In doing so, he became the first Court Dissenter.[113]

Jefferson continued to advocate for the Supreme Court to return to the *seriatim* method of delivering opinions, and applauded Johnson's efforts:

> I rejoice in the example you set of *seriatim* opinions. I have heard it often noticed and always with high approbation. Some of your brethren will be encouraged to follow it occasionally, and in time, it may be felt by all as a duty, and the sound practice of the primitive court be again restored. Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority.[114]

While the Court under Chief Justice Marshall continued to deliver unanimous opinions, the number of dissents slowly increased, though the Justices publicly expressed their



Justice William Paterson (pictured) probably delivered the Court's first true dissent, in an 1806 case. For most of the 19th century, the Justices would apologize for their dissents.

disagreement only when compelled by some important necessity.[115] Even then, their disagreements were undertaken with the utmost delicacy.[116] The Justices who offered dissents tended to express them in an apologetic tone. For example, in *United States v. Fisher*, Justice Bushrod Washington, who had not taken part in the decision because he sat on the circuit court below, felt compelled by what he considered to be the importance of the case to explain his reason for delivering a separate opinion: "In any instance where I am so unfortunate as to differ with this Court, I cannot fail to doubt the correctness of my own opinion. But if I cannot feel convinced of the error, I owe it, in some measure, to myself and to those who may be injured by the expense and delay to which they have been exposed to show at least that the opinion was not hastily or inconsiderately given."[117]

Justice William Paterson may have issued what was the first "true" Court dissent in *Simms and Wise v. Slacum*,[118] a case in which the Court reversed the judgment of the circuit court, when he said: "As to the third exception, which embraces the main point of the cause, my opinion differs from the opinion of the majority of the Court, and accords with the direction given by the court below."[119]

These early dissenting opinions reflect the prevailing sentiment that public disagreement was to be avoided whenever possible unless justified by the relative importance of the case. By the end of Marshall's tenure, Johnson's practice of dissenting gained traction and he was no longer the only Justice willing to deliver a separate dissent.[120] Yet, although there was an increase in dissents towards the end of the Marshall Court, the foundation for the Court speaking with one voice had been laid. The rate of dissents after the Marshall Court remained relatively low, appearing in no more than fifteen or twenty percent of the cases filed in a given Term before the early 1900s and in many years not reaching ten percent.[121]

The Shift in Voice from Marshall to Stone

From early to mid-nineteenth century, the norms surrounding dissents began to shift gradually, providing the backdrop for more dramatic changes that would occur in the following century.[122] This new shifts in the way the Court delivered its opinions was brought about by a combination of factors, including gradual changes in the attitudes of the Justices that were reflected in the changing rhetoric of their opinions between the Marshall and Stone eras. These changes were compounded by four factors that affected the Court's decision-making procedures in the early to mid-twentieth century: the rise of the legal-realist academic movement, the passage of the Judiciary Act of 1925, the Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, and the leadership of Chief Justice Stone. It was this period of transition between the tenures of Chief Justices Marshall and Stone that altered the Court's perceptions of its audience, resulted in an increased emphasis on individual ideological consistency, and made the Court's deliberative

function a relevant measure of its legitimacy—all of which led to a sharp increase in the publication of dissenting opinions by the 1940s.

Changes in Rhetoric and Rationales

In the years after Marshall's death in 1835, his influence on the method the Court used to deliver its opinions remained relatively undiminished, and his practices survived largely intact.[123] The rates of non-unanimous opinions delivered under Marshall's successor, Chief Justice Roger B. Taney (1836–1864), rose slightly: 20 percent of the cases decided during Taney's tenure were non-unanimous, compared to 11 percent under Marshall's leadership.[124] Also, more decisions were filed with multiple separate opinions, which had been uncommon on the Marshall Court.[125] Overall, however, the Taney Court continued the practice of delivering opinions of the Court and the number of dissenting opinions remained relatively low.[126]

Just as the rate of dissenting opinions changed little after Marshall's departure from the Court, the tone of dissents and the rationales used to justify them initially remained unaltered.[127] Dissents during the early Taney years were characterized by rhetorical references to "dutiful consideration, honest disagreement, personal duty, and precedential effect."[128] The rhetoric employed by dissenting Justices reflected their continued ambivalence toward the concept of dissenting opinions, and these dissenters were typically apologetic for their disagreement with the majority view.[129] For instance, Justice Peter Vivian Daniel, who was appointed to the Court in 1841, was known for expressing his "unaffected diffidence" and "unfeigned regret" at the prospect of having to dissent in some cases.[130] Further, dissenting Justices emphasized their deep respect for the majority viewpoint, as seen in Justice Daniel's dissent in *Searight v. Stokes*, in which he was "constrained openly to differ from the [majority] decision" despite having the "profoundest respect for the opinions of [his] brethren."[131]

The rationales for dissent also initially carried over from those employed during the Marshall years.[132] Justices still dissented only in "important" cases, where importance was measured by extensive public interest in the case or by the presentation of a constitutional question.[133] Chief Justice Taney explicitly justified his dissent on these grounds in *Kendall v. United States ex rel. Stokes*, in which he disagreed with the majority's view that a court of appeals could issue a writ of *mandamus* to compel an executive official to obey a congressional act.[134] Taney began his dissent by stating: "As this case has attracted some share of the public attention, and a diversity of opinion exists on the bench, it is proper that I should state the grounds upon which I dissent from the judgment pronounced by the Court."[135]

In his opinion in *Briscoe v. Bank of Kentucky*, Justice Joseph Story dissented from the majority's holding that notes issued by state-owned banks were constitutional.[136] He justified his dissent by appealing to the constitutional issues raised in the case:

> I am conscious that I have occupied a great deal of time in the discussion of this grave question; a question, in my humble judgment, second to none which was ever presented to this Court, in its intrinsic importance. I have done so, because I am of opinion . . . that upon constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the Court, and the reasons of his dissent.[137]

These examples suggest that the Justices continued to believe that dissent was a valid form of judicial expression, especially in significant cases, but were still hesitant to break from their colleagues unless they believed it to be absolutely necessary. This view is borne out by looking at the Court's overall statistics for filing opinions with dissents in the years following the Marshall era. Looking at

the Taney Court, which began in 1836, through the Hughes Court, which ended in 1940, the percentage of opinions filed with dissents was less than ten percent.[138]

Around 1841, the Justices' rationales for delivering dissenting opinions began to change. In *Groves v. Slaughter*, a case involving slavery, Moses Groves and James Graham purchased slaves brought to Mississippi by Robert Slaughter, agreeing to pay Slaughter the full price for the slaves at a later date.[139] Groves and Graham failed to pay the full price of the slaves and contended that a provision of the Mississippi constitution prohibited the sale of slaves, arguing that their payment should thus be waived.[140] In an opinion authored by Justice Smith Thompson, the Court ruled that the relevant provision of the state constitution had only been enacted by a statute that was passed after Slaughter had sold the slaves to Groves and Graham; therefore, Groves and Graham were still obligated to make the payment.[141] In a concurring opinion, Justice John McLean addressed an issue that the majority failed to raise: namely, whether the federal Constitution's Commerce Clause granted Congress authority to regulate the interstate sale of slaves.[142] McLean opined that it did not, but once he raised the issue, Justice Henry Baldwin and Chief Justice Taney felt compelled to respond by writing concurring opinions—not because McLean's concurrence raised a constitutional issue, but because they wished to disassociate themselves from certain aspects of the majority view by expressing their individual opinions.[143]

Chief Justice Taney began his concurrence with Justice McLean's view by writing, "I had not intended to express an opinion upon the question raised in the argument in relation to the power of Congress to regulate the traffic in slaves between the different states.... But, as my Brother McLean has stated his opinion upon it, I am not willing, by remaining silent, to leave any doubt as to mine."[144] Justice Baldwin, who thought that Congress could regulate the interstate sale of slaves, similarly justified his separate opinion by noting, "I am not willing to remain silent [on Congress's authority to regulate the sale of slaves between states]; lest it may be inferred that my opinion coincides with that of the judges who have now expressed theirs."[145] These concurring opinions highlight ideological differences between the Justices and represent their early attempts to maintain personal consistency despite their adherence to Marshall's practice of delivering a unanimous opinion of the Court. More broadly, this illustrates the Justices' changing conceptions of the Court's voice: while the Justices once sought to preserve the Court's institutional integrity by speaking with one voice, they increasingly began to value ideological consistency in their own individual voices.[146]

This ideological justification for dissent became more explicit in the mid-nineteenth century, though the Justices still expressed their ideological leanings through concurring opinions. In *Ohio Life Insurance & Trust Company v. Debolt*, Ohio Life Insurance & Trust alleged that the Ohio legislature's imposition of taxes infringed on contractual obligations between the state and the insurance company, including obligations outlined in the company's 1834 charter.[147] A divided Court ruled that Ohio Life Insurance & Trust was still subject to the Ohio taxes, with the Justices outlining different rationales for reaching the same conclusion.[148] In his concurrence, Justice John Catron wrote, "It is proper that I should say my object here is not to express an opinion in this case further than to guard myself against being committed in any degree to the doctrine that the sovereign political power is the subject of a private contract that cannot be impaired or altered by a subsequent legislature."[149] In each of these instances, the language employed by the Justices indicated that they began to see dissents as writings that strengthened the personal jurisprudence and consistency of the individual Justices, rather than as separate opinions that weakened the institutional prestige of the Court.

By the late nineteenth century, the Justices began using new rationales to justify their dissents.[150] They claimed that separate opinions were necessary in cases with particularly far-reaching or influential consequences,[151] in cases that they believed would establish a dangerous precedent for future rulings, and in cases that they thought disregarded the principle of *stare decisis*.[152] Though the Justices continued to justify their decisions by reference to the importance of the case, "importance" increasingly came to be defined by the presence of a constitutional question, rather than by intense public interest in the matter, and by the Justices' desire to maintain ideological consistency.[153]

The shift in rationales for issuing dissenting opinions continued throughout the nineteenth century. Justice John Marshall Harlan (1877–1911) heard 7,649 cases during his tenure on the Court and issued 380 dissents and 100 concurrences.[154] His influence on the justifications for dissenting opinions was just as significant as his prodigious output, in that he frequently wrote that he was dissenting simply because he disagreed with the majority view.[155] In *Brenham v. German American Bank*, in which Justice Harlan disagreed with the majority's view that the city of Brenham, Texas, had no authority to issue negotiable bonds, he said simply: "Believing the doctrine announced by the Court to be unsound upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion."[156]

Justice Harlan's forthright expressions of dissent reflected a shift away from a Court in which Justices apologized for publicly dissenting and towards one in which individual perspectives and atomistic viewpoints were valued to the same extent as the Court's collective voice. This shift indicates a growing acceptance of dissents that has carried over into the twentieth century. While Justices stopped apologizing for issuing public dissents, the number of dissents delivered remained relatively constant until about 1940. Beginning in the 1910s, a series of catalysts triggered a rise in dissenting opinions, beginning with the concept of legal realism.

The Role of Legal Realism

One of the most significant catalysts in the rise of dissenting opinions was President Theodore Roosevelt's appointment to the Supreme Court of Justice Oliver Wendell Holmes, Jr., who served on the Court from 1902 to 1932.[157] Justice Holmes wrote one of the most famous dissents in the Court's history in *Lochner v. New York*, in which the majority overturned a New York law limiting the number of hours that bakers could work each week.[158] Holmes felt the majority was imposing its economic theories on the Constitution and famously noted, in reference to an economic treatise popular in the mid- to late nineteenth century, that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."[159] Only six years later, in *Bunting v. Oregon*, the Court vindicated Holmes' reasoning by upholding an Oregon law setting maximum work hours and effectively overruling *Lochner*.[160] The Court's decision to overrule an earlier precedent, coupled with the overturning of several other precedents in the early twentieth century, demonstrated the potential for dissents to be vindicated and helped establish the dissenting opinion as a legitimate means of contributing to the development of law.[161]

But Justice Holmes' influence extends beyond any single dissent. It has been said that his major influence on American law was "the destruction of the myth of judicial certainty."[162] Prior to his appointment to the Bench, Holmes delivered a series of lectures at the Lowell Institute in Boston, later published as a book, entitled "The Common Law."[163] In these lectures, Holmes argued that the law is indeterminate and subject to interpretation.[164] Rejecting the formalist view of objective and impartial law, Holmes suggested that legal decisions were not the outcome of objective reasoning processes, but rather the product of a

number of factors, including extrajudicial ones:[165] "Law was no longer considered to be found, rather it was made."[166] In addition, Holmes' argument implicitly advanced the notion that the law—defined through its interpretation—was intrinsically linked to its real-world application.[167] This meant that, for a growing body of legal scholars, the way the judiciary interpreted the law became of the utmost importance.[168] If law can only be understood in terms of its real-world application, then the courts, tasked with interpreting the law and judging whether or not the law is being upheld in specific cases, become the ultimate lawgivers.[169]

Holmes' argument that law was not some form of objective truth, but rather the contingent outcome of subjective interpretations and extralegal perspectives, took hold of the legal academy in the early twentieth century.[170] The belief that law was made, rather than found, came to characterize the legal-realist movement of the late 1910s and early 1920s, which was centered at Yale University and Columbia University.[171] The dean at Columbia during this time (1910–1923) was the future Chief Justice of the United States, Harlan Fiske Stone.[172]

The dominance of legal realism contributed to the growing acceptance of dissenting opinions in the early twentieth century. Legal realism solidified the renewed emphasis on individual Justices, rather than on the institutional voice of the collective Court.[173] Justices were no longer able to release what Jefferson had derisively called "Oracles of the Court," issuing opinions and claiming them to be the objective legal truth.[174] Instead, legal realism recognized that individual extralegal factors shaped each Justice's unique interpretation of the law, making it logical for Justices to express their interpretations through separate opinions.[175]

Moreover, legal realism created the impression that unanimous opinions, particularly on controversial issues, were artificial. Since a number of unique factors shaped each Justice's interpretation of the law, and since there was no one "true" interpretation to be validated, it would be counterintuitive for the Court to release one unanimous opinion and claim that each of the Justices concurred completely with it.[176] Under the legal-realist framework, unanimous opinions began to take on an artificial tone, in that the public might respond negatively to an opinion on a controversial topic issued as a unanimous "opinion of the Court" where such an opinion, filed without dissent, gave little credence to opposing arguments that deserved consideration as potentially valid interpretations.[177]

Private Disagreement and Public Unanimity

Support for the legal-realist view that unanimous opinions are artificial was seen in the years before Stone's ascension to the Chief Justiceship in 1941.[178] An analysis of the dockets of Justice Pierce Butler, which cover the 1922 to 1924 Terms, and Justice Stone (prior to his elevation to Chief Justice), which cover the 1924 to 1929 Terms, reveals information about the Justices' voting habits in private conference and indicates that Justices in the 1920s were frequently willing to change their private votes to achieve public unanimity.[179] Based on Butler and Stone's notes, between 1924 and 1929, the Justices voted unanimously in conference on about 50 percent of their cases; however, about 86 percent of published opinions were unanimous during this period.[180] The difference between the Justices' private votes and the Court's public voice during the early part of the twentieth century signals a variety of factors that encouraged Justices to continue the practice instituted by Marshall and join with their colleagues in expressions of collegial unanimity.

One such factor was the belief, articulated by Chief Justice William Howard Taft in 1922, that "it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better

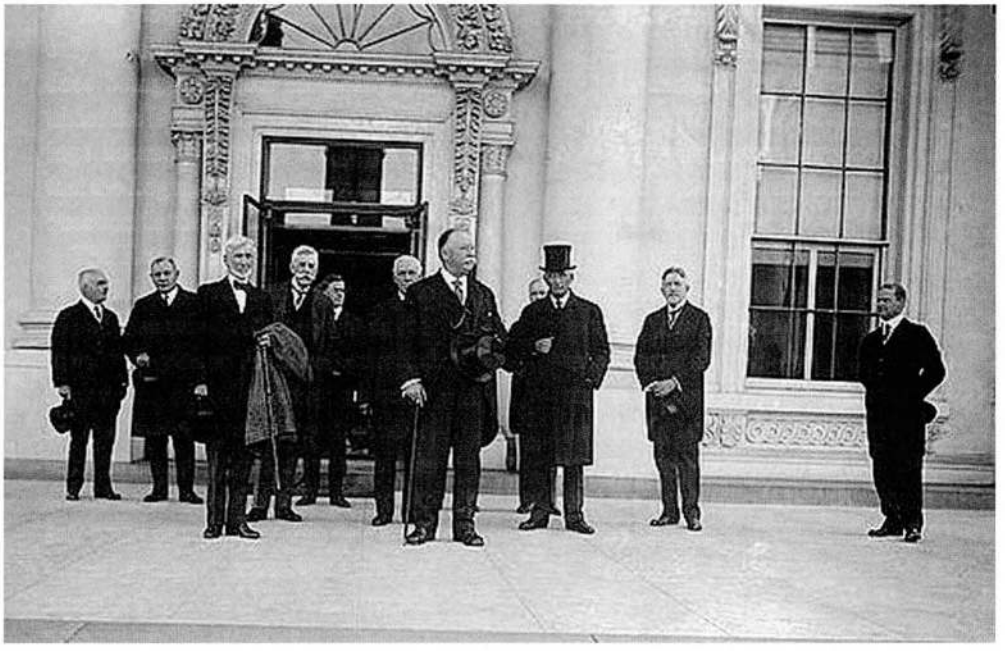
to have the law certain than to have it settled either way."[181] This belief reflects the view that the Court's audience was an important factor to consider in the method it used to deliver opinions. This led to a shift in the Court's perception of its audience that partially accounted for its increased acceptance of dissenting voices in the early twentieth century.[182]

There are at least three potential audiences for the Court's opinions: the Justices themselves, the litigants before the Court, and the American public at large.[183] In the early twentieth century, the Justices viewed their peers and the litigants before them as their primary audience.[184] This caused them to emphasize unanimity in their opinions and clarity in their explanations of the law. Unanimity was emphasized because the Justices, recognizing that their fellow Justices comprised one of their primary audiences, attempted to ensure that as many of their peers as possible would sign onto their opinions. As a result, opinions were written in a way to ensure that broad agreement and unanimity could be achieved. In addition, the Court's focus on the litigants emphasized the clear resolution of the parties' dispute in its opinions; the Justices agreed with Taft's formulation on the need to create certainty in the law.[185] The Court's dual focus on its internal audience and on the litigants before it resulted in a depressed rate of dissenting opinions, since the Justices were focused both on ensuring that their peers signed onto their opinions and on avoiding the confusion in the law that can come with an array of concurring and dissenting voices.

Internal correspondence illustrates how the Justices' desire to ensure unanimity and clarity created a disincentive to publish dissents.[186] In 1927, in *Atlantic Coast Line Railroad Company v. Southwell*, the Court unanimously ruled in an opinion by Justice Holmes that the heirs of a man who had been murdered during the course of his duty as a special policeman could not hold the employers responsible for negligent acts that had allegedly contributed to the man's death.[187] Prior to the release of the opinion, however, Justice Louis D. Brandeis had written to Justice Holmes, "I think the question was one for a jury—but the case is of a class in which one may properly 'shut up.'"[188] One year later, in the admiralty case *France v. French Overseas Corporation*, Justice Butler wrote a private note to Justice Stone in response to Stone's opinion, stating, "I voted to reverse. While this sustains your conclusion to affirm, I still think a reversal would be better. But I shall in silence acquiesce. Dissents seldom aid us in the right development or statement of the law."[189] The opinion came down unanimous.[190] These and other notes exchanged between the Justices demonstrate an emphasis on a "norm of acquiescence"[191] that encouraged Justices to join with their Brethren to ensure both collegial unanimity (appealing to the first audience, the Justices themselves) and a clear expression of the law (appealing to the second audience, the litigants).

The Judiciary Act of 1925 and the *Erie* Decision

Two key developments in the 1920s and 1930s created incentives for the Justices to change their emphasis and begin focusing on the impact of their opinions on the American public at large.[192] As Chief Justice Taft noted, once the Court began addressing its opinions to the American public, its opinions took on a new purpose: "sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law."[193] Once the Court's perceived audience shifted from the litigants and the Justices themselves to the public at large, the Justices began to emphasize the deliberation and "discussion" that went into reaching decisions, highlighting their engagement with difficult legal questions and



When the Judiciary Act of 1925 changed the Justices' jurisdiction from mandatory to discretionary, the Supreme Court began aiming its opinions at the American public, not just at the litigants and practitioners. Above is a visit to the White House by the Taft Court.

initiating a conversation with the American public over the correct interpretation of constitutional ideals.[194]

The first development that caused the Justices to shift their focus to the American public was the passage of the Judiciary Act of 1925, which changed the Justices' jurisdiction from mandatory to discretionary review.[195] A contemporary commentator, writing in 1928, highlighted the influence of the Judiciary Act of 1925 when he noted that "one might well say that the Supreme Court is abandoning its character as a court of last resort, and is assuming the function of a ministry of justice."[196] The difference between a "court of last resort" and a "ministry of justice" primarily relates to the Court's perceived audience.[197] When functioning as a court of last resort, the Justices' primary obligation is to resolve legal disputes between litigants; in contrast, a ministry of justice helps articulate and resolve legal issues that affect the entire population, and its audience is more broadly the American public.[198] Chief Justice Taft highlighted the way in which the Act would change the Court's audience, and while promoting the Act in a speech before the New York County Bar Association in 1922, he stated, "The real work the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it."[199]

The Judiciary Act changed the Court's perceived audience by limiting the Court's obligatory review and expanding its discretionary review.[200] Before the Act's passage, 75 percent of the Court's cases had been taken under its obligatory jurisdiction, while the remaining 25 percent were accepted only when four Justices voted to exercise their discretion to hear the case.[201] Immediately following the passage of the Act, the Court's non-unanimous opinions increased, along with the number of dissents.[202] Specifically, the percentage of non-unanimous cases increased from 8.4 percent before the Act's passage to 14.8 percent after.[203] This is likely because the effect of allowing the Court to choose which cases to review resulted in the Court choosing to

By the time Harlan Fiske Stone became Chief Justice (pictured here with Felix Frankfurter and Frank Murphy), the Justices were emphasizing the discussion that went into reaching decisions. They increasingly valued ideological consistency over institutional integrity.

accept what it considered to be the most important cases, which were the cases more likely to trigger controversy.[204] Because the Justices were engaging with increasingly controversial topics, they had more incentive to publicly express dissent in order to begin "developing and articulating a coherent judicial philosophy."[205] The Court's ability to select which cases to review and to resolve those cases that involved the most important legal issues paved the way for the Justices to use dissenting opinions as a means of expressing controversial internal debates.

The second development that potentially led to the explosion of dissenting opinions in the 1940s was the Court's 1938 decision in *Erie Railroad Co. v. Tompkins*. This case emerged when the respondent, a citizen of Pennsylvania named Tompkins, was injured by an oncoming train while walking alongside a train track in upstate New York.[206] Tompkins sued the Erie Railroad Company, which was based in New York City, in the federal District Court for the Southern District of New York, claiming that the railroad company was liable for damages.[207] The District Court accepted the case under its diversity jurisdiction and applied the standards of federal common law—the law as created and modified by federal courts—to resolve the case in favor of Tompkins.[208] The Court of Appeals affirmed the ruling.[209] However, the Supreme Court reversed, and, in a monumental opinion delivered by Justice Brandeis, ruled that the federal courts did not have authority to create common law when deciding questions of state law brought under diversity jurisdiction.[210] In this case, the District Court and Court of Appeals were obligated to decide the case based on the Pennsylvania common law governing personal injury.[211]

Like the Judiciary Act of 1925, the Court's decision in *Erie* was significant because it changed the tenor of the cases that came before the Court.[212] Cases involving federal common law, which had often come before the Court in the past, were now more frequently decided by lower courts applying state law. This freed the Supreme Court to address more controversial constitutional issues, resulting in a heightened output of dissenting opinions.[213] In this sense, mirroring the Court's change from a court of last resort to a ministry of justice was its change from a common-law court to a constitutional court.[214] Both of these shifts assigned the Court the role of articulating national and constitutional values. Whereas the Court had previously emphasized clarity in an effort to equitably resolve disputes between litigants, it now emphasized deliberation in an effort to effectively engage with national debates over constitutional questions and ideals. By expanding the Court's audience to include the broader American public, the Judiciary Act of 1925 and the *Erie* decision made deliberation a salient measure of the Court's legitimacy, and thus made dissents—a visible sign of contentious internal deliberations—a means of enhancing the Court's legitimacy in a society that had come to embrace the ideals of legal realism.

The Stone Court and the Age of Dissent

By the 1940s, these earlier catalysts culminated in a dramatic increase in dissenting opinions under the Stone Court, which began when Harlan Fiske Stone was elevated from Associate Justice to Chief Justice in 1941.[215] Stone ascended to the Chief Justiceship at a point at which factors like the Judiciary Act of 1925 and the *Erie* decision made the dissenting opinion an increasingly legitimate means of contributing to the development of the law, and his background motivated him to incorporate legal realist ideals in shaping the Court's voice.

Chief Justice Stone came from a background in academia and served as dean of Columbia during a time when the legal-realist movement was taking hold at the school.[216] He also served on a Court that contained two other prominent legal professors, both of whom were appointed by President Franklin D. Roosevelt in 1939, and would become prominent dissenters during their tenures: Justice Felix Frankfurter, who had previously taught at Harvard, and Justice William Douglas, a former professor at Yale.[217]

Emerging from this background, Chief Justice Stone exhibited a personal preference for dissenting opinions and encouraged debate among the Justices.[218] This made Stone unique in the historical lineup of Chief Justices, since the Chief Justices from Marshall to Charles Evans Hughes had universally encouraged unanimity over dissent.[219] This emphasis on unanimity was particularly prevalent among early twentieth-century Chief Justices such as Melville Fuller, who served from 1888 to 1910, and Taft, who served from 1921 to 1930; both were well known for their ability to marshal their fellow Justices and motivate them to join unanimous decisions.[220] But Stone had dissented frequently as an Associate Justice and continued to do so as Chief Justice, signaling to his peers that open debate would be encouraged on the Stone Court.[221] As a result, the number of opinions that included dissent increased from 9 percent for the Hughes Court to 27 percent for Stone's Court.[222] By 1947, the Court's rate of non-unanimous opinions had reached its peak of 86 percent, and about 75 percent of the Court's opinions since that time have been non-unanimous.[223]

Thus, by shifting the Court's focus to an academic audience, embracing legal realism, and encouraging debate, Chief Justice Stone took advantage of conditions facilitating dissent in the mid-twentieth century, and his immediate influence resulted in an explosion of dissenting voices.

The Voice of the Modern Court

The voice of the modern Supreme Court has been characterized as divided, often fractured, with Justices being identified as part of the "conservative bloc" or "liberal wing."[224] As the Court tackles more controversial social and political issues, and limits its review to cases involving significant federal questions and conflicting decisions by lower appellate courts, individual ideologies are more likely to play a role when the Court speaks, determining whether it will speak with one voice or many voices.

Chief Justice John G. Roberts, Jr., who was appointed in 2005, has indicated a preference for unanimous opinions founded on narrow grounds,[225] and of returning the Court to its practice of speaking with one voice.[226] He hoped to emulate the modesty and unanimity of John Marshall,[227] and promote more collegiality on the Court.[228] But unanimity in the modern Court has not been easy to achieve. For the past ten years, the Justices have ended each Term with divided rulings and a high rate of non-unanimous opinions. From 2000 to 2004, the last five years of the Rehnquist Court, the rate of non-unanimous decisions hit a low of 45 percent and a high of 58 percent.[229] From 2005 to 2010, the rate of non-unanimous opinions was at a low of 48 percent, while the high reached 70 percent.[230] These statistics indicate that Justices are dissenting in more than half of the decided cases. In addition, the rhetoric and rationale have changed since the Court's early years. Modern Supreme Court decisions often include opinions where Justices freely and unapologetically respond directly to their colleagues' views in what have been called "dueling opinions."[231]

Even in modern times, it has been said that one should always ask: is this dissent or concurrence necessary?[232] There are a number of reasons why a decision by the Court may be expressed with many voices. One reason, in the words of Justice Ruth Bader Ginsburg, is that "there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation."[233] Another reason may be that a dissent is so persuasive that it garners sufficient votes to become the opinion of the Court, either presently or in the future.[234] A third possibility is that a dissent may attract sufficient public attention to propel a legislative change.[235] Whatever the reason or motive behind the modern dissent, one thing is clear: while Justices appreciate the value of speaking with one voice, they will continue to dissent when they believe important matters are at stake.

Conclusion

The Supreme Court's voice in modern times does not completely conform to either the *seriatim* practice of delivering opinions that characterized the early years, as advocated by Jefferson, or the unanimity of the Marshall Court. The modern Court has adopted a kind of quasi-*seriatim* approach, issuing majority opinions of the Court that are usually accompanied by one concurrence and/or dissent, if not multiple such. So while Jefferson may have been doomed to disappointment over the Court's failure to return to the practice of *seriatim* after Marshall's tenure on the Court ended, did he in fact foreshadow the development of the modern practice whereby Justices feel free to join with their colleagues in the majority opinion of the Court as well as delivering their own separate concurring and dissenting opinions? And while there is a wider acceptance of the value of dissent in modern times, has dissent become overutilized, or has it become so ingrained in American judicial culture that the Court has, in a sense, returned to a quasi-*seriatim* practice? The answer lies in the central paradox at work in the conflict between dissent and unanimity: that dissent is ultimately a product of the quest for unanimity, in that it is only possible to dissent where there is a majority opinion to dissent from. Without the goal of unanimity, dissent would not be an issue—Justices would simply revert, as

Jefferson suggested, back to *seriatim* with the Court speaking through multiple voices. But without dissent, unanimity in today's climate might not have the same impact that it had during the early Marshall years.

For those who advocate unanimity, in which a single opinion issued by an undivided Court signals the objectivity and impartiality of the law, dissent keeps the Court from establishing a consistent jurisprudence because the voices of dissenting Justices are seen as distinct from the voice of the Court. The rule of law is then perceived as having no fixed meaning because it can change depending on the membership of the Court. But as this article has shown, an alternative view is that the rule of law may be strengthened through dissenting opinions because these opinions often provide a basis for future laws. In this way, if the Court overturns a decision in the future, the new judgment is consistent with reasoning from the past. Dissent further shows the level of deliberation of the Court in reaching its decision because, like the *seriatim* method, it demonstrates that individual Justices came to their own opinions, thereby strengthening the Court's reputation as a deliberative body.

Ultimately, the Court's voice can encompass each of these differing perspectives. Dissent does not have to strengthen or weaken the Court's voice—it is merely one aspect of the way the Court speaks to the public. And unanimity does not uniformly strengthen that voice, because a unanimous judgment that is at odds with moral and humanitarian values of the times could be far more damaging to the Court's voice than a dissent. Therefore, while unanimity may help the Court speak with one voice, dissent is an integral part of moderating that voice. In this way, the Court—speaking through many voices—still speaks as one Court.

ENDNOTES

*The views in this article are the views of the authors and do not represent the views of the Supreme Court, the U.S. Attorney's Office, or the U.S. Department of Justice.

[1]M. Todd Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent," John M. Olin Law & Economics Working Paper no. 363, second series, 38, *available at* http://www.law.uchicago.edu/files/files/363.pdf (last visited Dec. 3, 2011).

[2]Donald G. Morgan, "The Origin of Supreme Court Dissent," *William and Mary Quarterly,* 3d Series (1953), 355.

[3]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 24.

[4]*Ibid.*

[5]Kevin M. Stack, "The Practice of Dissent in the Supreme Court," *The Yale Law Journal*, vol. 105 *Yale L.J.* 8 (1996), 2235–37.

[6]*Ibid.*

[7]*Ibid.*, 2237–38.

[8]*Ibid.*, 2237 (attributing his research on the institutional approach to Paul W. Kahn and on the interpretive approach to Ronald Dworkin, **Law's Empire**, Harvard University Press (1986)).

[9]*Ibid.*, 2237–39.

[10]*Ibid.*

[11]*Ibid.*, 2238–40.

[12]*Ibid.*

[13]*Ibid.*, 2240–46.

[14]*Ibid.*

[15]*Ibid.*

[16]*Ibid.*

[17]*Ibid.*, 2246–56.

[18]*Ibid.*

[19]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 24.

[20]*Ibid.*; Hon. Evan A. Evans, "The Dissenting Opinion—Its Use and Abuse," 43 *Com. L.J.* 468 (1938), 469.

[21]Stack, "The Practice of Dissent in the Supreme Court," 2254.

[22]*Ibid.*

[23]Roger LeRoy Miller and Gaylord A. Jentz, **Fundamentals of Business Law: Excerpted Cases**, 2d ed., Southwestern Cengage Learning (2d Ed. 2007), 6; David R. Cleveland, "Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions," 10 *J. App. Prac. & Process* 61 (2009), 70–72.

[24]Cleveland, "Overturning the Last Stone," 70–71.

[25]*Ibid.*

[26]*Ibid.*

[27]*Ibid.*

[28]Miller and Jentz, **Fundamentals of Business Law**, 6; Cleveland, "Overturning the Last Stone," 70–72.

[29]*Ibid.*

[30]*Ibid.*

[31]William A. Stuart, "The Constitutional Clauses of Magna Carta," 2 *Va. L. Rev. 8 (1915)*, 570.

[32]*Ibid., 566.*

[33]*Ibid.*

[34]*Ibid.*, 571–72.

[35]John E. Young, "The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts," 27 *Yale L. Rev. 1* (1917), 26; *see also* Franklin A. Gervurtz, "The Historical and Political Origins of the Corporate Board of Directors," 33 *Hofstra Law Review* 89 (2004), 130 n. 192 (noting that the first "parliament" may have been summoned by Simon Montfort during his struggle with the king in 1264).

[36]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 8; Joshua M. Austin, "The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?," 31 *Northern Illinois University Law Review* 19 (2010), 30; Karl M. ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 44 *Cornell L.Q.* 186 (1958–1959), 190–91.

[37]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 8.

[38]*Ibid.*

[39]Austin, "The Law of Citations and Seriatim Opinions," 30.

[40]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 10.

[41]*Ibid.*

[42]James E. Pfander and Daniel D. Birk, "Article III and the Scottish Judiciary," 124 *Harv. L. Rev.* 1613 (2011), 1645.

[43]*Ibid.*

[44]ZoBell, "Division of Opinion in the Supreme Court," 187–89.

[45]*Ibid.*, 190.

[46]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 10–15.

[47]*Ibid.*

[48]*Ibid.*

[49]*Ibid.*

[50]*Ibid.*

[51]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 10–15; Austin, "The Law of Citations and Seriatim Opinions," 30.

[52]*Ibid.*

[53]*Ibid.*

[54]*Ibid.*

[55]Austin, "The Law of Citations and Seriatim Opinions," 30.

[56]*Ibid.*

[57]*Ibid.*

[58]*Ibid.*, 27.

[59]*Ibid.*

[60]1 U.S. 180 (1786).

[61]1 U.S. at 180.

[62]1 U.S. at 184.

[63]1 U.S. at 490 (Rush, J., dissenting).

[64]1 U.S. at 490.

[65]ZoBell, "Division of Opinion in the Supreme Court," 192.

[66]*Ibid.*

[67]2 U.S. 402, 404–5 (1792).

[68]2 U.S. at 409.

[69]2 U.S. at 409.

[70]2 U.S. at 409.

[71]2 U.S. at 405.

[72]2 U.S. at 407.

[73]Natalie Wexler, "The Chief Justice from a Historical Perspective," *154 U. Pa. l. Rev. 1373* (2006), 1413–19.

[74]3 U.S. 365 (1797); 3 U.S. 415 (1799); 3 U.S. 425 (1799).

[75]Wexler, "The Chief Justice from a Historical Perspective," 1413–19.

[76]Jean Edward Smith, **John Marshall: Definer of a Nation,** Henry Holt & Company (1996), 282.

[77]Alexander Hamilton, **Federalist No. 78**; *see also* Smith, **John Marshall**, 282.

[78]Smith, **John Marshall**, 282.

[79]*Ibid.*

[80]Smith, **John Marshall**, 282; Leonard Baker, "The Circuit Riding Justices," *Supreme Court Historical Society Yearbook* 1977, 63–69.

[81]Wexler, "The Chief Justice from a Historical Perspective," 1405 (discussing the impact and lost influence by the long absences of Chief Justices Jay and Ellsworth, and the observation at the Court's February 1795 Term when Jay was in England that "much of the dignity of the Court is lost by the absence of the Chief Justice").

[82]Smith, **John Marshall**, 283–84; Clare Cushman, **The Supreme Court Justices: Illustrated Biographies, 1789–1995**, 2d ed., Supreme Court Historical Society (1995), 3–4.

[83]Smith, **John Marshall**, 283–84; Cushman, **Supreme Court Justices**, 10.

[84]Smith, **John Marshall**, 283–84; Cushman, **Supreme Court Justices**, 49.

[85]Cushman, **Supreme Court Justices**, 4.

[86]"An Autobiographical Sketch by John Marshall," John Stokes Adams, ed. University of Michigan Press (1937), 9–10; Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 22.

[87]ZoBell, "Division of Opinion in the Supreme Court," 192–94; *see also* Austin, "The Law of Citations and Seriatim Opinions," 28.

[88]Austin, "The Law of Citations and Seriatim Opinions," 28.

[89]Smith, **John Marshall**, 293.

[90]5 U.S. 1 (1801).

[91]Smith, **John Marshall**, 295.

[92]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 24.

[93]Percival E. Jackson, **Dissent in the Supreme Court**, University of Oklahoma Press (1969), 24.

[94]*Ibid.*, 22.

[95]John P. Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 77 *Wash. U. L.Q.* 137 (1999), 137, 144.
[96]*Ibid.*
[97]*Ibid.*
[98]*Ibid.*
[99]*Ibid.*, 144–45.
[100]*Ibid.*
[101]ZoBell, "Division of Opinion in the Supreme Court," 195; Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 145.
[102]Thomas Jefferson, letter to Judge William Johnson (Oct. 27, 1822) and letter to Judge Johnson (Mar. 4, 1823), in **The Works of Thomas Jefferson**, vol. 12, **Correspondence and Papers 1816–1826,** *available at* http://oll.libertyfund.org/title/808 (last visited Dec. 3, 2011).
[103]Jefferson, letter to Justice William Johnson (June 12, 1823), in **Works of Thomas Jefferson**; Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 145–46.
[104]Jefferson, letter to Johnson (June 12, 1823).
[105]Austin, "The Law of Citations and Seriatim Opinions," 28; Jefferson, letter to Johnson (Oct. 27, 1822).
[106]Jefferson, letter to Johnson (Oct. 27, 1822).
[107]Cushman, **Supreme Court Justices**, 68–69.
[108]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 149.
[109]ZoBell, "Division of Opinion in the Supreme Court," 194–95.
[110]7 U.S. 1 (1805).
[111]7 U.S. at 72.
[112]Cushman, **Supreme Court Justices**, 69.
[113]*Ibid.*, 69; ZoBell, "Division of Opinion in the Supreme Court," 197; Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 26.
[114]Jefferson, letter to Johnson (June 12, 1823); Austin, "The Law of Citations and Seriatim Opinions," 28.
[115]Note, "From Consensus to Collegiality: The Origins of the 'Respectful' Dissent," 124 *Harv. L. Rev.* 1305 (2010-2011), 1307.
[116]*Ibid.*, 1308; Evans, "The Dissenting Opinion," 469.
[117]6 U.S. 358, 398 (1805); *see also* Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 146–47.
[118]7 U.S. 300 (1806).
[119]7 U.S. at 310; *see also* ZoBell, "Division of Opinion in the Supreme Court," 195.
[120]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 149–50.
[121]ZoBell, "Division of Opinion in the Supreme Court," 196.
[122]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 153.
[123]*Ibid.*
[124]*Ibid.*
[125]*Ibid.*
[126]*Ibid.*, 153–55; Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 29.
[127]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 153.
[128]"From Consensus to Collegiality: The Origins of the 'Respectful' Dissent" 1309.
[129]*Ibid.*
[130]*Ibid.*
[131]44 U.S. 151, 180 (1845).
[132]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 155.
[133]*Ibid.*
[134]37 U.S. 524, 641 (1838).
[135]37 U.S. at 626.
[136]36 U.S. 257 (1837).
[137]36 U.S. at 350.
[138]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 31 (chart showing percent of opinions with a dissent for each Chief Justice).
[139]40 U.S. 449 (1841).
[140]40 U.S. at 452–76.
[141]40 U.S. at 497–503.
[142]40 U.S. at 504–08.
[143]40 U.S. at 508–17.
[144]40 U.S. at 508.
[145]40 U.S. at 510.
[146]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945", 157; *see also* ZoBell, "Division of Opinion in the Supreme Court," 203.
[147]57 U.S. 416, 427 (1853).
[148]57 U.S. at 426–27.
[149]57 U.S. at 442.
[150]Kelsh,"The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 164.
[151]*Ibid.*, 164.
[152]*Ibid.*, 165.
[153]*Ibid.*, 163–164.
[154]*Ibid.*
[155]Kelsh,"The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 165.
[156]144 U.S. 197 (1892).
[157]ZoBell, "Division of Opinion in the Supreme Court," 201.
[158]198 U.S. 45, 64–65 (1905).
[159]198 U.S. at 66.
[160]243 U.S. 438 (1917).
[161]Kelsh,"The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 174.
[162]ZoBell, "Division of Opinion in the Supreme Court," 202.
[163]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 35.
[164]*Ibid.*, 44.

[165]*Ibid.*
[166]Kelsh,"The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 171.
[167]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent," 35.
[168]*Ibid.*
[169]*Ibid.*
[170]*Ibid.*
[171]*Ibid.*
[172]*Ibid.*
[173]Kelsh,"The Opinion Delivery Practices of the United States Supreme Court 1790–1945,"171.
[174]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 35.
[175]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 171.
[176]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 37.
[177]*Ibid.*
[178]Robert C. Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," Yale Law School Faculty Scholarship Series, paper 186 (2001), 1332–1333.
[179]*Ibid.*
[180]*Ibid.*, 1333.
[181]*Ibid.*, 1311.
[182]*Ibid.*, 1298.
[183]*Ibid.*
[184]*Ibid.*, 1340.
[185]*Ibid.*
[186]*Ibid.*
[187]274 U.S. 64 (1927).
[188]Quoted in Post, "The Supreme Court Opinion as Institutional Practice," 1341.
[189]Quoted in *ibid.*
[190]277 U.S. 323 (1928).
[191]Post, "The Supreme Court Opinion as Institutional Practice," 1344.
[192]*Ibid.*, 1304.
[193]*Ibid.*
[194]*Ibid.*
[195]Thomas G. Walker, et al., "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," 50 *Journal of Politics* 2 (1988), 364; Stephen C. Halpern and Kenneth N. Vines, "Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court," 30 *Western Political Quarterly* 4 (1977), 472.
[196]Gregory Hankin, "U.S. Supreme Court under New Act," 12 *Journal of American Judicature Society* 40 (1928), 40.
[197]*Ibid.*
[198]*Ibid.*
[199]Quoted in Post, "The Supreme Court Opinion as Institutional Practice," 1306.
[200]Halpern, "Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court," 473.
[201]*Ibid.*
[202]*Ibid.*, 475.
[203]*Ibid.*
[204]*Ibid.* 480–81; *see also* Walker, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," 365.
[205]*Ibid.*, 482–83.
[206]304 U.S. 69 (1938).
[207]304 U.S. at 69.
[208]304 U.S. at 70.
[209]304 U.S. at 70.
[210]304 U.S. at 78.
[211]304 U.S. at 78.
[212]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 32; Post, "The Supreme Court Opinion as Institutional Practice," 1274.
[213]Post, "The Supreme Court Opinion as Institutional Practice," 1274.
[214]*Ibid.*
[215]ZoBell, "Division of Opinion in the Supreme Court," 204.
[216]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 35.
[217]"From Consensus to Collegiality: The Origins of the 'Respectful' Dissent" 1315.
[218]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 32.
[219]Walker, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," 380.
[220]*Ibid.*, 380–81.
[221]*Ibid.*, 383–84.
[222]Henderson, "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" 31.
[223]Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945," 175.
[224]*See, e.g.*, statistics for the Supreme Court's October Term 2000–2010, *available at* SCOTUSblog.com (last visited Dec. 3, 2011); Jeffrey Rosen, "The Dissenter," *N.Y. Times* (Sept. 23, 2007).
[225]Jeffrey Rosen, "The Trial of John Roberts," *N.Y. Times* (Sept. 13, 2009).
[226]Austin, "The Law of Citations and Seriatim Opinions," 31; *see also* Linda Greenhouse, "As to the Direction of the Robert's Court: The Jury Is Still Out," *N.Y. Times* (Mar. 7, 2007).
[227]Austin, "The Law of Citations and Seriatim Opinions," 31; *see also* Rosen, "The Trial of John Roberts."
[228]Rosen, "The Dissenter."
[229]Statistics for the Supreme Court's October Term 2000–2004, *available at* SCOTUSblog.com.
[230]Statistics for the Supreme Court's October Term 2005–2010, *available at* SCOTUSblog.com.

[231]*See* Linda Greenhouse, "Roberts Dissent Reveals Strain Beneath Court's Placid Surface," *N.Y. Times* (Mar. 23, 2006) (discussing Justice David H. Souter's majority opinion and Chief Justice John G. Roberts, Jr.'s dissenting opinion in *Georgia v. Randolph*, 547 U.S. 103 (2006)).

[232]Hon. Ruth Bader Ginsburg, "The Role of Dissenting Opinions," 95 *Minn. L. Rev.* 1 (2010), 3.

[233]*Ibid.*, 3.

[234]*Ibid.*, 4; *see also* Austin, "The Law of Citations and Seriatim Opinions," 33–34 (discussing how a dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986) later became the basis for a majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

[235]Ginsburg, "The Role of Dissenting Opinions," 6; *see also* Austin, "The Law of Citations and Seriatim Opinions," 34 (discussing how a dissenting opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), in which the majority held that black men were not considered citizens within the meaning of the Constitution and thus were not afforded any of the rights that citizens enjoyed, led to the superseding thirteenth and fourteenth amendments to the Constitution).

The *Passenger Cases* Reconsidered in Transatlantic Commerce Clause History

TONY A. FREYER AND DANIEL THOMAS*

The Supreme Court's 5–4 decision in the *Passenger Cases* (1849) overturned two Northern states' taxes on poor foreign immigrants. The Court's eight opinions disputed whether destitute transatlantic immigrants arriving in U.S. ports were legally and constitutionally "persons" like fugitive slaves fleeing the South, free African Americans residing in the U.S.-Canadian borderlands, and black seamen working on ships entering Southern ports. The eight opinions issued in the case, as Charles Warren noted, raised fundamental constitutional questions concerning whether U.S. congressional or state authority was exclusive or concurrent over persons moving in interstate and international business, reflecting wider sectional struggles fostering the Civil War.[1] More recently, Mary Bilder and others examined connections among indentured contract labor, race-based American slavery, and the Court's antebellum Commerce Clause decisions to establish that foreign immigrants were commercial objects subject to regulation through the Constitution's Commerce Clause.[2] Southerners and Northern pro-slavery supporters argued, however, that fugitive slaves and free blacks crossing interstate and international borders were "persons" who could be regulated or altogether excluded under state police powers.[3]

Locating the *Passenger Cases* within converging foreign immigrant and antislavery crises, this essay argues that the Court's decision enforced divergent state-federal Commerce Clause regulations that socially and constitutionally "embedded" market relations and thereby undercut "persons" as commerce. During the mid-nineteenth century, Karl Polanyi affirmed, liberals put forth the idea that markets were autonomous, "disembedded" entities existing separate from government intervention and policies.[4] According to Polanyi, however, legal and constitutional policies and laws constituted or "embedded" market relations—including particular distributional outcomes—within society, culture,

and institutions. Regarding foreign immigrants, Matthew J. Lindsay argued, "The federalization of immigration lawmaking between the first federal Passenger Act of 1819 and Congress's assumption of full administrative control over the landing of immigrants in 1891 was deeply embedded in two epochal historical dynamics: slavery and emancipation, and the industrialization of labor."[5] The embedding of socially conflicted Commerce Clause issues in the *Passenger Cases* began in a transatlantic context; it became still more entrenched as slavery and foreign-immigrant crises converged within Congress, the states, and lawyers' courtroom arguments, resulting in the Supreme Court's eight opinions and sharply divided decision, undermining Union.[6]

I. The *Passenger Cases*: Commerce Clause Issues in Transatlantic Context

After a decade of litigation, the Supreme Court considered the *Passenger Cases* amidst intensified slave and immigrant crises during 1848–49. Various Southern periodicals announced South Carolina Senator John C. Calhoun's vote on March 20, 1849 for congressional funds to print more than 5,000 copies of the Court's decisions regarding whether New York and Massachusetts taxes on shipmasters transporting poor immigrants violated the Constitution's Commerce Clause.[7] The preceding month, Daniel Webster, Massachusetts Senator and counsel for the immigrant-shippers in the case, noted in a letter that the "decision will be more important to the country, than any decision since the steamboat [monopoly] case."[8] The March 7 *Savannah Republican* reported the argument of New York's lawyer, John Van Buren, declaring the urgent need for a decision, "especially in reference to the poor devils who are now at Quarantine. The cholera is raging among them with fearful mortality, and it would be a consolation to their friends to know that they are dying constitutionally."[9] Reflecting these tensions, the *Passenger Cases* presented to the Supreme Court federal, state, and local governance issues testing the lawful status of white foreign immigrants and African Americans under the commerce power, international treaties, and state police powers.

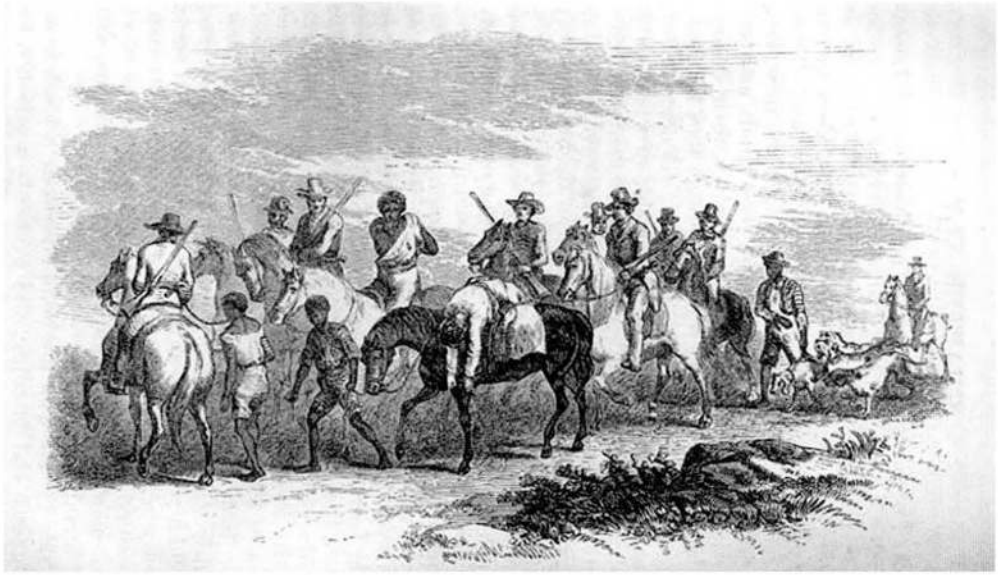
Separate cases from Massachusetts and New York first arose from growing international immigration. Since the late 1820s, the number of foreign immigrants arriving in U.S. ports increased steadily, testing the longstanding policy presumption that regulation was primarily a state rather than a federal duty. Attempting to aid poor steerage passengers by imposing reasonable space and health conditions aboard vessels arriving from continental European and British ports, Congress passed the 1819 Passenger Act.[10] More generally, the federal government left immigration regulation to state and local governments. Periodic public reports in the United States and abroad acknowledged that American vessels addressed health issues somewhat better than their British and European competitors. Overall, however, the steerage-passenger conditions were deplorable. During the Irish Famine (1846 to 1852), as ever-increasing numbers of foreign immigrants entered New York, Boston, and other ports, disease aggravated preexisting poverty, creating profound social-welfare problems local and state officials had to address.[11] Poor laws and workhouses proved inadequate; private business pursing relief alternatives proved to be even worse.

Confronting these problems, Massachusetts and New York pursued regulatory innovations. During the 1830s, the state legislature empowered New York City authorities to require reports of all shipmasters stipulating their passengers' health and welfare. In *City of New York v. Miln* (1837), the U.S. Supreme Court held that these reporting requirements did not violate the Constitution's grant of authority to Congress under the Commerce Clause and clearly were within the traditional state police powers controlling health, welfare, and morals.[12] In 1837, the Massachusetts

The Irish Famine (1846 to 1852) drove increasing numbers of foreign immigrants to enter ports in New York and Boston, creating profound social-welfare problems for local and state officials. Although Southerners generally blocked Commerce Clause–based regulation of slavery, there was bipartisan congressional support for Irish Famine relief.

legislature employed the same police-power authority to implement taxes on shipmasters arriving with alien passengers in Boston harbor. The taxes were paid into a fund to support hospital facilities for destitute and sickly alien immigrants. In 1839, the Court of Common Pleas upheld the Massachusetts tax against a shipmaster's challenge in *Norris v. City of Boston*.[13] On appeal, the Supreme Judicial Court of Massachusetts in 1842 upheld that decision, also employing the police-power principle. Meanwhile, the New York legislature authorized New York City officials to collect a tax on alien passengers from shipmasters; paid to the city's health commissioner, the tax supported a marine hospital and quarantine at Staten Island. State appellate courts upheld the tax in 1842 and 1843, respectively.[14]

In December 1845, Webster initiated appeals to the Supreme Court that gradually entangled immigration issues in the slavery controversy. The New York and Massachusetts immigrant-tax issues were reargued as the *Passenger Cases* in February and December 1847 and again in December 1848; the Court's final decision striking down the taxes as contrary to congressional commerce power in conjunction with international treaties was announced in January 1849. During the recurring arguments, various lawyers joined Webster in representing the shippers against various counsel defending the two states' victories. Delays first arose in 1845–1846 when Justices Smith Thompson, Henry Baldwin, and Joseph Story died; replacing the three were Samuel Nelson, Robert C. Grier, and Levi Woodbury.[15] With each change in the Court's membership, Democrats and Whigs agitated pro- and anti-slavery issues that were inflamed further over Texas annexation and debates concerning the war with Mexico.[16] By the war's end in 1848, periodic fugitive-slave escapes from the South into Canada also aroused U.S. protest against the British; over the same period, British diplomats and Massachusetts officials protested



British and Canadian efforts to defend African Americans—particularly fugitive slaves (above) and free blacks working as seamen—exacerbated tensions between state police-powers versus exclusive federal commerce power.

Southern port authorities' detention of black sailors on British and Northern Free State vessels.[17]

Exacerbating tensions between state police powers versus exclusive federal commerce power were British and Canadian efforts to defend African Americans. As early as 1837, while the Supreme Court was deciding the *Miln* case, Britain's Vice Consul in Boston, Robert C. Manners, began lobbying the Massachusetts legislature against its tax on immigrant shipmasters.[18] Manners also contributed funds supporting litigation challenging the tax before the Supreme Court in the *Passenger Cases*. Manners' efforts to overturn the state tax on immigrant vessels coincided with the British Empire's assertions of sovereignty across the Canadian borderlands in the fugitive-slave cases and in its defense of black British merchant seamen whom local port officials seized under Southern states' Negro Seamen Acts. Manners made two constitutional claims: the taxes violated the exclusive federal commerce power and they were contrary to U.S.-British treaties affirming sovereignty.[19] Inferentially, the sovereignty claims included black British merchant seamen in Southern ports and fugitive slaves seeking British justice in the Canadian borderlands and elsewhere.[20] Yet by 1848, Secretary of State James Buchanan, in James Polk's waning Democratic administration, insisted that Southern states' sovereignty defeated British claims of sovereignty in both the fugitive-slave and black-seamen cases.[21]

Buchanan's and his British counterparts' respective sovereignty claims involved more tenuous commerce-power enforcement issues. British North American officials' general refusal to return fugitive slaves as demanded by Southern slaveholders also concerned U.S. officials' weak or lack of enforcement of the international slave trade ban—which partially rested on the commerce power—in Texas and California. Both places were spatially far removed from the fugitive-slave cases agitating the U.S.-Canadian borderlands. Still, the conflicted international-treaty claims were like those arising from the Royal Navy's pursuit of illegal international slave traffickers, who were often American

citizens—especially after the United States established sovereignty over the Mexican cession through the Treaty of Guadalupe Hidalgo (1848). Moreover, though few in number, abolitionists in Texas and California—at least from the perspective of Southern slaveholders and their Northern allies—were united with the interracial, evangelical Protestant abolitionists working throughout the U.S.-Canadian borderlands in conjunction with the transatlantic British abolitionist movement. Indeed, for pro-slavery advocates, any affront to U.S. sovereignty in one place represented a threat everywhere.[22]

In practical operation, Manners understood, the exclusive commerce power assumed that federal power was dominant except where it was inconsistent with state sovereignty. Even so, the treaties the U.S. officials negotiated with Britain included the phrase "subject always to the laws and statutes of the two countries respectively."[23] Thus, the Massachusetts and New York taxes on transporting transatlantic immigrants did not only raise the question of state versus federal supremacy within the American Union. Those same taxes also posed the supremacy issue for U.S.-British treaties concerning fugitive slaves in the U.S.-Canadian borderlands, free blacks working as British or American merchant seamen, and—inferentially at least—the policing of the international slave-trade ban. Even so, applying the state-sovereignty treaty-clause exception, Democrat and Whig presidential administrations permitted Southern state port officials to enforce Negro Seamen Acts requiring detention of black merchant seamen who were British Crown subjects. The same treaty provision, however, empowered Canadian authorities' refusals to surrender fugitive slaves to Southern slaveholders because doing so was contrary to British imperial policy. The *Passenger Cases* revealed how socially and constitutionally embedded were these complexities as antislavery and immigrant crises converged.

II. Antislavery and Transatlantic Immigrant Crises Converge on the Commerce Power

Commerce Clause jurisprudence enabled state "black laws" imposing racial discrimination upon African Americans. Massachusetts and several other free states, however, generally rejected black laws, instead employing police powers to enact personal-liberty laws granting African Americans conditional citizenship status as "persons." In 1849, Ohio repealed most of its black laws and conferred similar conditional citizenship. The Free States' personal-liberty laws increased equality before the law in courts, property and contract exchanges, and the ballot box.[24] In 1849, John C. Calhoun and his Southern congressional colleagues informed their constituents that the personal-liberty laws effectively nullified enforcement of the federal Fugitive Slave Law.[25] In reply, Illinois Congressman T. J. Turner, "speaking . . . for the people of the North," exclaimed that a South Carolina law "forbidding the colored citizens of Massachusetts from going into that state [and] even imprisoning them when they go there aboard their vessels" was the "most flagrant violation of the Constitution ever perpetrated in" America. Responding to Southerners' arguments that "Massachusetts has no right to make the negroes citizens," Turner insisted that the Bay State was exercising the same state sovereignty to establish citizenship for blacks "that South Carolina has to make them slaves."[26]

After the *Steamboat Monopoly Case* (1824), Chief Justice John Marshall's opinions were ambiguous concerning whether Congress possessed exclusive constitutional power over interstate or international trade, which included "persons," or somehow shared with the states a concurrent power of this kind.[27] Before his death in 1835, Marshall delayed deciding the *Miln* case, in part because the state's regulations affecting steerage passengers potentially aroused Southern

concerns that an exclusive congressional commerce power might imply both a congressional authority to regulate the interstate slave trade and limits on state police powers to exclude free blacks as persons from residing in or entering—for example, on "foreign" merchant vessels—either free or slave states.[28] Still, in 1837, following pro-slavery Democrat Roger B. Taney's appointment as Chief Justice, the Court held that the New York regulation of immigrant shipmasters in *Miln* was a lawful exercise of state police powers that included African Americans as persons.[29] Five years later, in the controversial fugitive-slave case *Prigg v. Pennsylvania* (1842), Taney and Virginia's Justice Peter V. Daniel embraced *Miln*'s construction of state police powers to enforce state sovereignty over fugitive slaves and free blacks moving among Southern states and into the Free State borderland with Canada.[30]

The Calhoun–Southern congressional delegation's 1849 address exclaimed that the interstate slave trade had become a conspicuous Commerce Clause issue by the 1840s. Construing the Commerce Clause and state police powers over persons, Southerners thus projected their fear that the abolitionists' proposal to end the slave trade in the nation's capital might soon embrace not only the Mexican cession controversy but also slave emancipation in the South itself. Indeed, Southern federal elected officials consistently blocked attempts to enact federal legislation based on the Commerce Clause affecting interstate trade.[31] Also, a divided Court in *Groves v. Slaughter* (1841) upheld a Mississippi constitutional provision that forbade importing slaves for the purpose of sale;[32] nevertheless, such trade was permissible until the state enacted legislation enforcing the constitutional provision. The Commerce Clause question was whether the state constitutional provision violated an exclusive, if dormant, Commerce Clause, since there was no federal law. Asserting states'-rights police powers grounded in state sovereignty, the Court majority held that the Commerce Clause did not confer an exclusive power upon Congress. The implication was that the states and Congress somehow selectively shared regulatory power over interstate commerce.

Although Southerners generally blocked Commerce Clause–based regulation of slavery, there was bipartisan congressional support for Irish famine relief. The September 1846 *London Times* reported that, after a year, the failure of the potato crop brought famine throughout Ireland.[33] By January 20, 1847, the *Boston Pilot* began publishing reports of the famine's tragic progress and its implications for the "famine ships" arriving in U.S. ports.[34] During senatorial debates, Whigs such as Webster supported various Irish relief measures, including special grain shipments and new passenger legislation. Southern Democrat Calhoun did the same, "present[ing] a petition from the Irish Emigrant Society of New York."[35] Amidst the congressional debate over the 1847 Passenger Bill proposed in the House Judiciary Committee, a supporter exclaimed that it "intended to correct one of the most enormous and aggravated abuses which now existed in Christendom. The emigrants from abroad frequently came into the port of New York in such crowded condition on board of ships . . . that they were landed in so diseased a condition as to be unable to walk, and were carried in carts to the almshouse, and sometimes died on the way."[36] On board ship, "[n]umbers died on the passage from the same cause. By this abuse an immense expense was imposed on the city, as well as a crying inhumanity perpetuated."[37]

Against bipartisan support for the Passenger Bill, certain Protestant groups mobilized opposition under the banner of the Native American or Know Nothing party. The Passenger Bill's supporters insisted its "object . . . was not to check immigration, but to provide by law that sufficient space should be reserved on board the importing ships for comfortable accommodation of passengers, so that they might arrive on our shores in a state

of health, instead of presenting a revolting spectacle, which was a disgrace, not only to our laws and our country, but to humanity itself."[38] Prescribed shipboard spatial dimensions for cabin and steerage passengers reflected instrumental and humanitarian justifications that nonetheless required shippers' compliance, which informed observers such as Herman Melville said was unlikely to be forthcoming.[39] By contrast, the Know Nothings publicized neither their anti-Catholicism nor their general resistance to poor immigrants. Instead, they attacked a perceived political-party machination.[40] A more accurate title for the Bill, a critic claimed, was "to afford additional facilities to the paupers and criminals of Europe to emigrate to the United States." He expressed "at length . . . opposition to the whole system of importing voters from abroad; attributing it to a party policy, with a view to weaken the Native American Party."[41]

The bipartisan political support for and the Know Nothings' opposition to the Passenger Bill obscured conflicted state police powers governing "persons." The Know Nothings rejected the federal law in part because it enabled poor immigrants to enter Massachusetts, New York, and other states, whereupon the immigrants' federal admission within state borders empowered local party officials to recognize them as "persons" entitled to citizenship on the basis of state police powers. Know Nothings addressed these issues through three constitutional claims. First, as the *Miln* decision affirmed, the Constitution's commerce power did not prevent states from regulating immigrants as "persons," rather than commerce. Second, while state and federal governments shared power to regulate interstate and international commerce, state sovereignty—enforced through the state's police powers—was supreme when it came to protecting the state from external health, morals, and welfare threats identified with poor immigrants. Finally, the supremacy of state police powers meant that each state could establish a regulatory regime that excluded foreign immigrants from its borders and empowered it to expel those who had already established residence and citizenship.[42]

Southerners and Know Nothings nonetheless were ambivalent about the results of extending police-power status to foreign immigrants as persons. Southerners knew that Irish-American immigrants consistently voted Democrat in local, state, and federal elections. Maintaining such Irish-American electoral support required Northern and Southern sections within the Democratic party to recognize certain poor foreign immigrants as "persons" subject to state police powers and thus entitled to vote. In principle, too, the Know Nothings agreed with Southerners that foreign immigrants were "persons" under state police powers. Know Nothings endorsed the police-power principle over "persons," however, only in order to circumscribe the federal commerce power that might benefit immigrants and to impose state regulations excluding them from citizenship, including entry into the labor markets and free exercise of religion in public education. Police powers also could be used to expel the poorest immigrants from states. Thus, Southern and Northern Democrats endorsed state police powers as a basis for conferral of citizenship upon foreign immigrants, whereas the Know Nothings advocated police powers as a regulatory device to exclude immigrants from citizenship.[43]

These political exigencies had contradictory results. As their 1849 Southern congressional address indicated, Calhoun and his colleagues adamantly opposed Free States such as Massachusetts conferring upon free or fugitive African Americans even the most minimal legal citizenship as persons under state police powers.[44] Understanding clearly the electoral advantage Irish immigrants gave Democrats in Northern cities, Southerners nonetheless willingly conferred citizenship upon poor immigrants as persons employing those same police powers. Confronting the rising tide of

Southerners' and Know Nothings' inconsistent support for limited federal supremacy and expansive state police powers—which disrupted American as well as British support for exclusive federal commerce power—abolitionists and their more moderate antislavery supporters maneuvered within the border Free States, such as Ohio, winning repeal of the black laws sufficient to confer conditional citizenship upon African Americans. Also across the Free State borderland with Canada, interracial groups—confirming Calhoun's and his colleagues' fears—together disrupted the enforcement of federal fugitive-slave laws. Border Free State interracial groups effectively exploited these divisions.[45]

In the *Passenger Cases*, the Commerce Clause issues arising from Massachusetts's and New York's "alien" taxes thus involved more than foreign immigrants. Congressman Turner emphasized the implicit connection to African Americans' rights claims and their defense by the Northern border Free States.[46] Rebutting the Southern congressional delegation's address during February 1849, he linked the Mexican cession controversy and South Carolina's enforcement of Negro Seamen Acts to perceived implications the Court's *Passenger* decision had for Free States' selective extension of citizenship to African Americans. Turner stated that the "Supreme Court, in the celebrated case which has lately been adjudicated within this Capitol, says in effect that the law of South Carolina is unconstitutional." The South Carolina law "not only prevents the black citizen of Massachusetts from going into South Carolina, but it prevents an appeal being taken from the judgment of the courts of that State to the [U.S.] Supreme Court." This was "an offence against the Constitution, against Massachusetts, and all the States who make the blacks citizens."[47] The lawyers' sharply divided arguments over the Commerce Clause in the *Passenger Cases* reflected the ambivalence Turner recognized.

III. Lawyers' Arguments Reflect Converging Crises

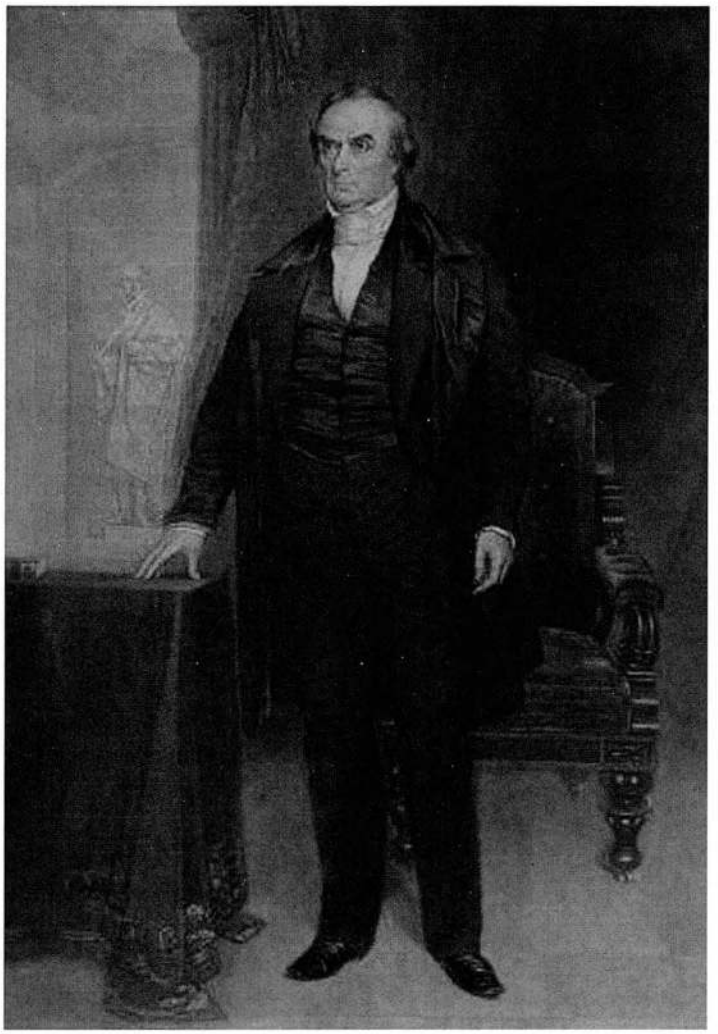
When the New York and Massachusetts courts affirmed their states' alien taxes by 1843, the commerce-power issues most directly concerned foreign immigrants. The state courts' decisions were consistent with the Taney Court's 8–1 holding in *Miln* that aliens were not objects of commerce and police powers regulating them did not breach the federal commerce power. Lone dissenter Justice Story, appealing to Marshall's ghost, contended that the states' regulations requiring ship captains to incur the costs of accounting for passengers' health and welfare prior to landing violated the exclusive federal commerce power.[48] Nevertheless, beginning in 1837—the same year as the *Miln* decision—Manners, the British Counsel in Boston, contended that the taxes were unconstitutional. In 1845, these constitutional claims received strong support when the shippers hired Webster to appeal the states' cases to the Supreme Court.[49] Encountering delays, Webster's appeal became entangled in the converging, profoundly conflicted transatlantic immigrant and North-South sectional crises. Webster and the other lawyers included the wider Commerce Clause and state police-power issues in their arguments before the Supreme Court in the *Passenger Cases*.

Each side in the appeal addressed whether the federal commerce power was exclusive or limited by state police powers. Webster and his co-counsels, David B. Ogden and J. Prescott Hall, argued for reading *Miln* as applying only to persons subject to police-power regulations once they disembarked from vessels. The manifests the state required, detailing passengers' status and condition, were minor state-authorized municipal regulations that neither burdened nor otherwise interfered with federal commerce.[50] Moreover, Webster and his colleagues argued, *Miln* was consistent with *Groves*, in which the Court had held that state regulations governing the interstate slave trade

Southern and Northern Democrats endorsed state police powers as a basis for conferral of citizenship upon foreign immigrants, but members of the Know Nothing party advocated police powers as a regulatory device to exclude immigrants from citizenship.

did not impinge upon the exclusive federal commerce power unless a federal statute or treaty imposed a direct conflict.[51] The states' counsel, John Van Buren, Willis Hall, and John Davis, focused on the few federal enactments: the Jay Treaty of 1794; the 1799 General Collections Act (authorizing customs duties); and the 1819 Passenger Act, prescribing shipboard space requirements based on tonnage. As essential police regulations over persons, the two states' alien taxes conflicted directly with none of these federal commercial regulations and were therefore consistent with *Miln*.

Amidst recurring rearguments, Webster wrote his son that there was "just about an even chance that the . . . [alien passenger tax] will be pronounced unconstitutional." During the "days of Marshall & Story it could not have stood one moment. The present Judges, I fear, are quite too much inclined to find apologies for irregular & dangerous acts of State Legislative."[52] Two days later, on February 9, 1847, Webster's reported argument for the ship captains and the shippers expressed the "hop[e] that this court would preserve with sedulous care all the rights that belonged to the State of Massachusetts as well as to the national government."[53] Striking such a balance within the existing American federal polity was difficult. Webster said it was *Miln* "which gave rise to the idea that a door had been opened thereby to the States, to enable them to raise revenue out of the exercise of the commercial power." The resulting "law" establishing the alien tax and the system for its collection was "a pure commercial regulation," and it shared nothing "in common with any police law . . . A tax on goods, on tonnage, or on any of the operations of commerce, cannot be construed into a poor tax or a police tax." He conceded that "it [was] yet to be proved that a tax on the importation of persons is not a tax on imports."[54]



In addressing whether the federal commerce power was exclusive or limited by state police powers, Daniel Webster, representing the immigrants, argued for reading *Miln* as applying only to persons subject to police-power regulations once they disembarked from vessels; the manifests the state required detailing passengers status and condition were minor state-authorized municipal regulations that neither burdened nor otherwise interfered with federal commerce.

Most importantly, Webster argued, the "Constitution" and U.S. "laws . . . encourage the importation of all foreigners free, untaxed." Massachusetts, however, "claims the right to tax these foreigners at her discretion, for the benefit of her exchequer." In addition, Webster echoed Know Nothing rejections of immigrants, observing that Massachusetts "claims the right . . . to exclude all foreigners from her soil; for if she can tax them two dollars she can tax them any amount." Accordingly, were "not the objects and ends of the Massachusetts law repugnant to the objects, and ends of the laws and Constitution of the United States?" Indeed, the state sent officials on board passenger vessels to collect the alien tax, followed a few days later by federal agents charged with enforcing customs duties. "What is this but direct collision between the laws of the United States and the law of Massachusetts?" Should the Court uphold the "constitutionality of this law"; Massachusetts and other states "in the exercise of [their] sovereign discretion" would declare all such laws "a pauper law" which "Congress cannot repeal," whereupon "all the States will replenish their treasuries by a tax on aliens arriving in the United States!"[55]

The "great truth" was that the federal government possessed "jurisdiction over" the "commerce, the ports . . . of" the nation "for strictly commercial purposes." Webster countered the claim that "if the State has not a right to tax alien passengers, it will have no power to redress the evils of foreign pauperism."[56] Instead, "it belongs to Congress to redress evils of this kind . . . at its discretion." Thus, in response to the "authorities of the City of New York," Congress had before it a Bill, soon enacted as the Passenger Act of 1847, "to regulate the admission of alien passengers. It goes back to the point of embarkation in the foreign country and requires the alien to prove his character before the American consul." Webster again distinguished *Miln,* as a constitutional exercise of the police power over persons, from the two states' alien taxes, which violated the "exclusive" federal power over commerce. Webster cited the Court's holding in *Groves* that the state's slavery regulations did not trench upon this exclusive federal power. "Some powers were granted by the States to Congress, and some were retained. This tribunal was constituted as the surveyors of the boundary line between the two governments: and whenever either Government gets on the wrong side of the line," it was the Court's duty" to "adjudge accordingly."[57]

Van Buren, Davis, and Hall, the lawyers representing the two states, focused on police powers over persons as not in conflict with federal laws or constitutional provisions regulating "commerce." Davis conceded that, while the states' police-power regulations addressed the enormous financial burdens the massive influx of immigrants engendered, they could also "affect" the federal commerce power. Nevertheless, the "fact that they [alien taxes] do affect commerce does not make them unlawful, though the influence amounts to regulation, because they are made for other lawful purposes, and are as indispensable to the public welfare as foreign commerce."[58] Moreover, Hall claimed, the Supreme Court's 1847 decision in the *License Cases* upheld state temperance laws having an impact on interstate commerce unless there was a direct conflict with a federal law.[59] The states' alien taxes regulating persons for state police-power purposes did not clash with the 1799 customs or 1819 passenger laws, or with the 1794 U.S.-British Treaty, which were clearly commercial regulations enacted pursuant to the Constitution's commerce powers. Even though the alien taxes affected federal commerce, the intent and result embraced persons who clearly came within the "jurisdiction" of the states' "sovereignty."[60]

The states' sovereignty to tax "alien persons" was consistent with state police-power regulations of free blacks, which did not conflict with a federal commerce power. Following the Court's decision in *Groves* affirming that the state's police-power controls over the interstate slave trade did not clash with the exclusive federal commerce power, Webster and his colleagues made only inferential reference to Southern states' Negro Seamen Acts and certain Northern Free States' black laws. Davis more expressly compared police powers underlying those race-based laws to police powers applied to regulate immigrants as persons. "If we cannot meet and control by suitable regulations the introduction of such persons [poor immigrant aliens classified as paupers, vagabonds, insane, or criminals]," Davis queried, "on what principle can the laws expelling or forbidding the introduction of free Negros be sustained? Such laws exist, and I apprehend it will be found difficult to sustain them on the ground of color alone."[61] Indeed, Van Buren said, at least fifteen free and slave states excluded or regulated free blacks seeking admission to their borders, consistent with the Court's finding in *Groves* that slaves and free blacks were "persons" outside the federal commerce power.[62]

These considerations recognized that persons were not commodities within the federal commerce power. The Supreme Court, argued Davis, affirmed in *McCulloch v. Maryland* (1819),[63] the *License Cases*, and other

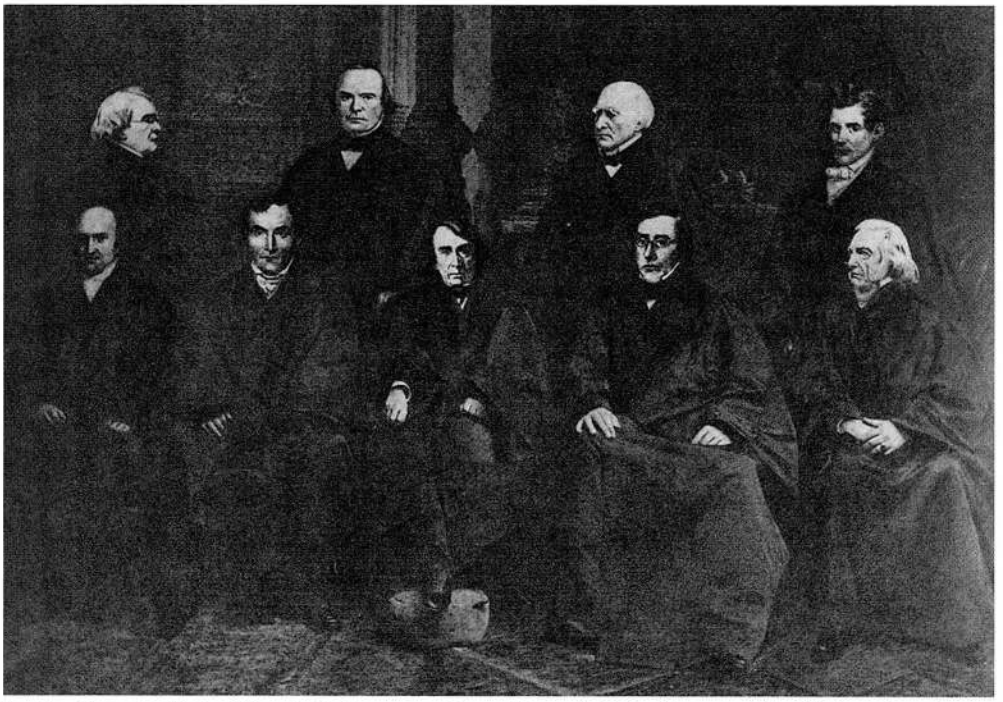
precedents that the taxing "power" was "vital, essential to the existence of the State, unabridged, concurrent, coextensive with the sovereignty of the State, applies both to persons and property, knows no supreme law over it, may reach any object within the jurisdiction, and may be carried in its application to any extent the government chooses."[64] A famous limitation was the second Bank of the United States; since 1836, of course, it had ceased to exist. Also, Article I, Section 10 of the Constitution stated that "[n]o State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports... No State shall, without Consent of Congress, lay any duty of tonnage." For the Alien Taxes to be contrary to these express provisions they would have to be taxes on "imports" or "tonnage." Applying the reasoning in *Miln*, however, passengers were "persons," not "cargo," placing them in either commercial category. In addition, the 1808 slave-trade ban taxed slaves, said Hall, not free (white) immigrants.[65]

Finally, the states' lawyers addressed the question of whether federal commercial regulations might be shared or concurrent with state police powers. Hall noted that Congress had passed laws in 1796, 1799, and 1832 authorizing federal revenue officials to cooperate with state authorities in their implementation of the state quarantine laws.[66] State and federal law thus "sanction the whole system of State quarantines, and every thing appurtenant to quarantines, such as hospitals, and the means of purifications, and the preventing the spreading of contagion."[67] Even so, Hall declared, the states' "possession of the power to establish embraces the power to support."[68] Similarly, Congress recognized that, like quarantine, "pilotage" of vessels entering state ports was not a federal commercial regulation, all of which reinforced Justice Barbour's holding in *Miln* that "passengers are not the subjects of commerce, and are not imported goods."[69] Lastly, Hall rejected the idea that the alien taxes could violate the Constitution's Commerce Clause absent a federal statute: "This rule of construction will be found oppressive in the extreme, and impossible. Oppressive, because it requires men to obey laws which they cannot know; impossible because the courts cannot apply it."[70]

IV. Divided Decision and Conflicted Majority and Dissenting Opinions

The lawyers provided ample grounds for the Supreme Court's eight opinions and 5–4 decision. The majority justices were John McLean, James M. Wayne, Robert C. Grier, John Catron, and John McKinley; those in the minority were Peter V. Daniel, Levi Woodbury, Samuel Nelson, and Chief Justice Roger B. Taney. Nelson alone wrote no opinion, saying he concurred fully with Taney. Consistent with the widespread understanding by 1849 regarding the constitutional significance of the *Passenger Cases*, the Court's reporter published several hundred pages embracing the lawyers' edited arguments and all eight opinions. The opinions were sufficiently conflicted, however, that only the result was clear.[71] While the majority found the alien taxes to be unconstitutional regulations of foreign commerce, the reasoning diverged concerning the scope of the exclusive commerce power and to what extent the laws clashed with an express federal law or treaty.[72] The minority concurred that the taxes were a proper exercise of the states' police power but did not agree on the limits of the federal commerce power. Three dissenters addressed the potential meanings the conflicted opinions had for free blacks' and poor immigrants' status as "persons" under state or federal law.[73] Both majority and minority opinions applied *Miln* in support of their contrary holdings.

The majority's agreement that the states' alien taxes were unconstitutional regulations of foreign commerce partially reflected the facts in each case. The master in the New York suit commanded a British vessel, the *Henry Bliss*; the plaintiff in the Massachusetts case was the captain of the schooner *Union*



The Court issued eight opinions in the *Passenger Cases*. The majority Justices were John McLean (not pictured in this image, a composite of the heads of Justices from various years of the Taney Court), James M. Wayne (not pictured), Robert C. Grier (not pictured), John Catron (not pictured), and John McKinley (standing at right); those in the minority were Peter V. Daniel (seated second from right), Levi Woodbury (seated left), Samuel Nelson, and Chief Justice Roger B. Taney (center chair). Nelson (seated at right) alone wrote no opinion, saying he concurred fully with Taney.

Jack from St. John's New Brunswick, a British North American colony.[74] Both captains resisted paying the taxes until state authorities compelled compliance. These facts, on their face, clearly seemed to have violated the 1794 commercial treaty between the United States and Britain, which permitted taxes only under limited reciprocal conditions, subject to each nation's domestic laws. Did the state taxes come within the exception? Justices Catron and Grier expressly held that the state taxes unconstitutionally conflicted with treaties and federal regulations enacted by Congress that were therefore the "supreme" law of the land.[75] By contrast, Justices McLean, Wayne, and McKinley applied varied reasoning to hold that the federal foreign and interstate commerce power was exclusive; it was sufficient that the state taxes violated that power, though the commercial treaties and regulations were also enacted pursuant to that same power.

Beyond the consensus regarding the 1794 Treaty, Wayne identified eight other holdings concurred in by the majority.[76] These Justices agreed that the state taxes were commercial regulations violating powers the Constitution *expressly* conferred upon Congress to regulate commerce with foreign nations and among the several states. Moreover, the states unconstitutionally taxed international and interstate commerce—which included the transportation of alien passengers—in order to pay for the execution and operation of their own police powers. The taxes also violated federal authority over passengers entering U.S. ports (Article 1, Section 9), which implicitly recognized that—except for slaves—persons were objects of commerce.[77] Congressional authority was sufficient also to ensure that, through

taxes and other means, states did not destroy their own commercial equality. The state taxes violated the mandate in Article I, Section 8 that duties, imposts, and excises should be uniform throughout the United States. The taxes also unconstitutionally burdened the federal commerce power regulating navigation on waterways. Still, the states possessed sufficient police powers to fund quarantine and other health laws that did not affect merchandise and persons entering U.S. ports.[78]

McLean, Grier, and Wayne addressed what implications invalidating the alien taxes might have for police-power regulations over immigrants or free blacks. "Except to guard against diseases and paupers," McLean said, agreeing with Grier, "a State cannot prohibit the introduction of foreigners. It may deny them a residence unless they shall give security to indemnify the public should they become paupers."[79] Although McLean did not say so, his comments reflected the initial status of free blacks in his home state of Ohio; by 1849, however, foreign whites and free blacks possessed the same right as all "persons" to establish residence in that state. By contrast, Grier said the taxes interfered with the U.S. government's "cherished policy"[80] that healthy white foreign immigrants were "persons" free to enter and travel across all the states.[81] Wayne most directly addressed free blacks as "persons." The "fear" the dissenters ascribed to the majority's decision, that "if the States have not the discretion to determine who may come and live in them, the United States may introduce into the Southern States emancipated Negroes from the West Indies and elsewhere, has no foundation," he declared. "All the political sovereignty of the United States, within the States, must be exercised according to the subject-matter upon which it may be brought to bear.... The Constitution was formed by States in which slavery existed,... and States in which slavery... was abolished.... The... continuance of that difference between the States at that time,... was the recognized condition in the Constitution for the national Union."[82]

Justice McKinley deferred to the opinions of the majority on the issue of the limits of state police power, but he wrote a separate opinion specifically to assert the controlling importance of Article I, Section 9 in his decision to oppose the state taxes on immigrants.[83] McKinley could only garner Justice Catron's support of his interpretation, because this section is typically interpreted as applying exclusively to the slave trade. McKinley read it as intentionally relevant to both immigration and slavery and supported his interpretation by drawing the critical distinction between "migration" as describing intentional travel and "importation" as indicating persons with "no exercise of volition in their transportation."[84] The clause expressly limits congressional prohibition of the "Migration or Importation of such persons as any of the States now existing think proper to admit" until 1808.[85] Prior to 1808, Congress had already taken control of this area in the four states not covered by the clause, because these states were not existent at the ratification of the Constitution.[86] After the clause lapsed in 1808, McKinley argued, the "power of Congress over the whole subject of migration and importation was complete throughout the United States."[87]

McKinley framed his conclusion by calling the process of finding the proper boundary between state and federal power over immigration "one of the most perplexing questions ever submitted to the consideration of this court."[88] His inventive solution was much like modern applications of the dormant Commerce Clause and was an early formulation of what is now called "field pre-emption."[89] By using the Necessary and Proper Clause in tandem with the Supremacy Clause to supplement the specific provisions of Article I, Section 9, he concluded that federal power invalidates any attempt at state control even "in the absence of legislation by Congress on this subject" because "the whole ground had been occupied by Congress

before that [New York state] act was passed."[90] McKinley was able to make an argument for federal control only after arguing that Article I, Section 9 applies to immigration in addition to the slave trade.[91] It is likely other Justices failed to use the same justification for their disposition of the case because they were unwilling to read into the Constitution the requisite federal intent to regulate in the field of immigration.

Defending the states' police powers, the dissenters endorsed only the narrowest federal commerce power. Thus, Daniel said, "a reasonable interpretation" of the Constitution was "that the powers so granted" to Congress were "never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States." Accordingly, Daniel argued, "In all other cases . . . it seems unquestionable that the States retain concurrent authority with Congress."[92] Woodbury was still more explicit that states could not generally surrender to Congress their sovereign authority to tax alien immigrants. Indeed, "notwithstanding that a grant to Congress is express, if the States are not directly forbidden to act, it does not give to Congress exclusive authority over the matter, but the States may exercise a power in several respects relating to it, unless, from the nature of the subject and their relations to the general government, a prohibition is fairly or necessarily implied."[93] A regulation of commerce could "be exclusive as to some matters and not as others, and everything can in that aspect be reconciled and harmonious, and accord . . . with the nature and reason of each case."[94]

Taney also argued that state police powers generally trumped claims of an exclusive federal commerce power. Like other Justices, Taney read *Miln* to mean that poor white immigrants and interstate-traveling free blacks were "persons" subject to state police powers. Even so, the alien taxes were essentially police regulations safeguarding the two states' people from the "evils of pauperism."[95] Moreover, Taney exclaimed, these same police powers protected Southerners from the "emancipated slaves of the West Indies [should they] have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably, producing the most serious discontent, and ultimately leading to the most painful consequences."[96] Following the *License Cases*, which upheld state liquor-prohibition regulations affecting interstate trade over an exclusive federal commerce power, Taney declared that "the grant of the power to Congress was not a prohibition to the States to make such regulations as they deemed necessary, in their own ports and harbours, for the convenience of trade or security of health; and that such regulations were valid, unless they came in conflict with an Act of Congress."[97]

Protecting the states' police powers over persons, Taney and Woodbury expressly refuted the majority's claim that the alien taxes violated the 1794 Treaty. For the dissenters, the immediate issue was whether the federal government possessed under an international treaty an exclusive power to regulate the right of alien passengers to enter a state of the Union. Applying a close reading of 1794 and 1815 U.S.-British treaties, as well as the 1819 Passenger Act,[98] Taney emphasized correctly that ultimately the municipal laws of each nation governed the enforcement of the respective "foreign" law. Though he did not say so, Taney's argument was consistent with the U.S. government's defense of the South's Negro Seamen Acts. Similarly, Taney said, the purpose of the revenue exemptions in the treaties and Passenger Acts—establishing transnational reciprocity—could not "subject [the state's] domestic concerns and social relations to the power of the federal government."[99] Indeed, Woodbury queried, "who ever thought that

these treaties were meant to empower, or could in any moral or political view empower, Great Britain to ship her paupers to Massachusetts, or send her free blacks from the West Indies into the Southern States or into Ohio, in contravention of their local laws?"[100]

Taney hammered the majority's tenuous consensus reflected in Wayne's admonition that neither international treaties nor the 1819 Passenger Act regulating the transatlantic-passenger traffic threatened the states' police powers governing free blacks. Indeed, Taney said, the "fundamental question is: Has the Federal Government power to compel States to receive, and suffer to mingle with its citizens, any person or class of persons?"[101] Taney believed that *Groves*, *Prigg*, and other precedents upheld the idea that "the States have the power to expel and exclude." While "[t]here can be no concurrent [federal-state] power respecting such a subject matter," the state's exercise of police powers was "necessarily discretionary. Massachusetts fears foreign paupers; Mississippi, free Negros."[102] The Constitution empowered neither the federal government nor the states to "distinguish between different grades of aliens." The Massachusetts law "only exact[ed] security against pauperism. We [Taney and his fellow Southerners] cannot admit emancipated slaves." The New York law was "a quarantine law, and no more. The provisions for making it self-supporting are legitimate incidents."[103]

Conclusion

Like the lawyers' arguments and the Court's eight opinions, Northern and Southern public commentary perceived ambivalent outcomes in the 5–4 decision of the *Passenger Cases*. The Court's decision coincided with congressional debates over Mexican territorial cession, the border Free States employing personal-liberty laws to defy enforcement of the federal fugitive-slave law, and growing congressional acceptance of slave-trade abolition in Washington, D.C. Even so, Southern periodicals and Illinois Democrat Congressman Turner—for ambivalent reasons—viewed the invalidation of the states' alien taxes as challenging state-police powers to exclude and otherwise impose racially inferior status upon the free blacks as persons. Conversely, as Turner also suggested, the decision legitimated the border Free States granting free blacks—including fugitive slaves liberated from slave catchers—conditional citizenship. Lawyers such as Webster and Calhoun, however, who at the same time supported aiding the foreign immigrants—especially the Famine Irish—could see in the Court's divided decision a circumscribed federal commerce power that preserved the states' discretionary exercise of police powers to protect either free or slave labor.

The great irony of the debate about the Constitution's commerce power in regulating passenger immigrants and slaves was that, for all of the humanitarian and moral posturing, no party was able to formulate a legal argument that could justify taking the moral high ground regarding the treatment of *both* vulnerable populations. The resulting lack of legitimacy made the debate mute in the face of the bayonets and cannons of the Civil War. In the end, the intellectual and theoretical efforts to resolve the *Passenger Cases* constitutionally through the commerce power threatened to force the Court to talk out of both sides of its mouth. The Northern and Southern states were divided by deep ambiguity over which "persons" each state had the exclusive right to control. Regarding passengers, Massachusetts and New York argued, states had a sovereign right to regulate and protect their population free from outside interference. Regarding slaves and free blacks, however, Free States such as Massachusetts and Ohio opposed the validity of the Southern police powers supporting slave codes and black laws intended to preserve the peaceful social dynamic. Webster was aware of the troubling hypocrisy: "Everything may be said of them [Massachusetts's laws] that Massachusetts says against South Carolina."[104]

After the bewildering repeated arguments of the cases and recent reconstitutions of the Bench, the politicized Court was confronted with what boiled down to the devil's dilemma of exclusive and terrible alternatives. Would the Court strike down the state laws and help save the lives of hundreds of thousands of Europeans from the famine immigration? Or would the Court uphold the state laws and protect the union of the states by reinforcing the legal justification for the longterm tragedy of the social oppression of African slaves in the Southern states? The constitutional arguments of the time were simply inadequate grounds to legitimize either course of action over the other. The Court reluctantly made what seemed to be a morally defensible decision, but no written opinion would dare state such an obvious truth no one wanted to hear—that the United States government must help these millions of starving and oppressed people. Instead, the multiplicity of opinions struck down the Massachusetts and New York laws but scrambled attempting to protect the constitutional right to state sovereignty over slavery for the Southern states.

The result of the *Passenger Cases* was confusion, and it set the stage for the transition from argument to warfare. The perceptions coalescing around the *Passenger Cases* remained contestable during the coming decade. The 1850 Compromise confirmed federal authority over excluding slavery from California while leaving to popular vote the institution's existence in the Mexican cession. It also abolished the slave trade in the nation's capital and established a draconian federal fugitive-slave law that targeted the border Free States' personal-liberty laws. The uneasy compromise between federal power and preexisting or to-be-created state authority suggested the question the *Passenger Cases* left unanswered: whether the federal government possessed an exclusive commerce power, or whether such a power was concurrent with or even exclusive to the states. The Supreme Court offered an answer to this question in *Cooley v. Board of Wardens of the Port of Philadelphia* (1852), as Harriet Beecher Stowe's *Uncle Tom's Cabin* radicalized American and British abolitionist opinion against slavery.[105] The Court's 6–2 *Cooley* decision held that federal power was exclusive where the subject matter was expressly national. Conversely, where subject matter was fundamentally local, the states possessed concurrent power. The status of "persons" under state police powers versus the federal commerce power remained contingent, as it had been in the *Passenger Cases*.

The Court's ambiguous legal position made each case a new litmus test. Favoring Southern slaveholders, the Court denied the Republican claims in the notorious 1857 *Dred Scott* decision; in *Ableman v. Booth* (1859) it overturned the Wisconsin supreme court's reliance upon state police powers to defy federal enforcement of the 1850 Fugitive Slave Act. The failure of the Court to agree on a reason for its decision in the *Passenger Cases* cast Southern state slavery laws into a long and growing shadow of conflicted contestation. Over time, the Southern laws remained insistently valid, but their constitutional foundation had been removed. In the absence of constitutional justification, social and economic forces became the de facto reasons for preserving the validity of state slavery laws. Embedding these dynamics only heightened the ambiguity of the legal position and called into question the possibility of a single consistent governmental approach. Eventually, the constitutional cognitive dissonance inaugurated in the *Passenger Cases* collapsed when it became clear that the two theories of governance could not be sustained in one government, and the South seceded.

ENDNOTES

*Author's note: For support, Professor Freyer thanks Law School Dean Kenneth C. Randall, University of Alabama Law School Foundation, and the Edward Brett Randolph Fund, as well as the University Research Professorship he holds, and the College of Arts & Sciences; and also the Earhart Foundation Research Fellowship, 2011–12.

He thanks, too, Lyndsay Campbell and the participants in a panel presentation at the 2011 Law and Society annual meeting in San Francisco.

[1]Charles Warren, 2 **The Supreme Court in United States History 1821–1855** 442 (Little Brown & Co. 1922).

[2]Mary Sarah Bilder, "The Struggle over Immigration: Indentured Servants, Slaves and Articles of Commerce," 61 *Missouri L. Rev.* 743 (1996).

[3]Tony Freyer & Lyndsay Campbell, "Introduction," in **Freedom's Conditions in the U.S.-Canadian Borderlands in the Age of Emancipation** 3, 21 (Tony Freyer & Lyndsay Campbell eds., Carolina Academic Press 2011).

[4]Fred Block, "Introduction," xxiii–xxiv, in **Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time** (Beacon Press 2001) (1944).

[5]Matthew J. Lindsay, "Immigration as Invasion: Sovereignty, Security and the Origins of the Federal Immigration Power," 45 *Harv. C.R.-C.L. L. Rev.* 1, 14 (2010).

[6]Douglass C. North, **Institutions, Institutional Change and Economic Performance** 24 (Cambridge 2004) (1990); distinguishing George J. Stigler & Gary S. Becker, "*De Gustibus Non Est Disputandum*," 67 *Am. Econ. Rev.* 76 (Mar. 1977).

[7]"Remarks on Printing Extra Copies of a Supreme Court Decision Annulling Laws of N.Y. and Mass. in Regard to Immigrant Passengers (March 20, 1849)," *reprinted in* 24 **The Papers of John C. Calhoun, 1848–1849** 355 (Clyde N. Wilson & Shirley Bright Cook eds., Univ. South Carolina Press 2001). Baltimore, Md., *Sun*, March 21, 1849, p. 4; Petersburg, Va., *Republican*, March 23, 1849, p. 2; Charleston, S.C., *Mercury*, March 24, 1849, p.2.

[8]Letter from Daniel Webster to Richard Milford Blatchford (Feb. 3, 1849), *in* 3 **The Papers of Daniel Webster: Legal Papers: The Federal Practice Part II** 727 (Andrew J. King, ed., Univ. Press of New England 1989). The case to which Webster refers is *Gibbons v. Ogden,* 22 U.S. 1 (1824).

[9]Warren, *supra* note 1, at 450, citing a letter to the *Cleveland Plain Dealer,* quoted in *Mississippi Free Trader,* Jan. 20, 1848; *Savannah Republican,* March 7, 1849.

[10]Aristide Zolberg, **A Nation by Design: Immigration Policy in the Fashioning of America** 146 (Harvard Univ. Press 2006).

[11]In Ireland, an estimated 1.5 million died and 2 million emigrated. William L. Langer, **Political and Social Upheaval 1832–1852** 323 (Harper 1969), citing John E. Pomfret, **The Struggle for Land in Ireland, 1800–1923** 34 (Princeton 1930); Lord Dufferin & G.F. Boyle, **Narrative of a Journey from Oxford to Skibereen** (London 1847). The essential account of the famine is J. O'Rourke, **The History of the Irish Famine of 1847** (Dublin 1875). On the conditions on the passenger ships, see Arnold Shrier, **Ireland and the American Emigration** at 157 (Minneapolis 1958).

[12]*Mayor, Aldermen and Commonality of City of New York v. Miln*, 36 U.S. 102, 11 Pet. 141 (1837).

[13]*George Smith v. William Turner, Health-Commissioner of the Port of New York, James Norris v. The City of Boston (Passenger Cases)*, 48 U.S. (7 How.) 283, 285 (1849).

[14]*Id.* at 283, 284–85.

[15]Warren, *supra* note 1, at 418–22.

[16]Carl B. Swisher, 5 **History of the Supreme Court of the United States: The Taney Period 1836–64** 382 (McMillan Pub. Co. 1974).

[17]Bradley Miller, "British Rights and Liberal Law in Canada's Fugitive Slave Debate, 1833–1843," in Freyer & Campbell, *supra* note 3, at 141. Michael Schoeppner, "Navigating the Dangerous Atlantic: Racial Quarantines, Black Sailors and United States Constitutionalism" (unpublished Ph.D. dissertation, University of Florida, 2010).

[18]"The Alien Passenger Tax," 75 *Niles National Register* 207 (March 28, 1849).

[19]*Id.*

[20]Van Gosse, "As a Nation, the English Are Our Friends: The Emergence of African American Politics in the British Atlantic World, 1772–1861," 113 *Am. Hist. Rev.* 1003 (2008). *See supra* note 17.

[21]Philip M. Hamer, "Great Britain and the Negro Seamen Acts, 1822–1848," 1 *J. Southern Hist.* 3 (1935); Schoeppner, *supra* note 17.

[22]Ernest Obadele-Starks, **Freebooters and Smugglers: The Foreign Slave Trade in the United States after 1808** 109–43 (Univ. Arkansas Press 2007).

[23]Hamer, *supra* note 21, at 28.

[24]Tony Freyer, "Constituting the Free-State Borderlands: New York, Pennsylvania, and Ohio," in Freyer & Campbell, *supra* note 3, at 35, 54–57; Thomas D. Morris, **Free Men All: The Personal Liberty Laws of the North, 1780–1861** (Johns Hopkins Press 1974); Paul Finkelman, **An Imperfect Union Slavery, Federalism, and Comity** 7n, 17, 54n, 69, 93, 130–31, 137–38, 177–78, 286, 322 (The University of North Carolina Press 1981).

[25]"The Address of Southern Delegates in Congress, To Their Constituents" (1849), *reprinted in* Wilson & Cook, *supra* note 7, at 225.

[26]Cong. Globe, 30th Cong., 2d Sess. Appendix 589 (Feb. 23, 1849).

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

[28]David Lightner, **Slavery and the Commerce Power: How the Struggle Against the Interstate Slave Trade Led to the Civil War** 66–71 (Yale Univ. Press 2006).

[29]*Mayor, Aldermen and Commonality of City of New York v. Miln*, 36 U.S. 102, 11 Pet. 141 (1837).

[30]*Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

[31]"The Address of Southern Delegates in Congress, To Their Constituents," *supra* note 25. *See also supra* notes 24, 27, 28.

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

[33]William M. Fowler, Jr., "Sloop of War/Sloop of Peace: Robert Bennet Forbes and the USS 'Jamestown,'" 98 *Proceedings of the Massachusetts Historical Society, Third Series* 49, 51 (1986), citing Cecil Woodham-Smith, **The Great Hunger: Ireland 1845–49** 88 (London 1962), and *London Times,* September 2, 1846.

[34]*Id.*, also citing the *Pilot*, Feb. 13, 1847.

[35]Cong. Globe, 29th Cong., 2nd Sess. 446 (Feb. 18, 1847).

[36]Cong. Globe, 29th Cong., 2d. Sess. 304 (Feb. 1, 1847).

[37]Cong. Globe, 29th Cong., 2d. Sess. 446 (Feb. 18, 1847).

[38]Cong. Globe, 29th Cong., 2d. Sess. 304 (Feb. 1, 1847).

[39]Aristide R. Zolberg, **A Nation by Design: Immigration Policy in the Fashioning of America** 146 (Harvard Univ. Press 2006). Herman Melville stated, "But it is hardly to be believed, that either of these laws [U.S. and U.K. passenger regulations] is observed." Citing Melville, **Redburn: His First Voyage** (NY: Harper & Brothers, 1849), 382.

[40]Philip Hamburger, **Separation of Church and State** (Harvard Univ. Press 2004).

[41]Cong. Globe, 29th Cong., 2d. Sess. 304 (Feb. 1, 1847).

[42]Zolberg, *supra* note 38, at 140–45.

[43]Tony Freyer, "Constituting the Free-State Borderlands: New York, Pennsylvania, and Ohio," in Freyer & Campbell, *supra* note 3, at 35, 37–41.

[44]"The Address of Southern Delegates in Congress, To Their Constituents," *supra* note 25, at 242.

[45]Freyer, *supra* note 42, at 35, 54. *See supra* notes 24, 25, 40 and 41.

[46]Cong. Globe, 30th Cong., 2d Sess. Appendix 589 (Feb. 23, 1849).

[47]*Id.*

[48]*See supra* note 28.

[49]"The Alien Passenger Tax," 75 *Niles National Register* 207 (March 28, 1849).

[50]"The New York law [in *Miln*] imposed no condition on the passengers before landing.... It was, in this view of the subject, a pure internal police law." Document 80 Reported Argument February 9, 1847, in 3 **The Papers of Daniel Webster: Legal Papers: The Federal Practice Part II** at 709, 714 (Andrew J. King ed., Univ. Press of New England 1989).

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

[52]Letter from Daniel Webster to Fletcher Webster, in 3 **The Papers of Daniel Webster**, *supra* note 49, at 709.

[53]Document 80 Reported Argument February 9, 1847, *supra* note 49, at 709, 710.

[54]*Id.* at 711.

[55]*Id.* at 713.

[56]*Id.*

[57]*Id.* at 714.

[58]*Passenger Cases* at 320.

[59]*Thurlow v. Massachusetts, Fletcher v. Rhode Island, Peirce v. New Hampshire*, 46 U.S. 504 (1847).

[60]*Passenger Cases* at 323.

[61]*Id.* at 333.

[62]*Id.* at 374.

[63]17 U.S. 316 (1819).

[64]*Passenger Cases* at 324.

[65]*Id.* at 349–50.

[66]*Id.* at 347.

[67]*Id.* at 347.

[68]*Id.* at 348.

[69]*Id.* at 354.

[70]*Id.* at 361.

[71]"The opinions, whether majority or minority, were so diverse that attempts to summarize could only confuse." Swisher, *supra* note 16, at 388.

[72]McLean in *Passenger Cases* at 392 and 409, Wayne in *Passenger Cases* at 410, McKinley in *Passenger Cases* at 452, Grier in *Passenger Cases* at 452 and 455, Catron in *Passenger Cases* at 437 and 455.

[73]Taney in *Passenger Cases* at 464, Daniel in *Passenger Cases* at 494, Woodbury in *Passenger Cases* at 518.

[74]*Passenger Cases* at 284, 285.

[75]*Id.* at 439.

[76]*Id.* at 413–14.

[77]U.S. Const. art. I, § 9.

[78]*Passenger Cases* at 413–414.

[79]*Id.* at 406.

[80]"Justice McLean spoke from the heart about a 'cherished' immigration policy, because that policy had meant so much to him and his family." Paul Brickner, "The *Passenger Cases* (1849): Justice John McLeans's 'Cherished Policy' as the First of Three Phases of American Immigration Law," 10 *SW. J. L. & Trade Am.* 63, 69 (2004). McLean was the son of German immigrants. Francis P. Weisenburger, **The Life of John Mclean** 166–67 (Da Capo Press 1971) (1937).

[81]*Passenger Cases* at 461

[82]*Passenger Cases* at 428. The text is the exact language in the version printed in the official **U.S. Reports**. As a result of other reports of the *Passenger Cases*, different language for the same discussion by Wayne is quoted in other sources. For example, in Friedrich Kapp, **Immigration and the Commissions of Emigration of the State of New York** 176 (1870), Justice Wayne is credited with saying "The fear that the decision (of the majority) will be held to prevent the slave States from forbidding the introduction of freedmen from the West Indies is unfounded" and that "[t]hat case would be an exception to the present rule, because the Constitution must be interpreted according to its subject matter. The fundamental idea was, that slavery should remain undisturbed by the Federal Government." Recalling the 5,000 copies of the decision which Calhoun and Congress had distributed, it is not unlikely Kapp was quoting from a version of the decision different from the official version. *See supra* note 7.

[83]*Passenger Cases* at 453.

[84]*Id.*

[85]U.S. Const. art. I, § 9.

[86] *Passenger Cases* at 454.
[87] *Id.*
[88] *Id.* at 455.
[89] *English v. General Elec. Co.* 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
[90] *Passenger Cases* at 455.
[91] In instances of modern field pre-emption, courts strike down state laws in the absence of conflicting legislation by congress, "where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. General Elec. Co.* 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).
[92] *Passenger Cases* at 499.
[93] *Id.* at 533–534.
[94] *Id.* at 561.
[95] *Id.* at 473.
[96] *Id.* at 474.
[97] *Id.* at 470, referring to the *License Cases*, 5 How. 629 (1847).
[98] Steerage Act of March 2, 1819 ch. 46, 3 Stat. 488.
[99] *Passenger Cases* at 477.
[100] *Id.* at 569.
[101] Friedrich Kapp, **Immigration and the Commissions of Emigration of the State of New York** 176 (1870), paraphrasing Taney in the *Passenger Cases* at 465–66: "Whether . . . the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit."
[102] Kapp, *supra* note 100, at 177.
[103] *Id.*
[104] Warren, *supra* note 1, at 448, citing to the *Boston Post*, Feb. 10, 12, 1847.
[105] *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1852); Lightner, *supra* note 28, at 84–85.

Myra Bradwell and the Profession of Law: Case Documents

JOHN A. LUPTON

Most attorneys—certainly most women attorneys—know the story of Myra Bradwell, who applied to become a lawyer in Illinois only to be rebuffed by both the Illinois supreme court and the U.S. Supreme Court. Despite her fame in her attempt to become licensed as an attorney specifically and for progressive Victorian women generally, there are only a few biographies of her and a handful of articles regarding her plight.[1] This documentary edition is a new perspective on Myra Bradwell's attempt to become a lawyer—not through an interpretive framework, but through the lens of the case documents.[2] By examining transcriptions of the original case documents with interspersed editorial narrative, researchers and historians can place Bradwell in the context of her times and better interpret her role in attempting to break gender barriers.

Myra Colby was born in Manchester, Vermont on February 12, 1831, the youngest of five children born to Eban and Abigail Colby. Soon after, the family moved to Portage, New York. In 1843, the family moved to Schaumburg, Illinois in Cook County. Myra moved to Wisconsin to live with a married sister to attend a finishing school. She finished her schooling at the Elgin Female Seminary in 1851.[3]

While at Elgin, Myra met James Bradwell. The Colby family did not like Bradwell due to the fact that he had worked menial jobs while studying law. James had claimed that he could earn a living as a journeyman in seventeen different trades. James and Myra escaped to Chicago, where they eloped in May 1852.[4]

The newlywed couple moved to Memphis, Tennessee, and James began teaching at a private school. James continued to study law and became licensed to practice in Tennessee in 1852. James was under way in a promising career, but the constant reminder of slavery weighed heavily on the abolitionist couple. In 1854, the Bradwells returned to Illinois, settling in Chicago. From 1854 to 1862, they had four children: Myra in 1854, Thomas in 1856, Bessie in 1858, and James in 1862. Only Thomas and Bessie survived into adulthood.[5]

Upon his return to Illinois, James resumed studying law to become licensed in Illinois, which occurred in 1855. He formed a partnership with his brother-in-law, Frank Colby, who four years earlier had chased Bradwell with his shotgun for courting his sister.[6]

After James became a lawyer in Illinois, Myra began reading law with him. She had no intention of becoming a lawyer but only studied with him in order to assist him in his chosen career. In the 1850s, reading law with an established attorney was the principal method of obtaining a legal education. Myra stopped reading law when the Civil War broke out in 1861. She raised money to assist with sick and wounded soldiers with Soldiers' Fairs in 1863 and 1867 and with the Northwestern Sanitary Fair in 1865.[7]

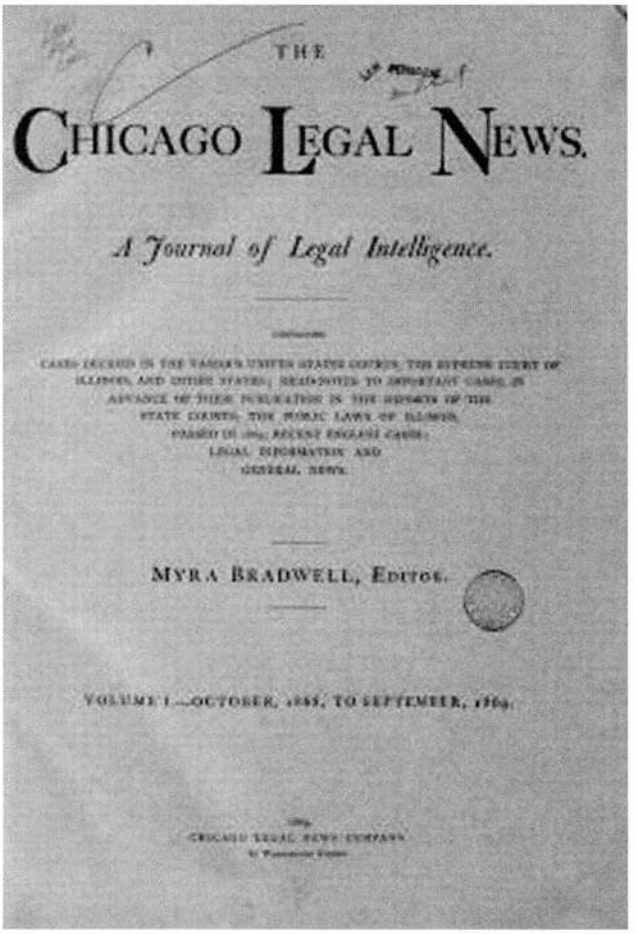
In the meantime, James won election as a Cook County judge in 1861 and gained reelection in 1865. He served as a probate judge, and, during the Civil War, held that a slave marriage was valid after emancipation, securing inheritance rights for many former slaves.[8]

Myra Bradwell originally learned the law by reading it alongside her husband, James, as he studied to be an attorney. She did not decide to get her law license until many years later.

After the 1867 Soldiers Fair, Myra resumed reading law with her husband. During this second stage of legal education, she was determined to obtain her law license.[9] In 1868, she founded the *Chicago Legal News*, a weekly newspaper devoted to conveying news important to the legal profession in a timely manner.[10] Bradwell realized that too much time elapsed between the passage of laws and their publication and between the pronouncement of opinions and their publication. Her venture into legal publishing and her attempt to become a lawyer, according to the *American Law Review*, was the "first serious attempt by a woman to share in the labors of the law, since the fourteenth century."[11]

During the 1860s in Illinois, the method for obtaining a license to practice law was rather simple: a candidate needed to have an inferior court attest to a certificate of good moral character and to have a circuit judge and state's attorney attest to a successful examination.[12] With a genuine interest in the law and after years of earnest studying with her husband, Myra Bradwell took the bar examination on August 2, 1869. Cook County Circuit Court judge Erastus S. Williams and Cook County State's Attorney Charles H. Reed certified that they had examined her as to her qualifications, found her qualified, and recommended that she receive a law license.[13] One month later, upon the testimony of John L. Beveridge, she obtained her certificate of good moral character, completing the two requirements for admission.[14]

With these necessary documents in hand, Bradwell secured the assistance of a Chicago attorney, Robert Hervey,[15] to present her petition for a license to practice law. In addition to the petition were the required certificate of good moral character and the certificate of examination. Hervey, a long-time family friend of the Bradwells, traveled to the


THE
CHICAGO LEGAL NEWS.
A Journal of Legal Intelligence.
MYRA BRADWELL, EDITOR.
VOLUME I.—OCTOBER, 1868, TO SEPTEMBER, 1869.

In 1868, Bradwell founded the *Chicago Legal News*, a weekly newspaper devoted to conveying news important to the legal profession in a timely manner. She realized that too much time elapsed between the passage of laws and their publication and between the pronouncement of opinions and their publication.

Illinois supreme court in Ottawa, Illinois for its September term.[16]

Petition for License to Practice Law[17] 21 September 1869

Supreme Court of Illinois
3rd Grand Division
September Term 1869.
In the matter of the application of Myra Bradwell for license to practice law.
To the Honorable – the Judges of the Supreme Court of Illinois,

Now comes your Petitioner Myra Bradwell, a resident of Chicago Illinois—over twenty one years of age, & presents to your Honors, under rule 76[18] of this Honorable Court the certificate of the Hon E. S. Williams, Judge of the Circuit Court for the 7th circuit, & the Hon Charles H. Reed, States Attorney for said circuit, stating that they have examined your petitioner & found her qualified to practice law & recommend that a license issue to her for that purpose—& also a certificate as to character from the Superior court of Chicago as required by the Statute & the rule aforesaid, & moves Your Honors that an order of this honorable Court may be entered directing a license to be given to your petitioner.

Your petitioner suggests that the only question involved in her case is, does being a woman disqualify her under the laws of Illinois from receiving a license to practice law, & claims that the Legislature has answered this question in the negative.

The first section of chapter eleven of the Revised Statutes[19] in regard to the admission of Attorneys is as follows. "No person shall be permitted to practice as an attorney or counselor at law, or to commence, conduct or defend any action suit or plaint, in which he is not a party concerned in any court of record within this state, either by using or subscribing his own name or the name of any other person without having previously obtained a license for that purpose from some two of the Justices of the Supreme Court, which license shall constitute the person receiving the same an attorney & counselor [at] law & shall authorize him to appear in all the courts of record within this state, & there to practice as an attorney and counselor at law according to the laws & customs thereof for & during his good behavior in said practice, & to demand & receive all such fees as are or hereafter may be established for any services which he shall or may render as an attorney or counselor at law in this state" Your petitioner claims that the pronoun he not only in this section but the whole chapter is used indefinitely for any person & may refer to either a man or woman.

The legislature devoted the whole of chapter 90 to construing various expressions & words used in the Revised Statutes & in Section 28 said "when any party or person is described or referred to by words importing the masculine gender, females as well as males shall be deemed to be included."[20]

It is declared by Act no 29 Appendix to the Revised Statutes, that the several chapters composing the Revised Statutes shall be deemed & taken as one act.[21]

It is evident that if a woman should practice law without a license, receive fees for her services & be sued for three times the amount thereof that under Section 11 of Chapter 11 for practicing law without a license that it would be no defense for her to say that the masculine pronoun was used in this Section.[22]

Section 3 of our Declaration of Rights says "That all men have a natural and indefensible right to worship Almighty God" &c.[23] It will not be contended that women are not included within this provision.

The 8th section declares "that no freeman shall be imprisoned or disseized of his freehold &c but by the judgment of his peers or the laws of the land."[24]

Will women be deprived of the guarantees in this section and the right of trial by jury because the masculine pronoun is used?

Under the 11th Section no mans property can be taken or applied to public use without the consent &c.[25]

Is not the property of a woman as secure under this provision as that of a man?

In the chapter upon Forcible Entry and Detainer the masculine pronoun is used throughout, but no court would hesitate for a moment in holding a woman to be within its provisions, if she should wrongfully hold possession of premises.[26]

In the whole chancery Code of this state consisting of fifty three sections the words woman, female, she,

her, herself or any other feminine pronouns are not to be found while the 5th, 8th, 15th, 18th, 19th, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 36th, 38th, 46th & some others the masculine pronouns frequently occur.[27]

The same construction that would exclude a woman from the provisions of the statute in regard to the admission of Attorneys would place her without the Chancery code. Yet no respectable attorney would claim because defendants in chancery are represented in the Law by masculine pronouns that a woman could not be made a defendant in chancery.

All of which is respectfully submitted

Myra Bradwell

The three justices of the Illinois supreme court—Chief Justice Sidney Breese and Associate Justices Pinkney H. Walker and Charles B. Lawrence—considered Bradwell's request.[28] After arriving at their decision, instead of contacting her directly, the justices directed Norman L. Freeman,[29] the Illinois supreme court reporter, to respond.

Norman L. Freeman to Myra Bradwell[30]
6 October 1869

State of Illinois,}
Supreme Court,}
Third Grand Division}
Clerk's Office,}
Ottawa, Oct. 6, 1869}

Mrs. Myra Bradwell,
Madam:

The court instruct me to inform you that they are compelled to deny your application for a license to practice as an attorney-at-law in the courts of this State, upon the ground that you would not be bound by the obligations necessary to be assumed where the relation of attorney and client shall exist, by reason of the DISABILITY IMPOSED BY YOUR MARRIED CONDITION—it being assumed that you are a married woman.

Applications of the same character have occasionally been made by persons under twenty-one years of age, and have always been denied upon the same ground—that they are not bound by their contracts, being under a legal disability in that regard.

Until such DISABILITY shall be removed by legislation, the court regards itself powerless to grant your application.

Very respectfully,
your obt. serv't,
N. L. Freeman.

Bradwell was not satisfied with this response, since she believed that the legislature had duly modified the common law to allow a married woman the right to become a lawyer in Illinois.[31] She authored an additional brief, stating her case more fully with legal citations, and filed the brief with the Illinois supreme court.

Additional Brief[32]
18 November 1869

IN THE
SUPREME COURT OF ILLINOIS.
THIRD GRAND DIVISION.
SEPTEMBER TERM, 1869.
IN THE MATTER OF THE APPLICATION OF MYRA BRADWELL TO OBTAIN A LICENSE TO PRACTICE AS AN ATTORNEY AT LAW.
ADDITIONAL BRIEF.

And now again comes the said Myra Bradwell, it having been suggested to her that the court had assumed that she is a married woman, and therefore queried whether this would not prevent her from receiving

a license, and files this her additional brief.

Your petitioner admits to your honors that she is a married woman (although she believes that fact does not appear in the record), but insists firmly that under the laws of Illinois it is neither a crime nor a disqualification to be a married woman.

I propose to state very briefly,

1st. What is an attorney?

2nd. Who may act as attorney?

3rd. The rights and powers of married women in relation to their business and property under the common law.

4th. Their rights and powers as to transacting business under the recent statutes of our State, with reference to their transacting business in their own names and acting as attorneys.

5th. The avenues of trade, and the professions opened to women by the liberal enactments of the law makers, and the construction of the courts.

6th. How the legislature has regarded petitioner with reference to her rights to carry on business in her own name and act for herself.

I.
WHAT IS AN ATTORNEY?

An attorney is "one who takes the turn or place of another."—Webster. "*An attorney at law*," says Bouvier, "is an officer in a court of justice who is employed by a party in a cause to manage the same for him."[33] All attorneys are agents. They transact business, and appear for, and act in the place of their clients who have not the requisite learning, time, or desire to appear in suits for themselves.

Mr. Story, in his work upon *Agency*, and Mr. Bouvier, in his *Institutes*,[34] in treating of the different kinds of *agents*, both speak first of attorneys-at-law. All the elementary writers upon law tell us that attorneys are agents. Without reference to our recent statutes modifying the common law, we will open the books and see who may be attorneys or agents.

II.
WHO MAY BE ATTORNEYS OR AGENTS.

Mr. Story, in his work on Agency, says, sec. 7: "Secondly, who are capable of becoming agents? And here it may be stated that there are few persons who are excluded from acting as agents, or from exercising an authority delegated to them by others. Therefore, it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or HERSELF to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed, or excommunicated villeins, and aliens, may be agents for others."

"A *feme covert* may be an attorney for another, to make livery to her husband upon a feoffment; and a husband may make such livery to his wife, although they are generally deemed but one person in law. She may also act as agent or otherwise of her own husband, and as such, with his consent, bind him by her contract, or other act; or she may act as the agent of another, in a contract, with her own husband."[35]

III.
UNDER THE COMMON LAW.

In Cox v. Kitchin, Bos. & Pul. 438,[36] where a *feme covert* represented herself falsely to the tradesman to be a *feme sole*, and obtained goods on credit, it was held

that she rendered herself personally responsible.

In Derry v. Mazarine, 1 Ld. Raymond, 147,[37] it was held that the wife of an alien, who was doing business in her own name, in England, was liable as a *feme sole*. In Hauptman v. Catlin, 20 N. Y., 248,[38] the Court of Appeals says; "Even before the late statute respecting married women, they were regarded as *femes sole* in respect to their separate property, and were as to such property liable on their contracts respecting the same, to the same extent and as though they were not under the disability of coverture."

It was held by Lord Mansfield and his associates, in Corbett v. Poelnitz, 1 T.R. 5,[39] that if a husband and wife choose to separate, and the husband allows the wife a separate maintenance, *she may contract and be sued* as though she were unmarried, and may be held to bail and imprisoned on a *ca. sa.*[40] without her husband. The court made this innovation, on the ground that "the times alter new customs and new manners arise, which require new exceptions, and a different application of the general rule."

IV.
UNDER THE RECENT STATUTES.

In Conway v. Smith and Wife, [13] Wis., 125,[41] the court held, that "the statute gives to married women, as necessarily incidental to the power of holding property to their own use, the power of making all contracts necessary or convenient to its beneficial enjoyment, and such contracts are to be regarded as *valid in law*, and may be enforced by *legal* remedies." Cole, J., dissenting.

In Barton v. Beer, 35 Barbour, 81,[42] the court in treating of the liability of a married woman says:

"If she acts as a *feme sole*, she ought, in justice to the public, to be subjected to all the duties and liabilities of a *feme sole*."

In Emerson v. Clayton, 32 Ill., 493,[43] this honorable court held, that a married woman might bring replevin in her own name, for her separate property, against a third party, or even *against her own husband*, and that the act designed to make and did make a radical and thorough change in the conditions of a *feme covert*; that she is to be regarded as unmarried, so far as her separate property is concerned.

In Pomeroy v. Manhattan Life Ins. Co., 40 Ill., 398,[44] Walker, C. J., in delivering the opinion of the court, says: "Under the statute she is entitled to the benefits it confers, and must be held liable for her acts performed in pursuance of the authority it confers. If it gives the rights of a sole ownership, *it must impose the liabilities incident to such a right*."

In Brownell v. Dixon, 39 Ill., 207,[45] this court not only held, under the act of 1861,[46] that a married woman possessed of separate property might employ "an agent to transact her business," but that she might employ her own husband as such agent.

Relying upon the doctrine laid down in this case, we insist that the power "to employ an agent" carries with it the liability to pay such an agent a reasonable compensation for his services; and that if a married woman employs a man to work on her farm for one day, and agrees to give $2 therefor, and fails so to do, that a fair construction of the act of 1861 would allow him to sue her

before a justice of the peace, and not drive him to the expense of filing a bill in chancery that would amount to more than a denial of justice.

Now, if under the Act of 1861, she can employ an agent to transact her business, we insist under the Act of 1869,[47] giving the wife her own earnings, and the rights to sue for the same in her own name, free from her husband, that she has the right to be employed as an agent, or attorney, or physician, if she is capable, and to agree to do the duties of her profession. It would almost seem that this question is answered by the following extract from the opinion of this honorable court, as delivered by Mr. Justice Lawrence, in Carpenter v. Mitchell, 2 *Legal News*, 44:[48]

"It may be said that a married woman can not adequately enjoy her separate property unless she can make contracts in regard to it. This is true, and hence her power to make contracts, so far as may be necessary for the use and enjoyment of her property, must be regarded as resulting by implication from the statute. If she owns houses she must be permitted to contract for their repair or rental. If she own a farm she must be permitted to bargain for its cultivation, and to dispose of its products. We give these as illustrations of the power of contracting which is fairly implied in the law."

It is true, in this opinion, the learned judge confines his remarks strictly to the contracts of the wife made in relation to her separate property, and not in relation to general trade. This case arose before the passage of the Act of 1869.

The right of a married woman to bring a suit in her own name is a necessary incident to the law.

Cole v. Van Riper, 1 Legal News, 41.[49]

[V.]

THE TRADES AND PROFESSIONS OPEN TO WOMEN.

The doors at many of our universities and law schools are now open to women upon an equality with men. The Government of the United States has employed women in many of its departments, and appointed many, both single and married, to office. Almost every large city in the Union has its regularly-admitted female physicians. The law schools of the nation have now many women in regular attendance, fitting themselves to perform the duties of the profession. The bar itself is not without its women lawyers, both single and married.

Mrs. Arabella A. Mansfield,[50] wife of Prof. J. M. Mansfield, of Mount Pleasant, Iowa, was admitted to the bar of Iowa, upon the unanimous petition of the attorneys of that place, after a very careful examination, not only of the applicant, but of the statutes regulating the admission of attorneys.

The statute of Iowa provides that, "Any white male person, twenty-one years of age, who is an inhabitant of this State," and who satisfies the court "that he possesses the requisite learning, and that he is of good moral character, may, by such court, be licensed to practice in all the courts of the State, upon taking the usual oath of office."

The clause construing statutes is as follows: "Words importing the singular number only, may be extended to several persons, or things; and words importing the plural number only may be applied to one person, or thing; and words importing

the masculine gender only may be extended to females."

In Mrs. Mansfield's case, the court not only held that she could be admitted, notwithstanding the fact that she was a married woman, under the clause of the statute giving a construction to the masculine noun "MALE," and pronoun "HE;" but that the affirmative declaration, that male persons may be admitted, is not an implied denial of the right to females." We know of no instance in the United States, where a woman, whether married or single, who has complied with the statutes of the State in which she lived and applied for admission, that the proper court has refused to grant her license.

VI.

HOW THE LEGISLATURE HAVE REGARDED YOUR PETITIONER.

It has been held, in England, that a wife who does business in her own name, with either the express or implied consent of her husband, should be treated as a *feme sole*, and be sued as such; and, with such consent, could be an administrator, executor or guardian, in England or America.

The legislature has, in repeated instances, acknowledged the capability and capacity of your petitioner to transact business, by providing that the *Chicago Legal News*, edited by her, and containing the decisions rendered by your honors, should be received in evidence in all the courts of this State, and in the following extract from the charter of the *Chicago Legal News* Company: "And all the real and personal estate of said Myra Bradwell shall be liable for the debts of said company, contracted while she is a stockholder therein, and all stock of said company owned by her, and the earnings thereof, shall be her sole and separate property, the same as if she were AN UNMARRIED WOMAN; and she shall have the same right to hold any office or offices in said company, or TRANSACT ANY OF ITS BUSINESS THAT A FEME SOLE WOULD HAVE."—*Legal News* Edition Laws of 1869, p. 93 Sec. 4, p. 93.[51]

Your petitioner claims that a married woman is not to be classed with an infant since the passage of the act of 1869. A married woman may sue in her own name for her earnings, an infant cannot. A married woman, if an attorney, could be committed for contempt of court the same as any other attorney. If she should collect money and refuse to pay it over, she could be sued for it the same as if she were single. A married woman is liable at law for all torts committed by her, unless done under the real or implied coercion of her husband. Having received a license to practice law as an attorney, and having acted as such she would be estopped from saying she was not liable as an attorney upon any contract made by her in that capacity.

The fees that a married woman receives for her services as an attorney are just as much her earnings as the dollar that a sewing-woman receives for her days' work, and are just as much protected by the act of 1869.

Is it for the court to say, in advance, that it will not admit a married woman? Should she be admitted, and fail to perform her duty, or to comply with all her contracts as an attorney, could not the court, upon application, strike her name from the roll, or inflict more summary punishment?

Your petitioner has complied with all the provisions of the statutes of

the State regulating the admission of attorneys, and asks, as a matter of right and justice, standing as she does upon the law of the land, that she be admitted.

Not a line of written law, or a single decision in our State, can be found disqualifying a married woman from acting as an attorney.

This honorable court can send me from its bar, and prevent me from practicing as an attorney, and it is of small consequence; but if, in so doing, your honors say to me: "You cannot receive a license to practice as an attorney at law in the courts of this State, upon the ground that you would not be bound by the obligations necessary to be assumed, where the relation of attorney and client shall exist, by reason of the *disability imposed by your married condition;*" you, in my judgment, in striking me down, strike a blow at the rights of every married woman in the great State of Illinois who is dependent on her labor for support, and say to her, you cannot enter into the smallest contract in relation to your earnings or separate property, that can be enforced against you in a court of law.

This result can, in my opinion, only be reached by disregarding the liberal statutes of our State, passed for the sole purpose of extending the rights of married women, and forever removing from our law, relating to their power to contract in regard to their earnings and property the fossil footprints of the feudal system, and following the strictest rules of the common law.

Lord Mansfield, notwithstanding the fact that slaves had been held, bought and sold, for years, in the streets of London, declared that the moment a slave touched British soil his shackles fell. The same noble Lord held that a married woman might under certain circumstances, contract, and sue and be sued at law, as a single woman, upon the ground that, the reason of the law ceasing, the law itself must cease; and that, as the usages of society alter, the law must adapt itself to the various situations of mankind. Mr. Justice Buller, in speaking of this decision years afterwards, declared that the points there decided were ["]founded in good sense, and adapted to the transactions, the understanding and the welfare of mankind."

Apply this reasoning in our State, now that the Legislature has removed every claim that the husband had, under the common law, upon the property of the wife, except his life estate in her hands, which only commences with her death, and all difficulty is removed, and the case is clear.

MYRA BRADWELL

Before the Illinois supreme court had time to consider Bradwell's additional brief, she anticipated an adverse judgment from the three justices and had already planned to appeal their decision to the U.S. Supreme Court. In order to demonstrate federal jurisdiction in the matter, Bradwell filed an affidavit and an additional brief to frame her argument with respect to the recently passed Fourteenth Amendment, which prohibited states from denying the privileges and immunities of its federal citizens.[52] Bradwell argued that her privilege of becoming a lawyer had been denied by the Illinois supreme court.[53]

Additional Brief[54] [31 December 1869]

And now again comes the said Myra Bradwell, and files the following additional points:

VII.

Your petitioner claims under the XIV Amendment to the Constitution of the United States, and the act commonly known as the "Civil Rights Bill," the "full and equal benefit of all laws and proceedings or the security of person and property," and the right to exercise and follow the profession of an attorney at law upon the same terms, conditions and restrictions as are applied to and imposed upon every other citizen of the State of Illinois, and none other.

And that having complied with all the laws of the State, and the rules and regulations of this honorable Court, for the admission of attorneys, it is contrary to the true intent and meaning of said amendment and said "Civil Rights Bill," for your petitioner to be refused a license to practice law, upon the sole ground of her "married condition."

VIII.

And your petitioner further claims, that having been born in the State of Vermont, and having been a citizen of the State last named, and of the United States, and having removed to the State of Illinois, where she has resided for many years, that under the second section of the IVth Article of the Constitution of the United States, which is in these words, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," she has guaranteed to her the privileges and immunities which every other citizen of the State of Illinois has, among which may be named the protection of the Government, the right to the enjoyment of life and liberty, to acquire and possess property, to reside in the State, to carry on trade, and the right to follow any professional pursuit under the laws of the State, which must work equally upon all the citizens of the State, and that under this section of the Constitution she has a right to receive a license to practice law upon the same terms and conditions as the most favored citizen of the State of Illinois.

People v. Washington, 36 California R. 662. Carfield v. Coryell, 4 Washington C. R. 381.[55]

MYRA BRADWELL

The Illinois supreme court responded to Bradwell's additional arguments with a unanimous opinion. Justice Charles B. Lawrence wrote the opinion.

Opinion[56]
28 January 1870

In the matter of
the application of Mrs.
Myra Bradwell for
a license to practice as
an attorney at law

Lawrence J.

At the last term of the court Mrs Myra Bradwell applied for a license as an attorney at law, presenting the ordinary certificates of character and qualifications. The license was refused and it was stated as a sufficient reason, ~~for our decision~~ that under the decisions of this court the ^applicant,^ as a married woman, would be ~~not~~ bound neither by her express contracts ~~with her clients~~ nor by those implied contracts which it is the policy of the law to create ~~as~~ between attorney and client. Since the announcement of our decision, the applicant has filed a printed argument in which her right to a license is earnestly and ably maintained. Of

the ample qualifications of the application we have no doubt. ^and we put our decision in writing in order that she or other persons interested ~~in the question~~ may bring ^the question^ ~~it~~ before the next legislature.

The applicant, in her printed argument, combats the decision of this court in the case of Carpenter v. Mitchell June Term 1869, in which we held a married woman was not bound by ~~her~~ contracts having no relation to her own property. We are not inclined to go over again the grounds of ^that^ decision. It was the result of a good deal of deliberation and discussion in our council-chamber, and the confidence of the present members of this court in its correctness can not easily be shaken. ~~At the same time we admit it is one of those questions about which there may be found a difference of opinion.~~ We are ~~harmonious~~ in accord with all the courts in this country which have had occasion to pass upon a similar question, the Supreme Court of Wisconsin in Conway v. Smith 13 Wis. 125, differing from us only on the minor point as to whether in regard to contracts concerning the separate property of married women the law side of the court would take jurisdiction.

As to the main question, the right of married women to make contracts not affecting their separate property, the position of those who assert such right is, that because the legislature ~~assent~~ has ^expressly^ removed the common law disabilities of married women in regard to holding property not derived from their husbands, it ^has^ ~~had~~ therefore, by necessary implication, ^also^ removed ^~~also~~ ^ all their common law disabilities in regard to making contracts, ~~which are a mode of acquiring property. The hiatus between the premise and the conclusion may be bridged by the disciples of that school of social and political opinion is too wide for us to bridge. We are asked to say, because the legislature has enacted that married women may own their own property free from molestation for their husbands debts that it has also by implication, enacted that they may enter~~ ^and invited them to enter,^ equally with men, upon those fields of trade and speculation by which property is acquired through the agency of contracts. ~~It may be wise and desirable that~~

The hiatus between the premise and the conclusion is too ~~broad~~ ^wide^ for us to bridge. It may be desirable that the legislature should relieve married women from all their common law disabilities. But to say that it has done so in the act of 1861, the language of which is carefully guarded, and which makes no allusion to contracts, and does not use that or any equivalent term would be simple misinterpretation. It would be going as far beyond the meaning of that act as that act goes beyond the common law in changing the legal status of women. The act itself is wise and just and therefore entitled to a liberal interpretation. This we have endeavored to give it ^in the cases that have come before us^, but we do not intend to decide that the legislature has gone to a length in its measure of reform ^for^ which the language it has carefully used furnishes no warrant.

It is urged, however, that the law of the last session of the legislature, which gives to married women the separate control of their earnings, must be construed as giving

~~a married~~ to them the right to contract in regard to their personal services. This act had no application to the case of Carpenter v. Mitchell, having been passed after that suit was commenced, and we were unmindful of it when considering this application at the last term. Neither do we now propose to consider ^how far^ ~~to what extent~~ it extends the power of a married woman to contract, since, after further consultation in regard to this application, we find ourselves constrained to hold, that the sex of the applicant, independently of coverture, is, as our law now stands, a sufficient reason for not granting this license.

Although an attorney at law is an agent, as claimed by the applicants argument, when ~~sh~~ he has been retained to act for another, yet he is also much more than an agent. He is an officer of the court, holding his commission, in this State, from two of the members of this court, and subject to be disbarred by the court for what our statute calls "mal-conduct in his office." He is appointed to assist in the administration of justice, is required to take an oath of office, and is privileged from arrest while attending courts.

Our statute provides that no person shall be permitted to practise as an attorney or counsellor at law without having previously obtained a license ~~for~~ for that purpose from ~~some~~ two of the justices of the supreme court ~~which license shall constitute the person receiving the same an attorney and counsellor at law~~. By the second section of the act, it is provided that no person shall be entitled to receive a license, until he shall have obtained a certificate from the court of some county of his good moral character, and this is the only express limitation upon the exercise of ~~this~~ ^the^ power ^thus^ ~~by the~~ entrusted to this court. In all other respects it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, and must be held subject to at least two limitations. One is, that the court should establish such terms of admission as will promote the proper administration of justice, the second ~~is~~, that it should not admit any persons or class of persons who ~~were~~ ^are^ not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute. The substance of the last limitation is simply that this important trust ~~conferred~~ reposed in us should be exercised in conformity with the designs of the power creating it.

~~Whether the administration of justice would be promoted by the participation~~ Whether, in the existing social relations between men and women, ~~and~~ it would promote the proper administration of justice, and the general well-being of society, to permit women to engage in the trial of cases at the bar, is a question opening a wide field of discussion upon which it is not necessary for us to enter. It is sufficient to say that, in our opinion, the other implied limitation upon our power, to which we have above referred, must operate to prevent our admitting women to the office of attorney at law. If we were to admit them, we should be exercising the ~~power~~ ^authority^ conferred upon us in a manner which, we are fully satisfied, was never contemplated by the legislature ~~and which would~~. Upon this question it seems to us neither this

applicant herself, nor any unprejudiced and intelligent person, can entertain the slightest doubt. It is to be remembered that at the time this statute was enacted we had, by express provision, adopted the common law of England, and ~~the~~ with three exceptions, the statutes of that country ~~so far~~ passed prior to the 4th year of James the First, so far as they were applicable to our condition. It is to be also ^remembered^ ~~rembered~~ that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity ^or as a barrister^ would have created hardly less astonishment than ^one^ that she should ascend the bench of Bishops or be elected to a seat in ~~Parliament~~ ^the House of Commons^. It is to be ^further^ remembered that when our act was passed, that school of reform which claims for women ~~a~~ participation in the making and administering of the laws had not then arisen, ~~and~~ or, if here and there a writer had advanced such theories, they were regarded rather as abstract ^speculations^ ~~theories~~ than as an actual basis for action. That ~~nature~~ God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth. ~~trut~~ It may have been a radical error, and we are by no means certain it was not, but that this was the universal belief certainly admits of no denial. ~~Neither then nor up to the present time.~~ A direct participation in the affairs of government in even the most elementary form, ^namely^ the right of suffrage, was not then claimed, and has not yet been conceded unless recently in one of the nearby settled territories of the West. In view of these facts, we are certainly warranted in saying, that when the Legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege ~~should~~ would be extended equally to men and women. Neither has there been any legislation since that period, which would justify us in presuming a change in the legislative intent. Our laws to day, in regard to women, are ~~to day~~ substantially what they ~~were~~ have always been, except ~~the~~ in the change wrought by the ^acts^ of ~~laws~~ 1861 and 1869, giving to married women the right to control their own property and earnings.

Whatever ^then^ may be our individual opinions as to the admission of women to the bar, we do not deem ourselves at liberty to ~~admit them~~ exercise our power in a mode ~~which we are persuaded was never persuaded was~~ never contemplated by the legislature, and inconsistent with the usages of courts of the common law from the origin of the system to the present day.

But it is not merely an immense innovation in our own usages as a court that we are asked to make. This step, if taken by us, would mean that in the opinion of this tribunal, any civil office in this State may be filled by women—that it is in harmony with the spirit of our constitution and laws that women should be made Governors, Judges, and Sheriffs. This we are not yet prepared to hold.

In our opinion, it is not the province of a court to attempt, by giving a new interpretation to an ancient statute, to introduce so important a change in the legal position of one half the

people. Courts of justice were not intended to be made the instruments of pushing forward measures of popular reform. If ^it be^ ~~it is ^however^~~ desirable ^~~it may be~~ ^ that those offices which ~~the Legislature creates should for the purpose of carrying forward the functions of government should be filled indifferently by men and women~~ we have borrowed from the English law, and which from their origin some centuries ago thru to the present time, have been filled exclusively by men, should also be made accessible to women, then let the change be made, but let it be made by that department of the government to whom the constitution has entrusted the power of changing the laws. The great body of our law rests merely upon ancient usage. The right of a husband ~~to the~~ in this State to the personal property of his wife, before the act of 1861, rested simply upon such usage, yet who could have justified this court if, prior to the passage of that act, it had solemnly decided that it was unreasonable that the property of the wife should ~~be~~ vest in the husband, and ~~that~~ ^this^ usage should no longer be recognized? Yet was it not as unreasonable that a woman by marriage should lose the title of her personal property, as it is that she should not receive from us a license to practice law? The rule in both cases, until the law of 1861, rested upon the same common law usage and could ^have^ pleaded the same antiquity. In the one case it was never pretended that this court ~~should~~ could properly overturn the rule, and we do not see how we could be justified should we disregard it in the other. The principle can not be too strictly and conscientiously observed, that each of the three departments of the government should avoid encroachment upon the other, and ^that^ it does not belong to the judiciary to attempt to inaugurate ^great^ social or political reforms. The mere fact that women have never been ~~made~~ licensed as attorneys at law is, in a tribunal where immemorial usage is as much respected as it is and ought to be in courts of justice, a sufficient reason for ~~holding their~~ declining to exercise our discretion in their favor until the propriety of their participating in the offices of State and the administration of public affairs shall have been recognized by the law making department of the government—that department to which the initiation in great measures of reform properly belongs. For us to attempt, ^in a matter of this importance,^ to inaugurate a practice at variance with all the precedents ~~and usages~~ of the law we are sworn to administer, would be an act ^of^ judicial usurpation deserving of the greatest censure. If we could disregard, in this matter, the authority of those unwritten usages which make the great body of our law, we might do so in any other, and ^the clearest^ rights of person and property would become a matter of mere judicial discretion.

But it is said the 28th section of chapter 90 of the Revised Statutes of 1845 provides that, whenever any person is referred to in the statutes by words importing the masculine gender, females as well as males shall be deemed to be included. But the 36th section of the same chapter provides that this rule of construction shall not apply where there is anything in the subject or context repugnant to such construction. That is the case in the present instance.

In the view we have taken of this question the argument drawn by the applicant from the constitution of the United States has no ~~application~~ pertinancy.

In conclusion we would add that, while we are constrained to refuse this application, we respect the motive which prompts it, and we entertain a profound sympathy with those efforts which are being so widely made, to ^reasonably^ enlarge the field for the exercise of womans industry and talent. While those theories which are popularly known as "womans rights" can not be expected to meet with any cordial ~~reception~~ acceptance among the members of a profession which, more than any other, inclines its followers, if not to stand immovable upon the ancient ways, at least to make no hot haste in measures of reform, still all right-minded men must gladly see new spheres of action opened to ~~woman~~ ^woman^, and greater inducements offered her to seek the highest and widest culture. There are some departments of the legal profession in which she can appropriately labor. Whether, on the other hand, to engage in the hot strifes of the bar, in the presence of the public, and with momentous verdicts the prizes of the struggle, would not tend to destroy the deference and delicacy with which it is the pride of our ruder sex to treat her, is a matter certainly worthy of her consideration. But the important question is, what effect the presence of women as barristers in our courts would have upon the administration of justice and the question can ~~only~~ be satisfactorily answered ^only^ in the light of experience.

> If the Legislature shall choose to ~~authorize the admission~~ remove the existing barriers and authorize us to issue licenses equally to men and women we shall cheerfully obey, trusting to the good sense and sound judgment of women themselves to seek those departments of the practice in which they can labor without reasonable objection.
>
> Application denied.

Even though Bradwell had anticipated this decision, she was still not pleased. She wrote that "what the decision of the Supreme Court of the United States in the Dred Scott[57] case was to the rights of negroes as citizens of the United States, this decision is to the political rights of women in Illinois—annihilation."[58] She decided to appeal her case to the U.S. Supreme Court, and in June 1870, the clerk of the Northern Grand Division of the Illinois supreme court prepared a transcript to be sent to Washington.

Supreme Court Justice Samuel F. Miller[59] of Iowa reviewed the transcript, agreed that the Court had federal jurisdiction, and accepted a writ of error from the Illinois supreme court.[60] The Supreme Court then prepared a citation, or a summons, to the State of Illinois notifying it that Bradwell had appealed her case. The citation and the writ of error was part of the process in appealing a judgment from an inferior court—in this case, the Illinois supreme court—to the Supreme Court. Illinois Attorney General Washington Bushnell[61] acknowledged the service of the citation.[62]

Bradwell retained renowned constitutional attorney and U.S. Senator from Wisconsin Matthew H. Carpenter[63] to represent her at the Supreme Court. Carpenter allegedly took no fee for his participation in the case, as he had a long history of supporting women's rights.[64]

Only a few months before allowing Bradwell's case, Justice Miller wrote that "there is

not the least probability that any case not now on the docket will be reached during the next term of our court. Our docket of the present term numbers 500 and we are engaged now in hearing 178. We have never thought of getting up with the business under two or three years."[65] The Court continued Bradwell's case in the December 1870 Term, and the case was finally argued in the December 1871 Term.[66] Carpenter filed a printed argument on behalf of Bradwell; the state of Illinois offered no argument.

Argument for Plaintiff in Error[67] 10 January 1872

SUPREME COURT OF THE UNITED STATES.
DECEMBER TERM, A. D. 1871. –
No. 67.

MYRA BRADWELL}
Plaintiff in Error,}
}
vs.}
}
STATE OF ILLINOIS.}

This is a writ of error to the supreme court of the State of Illinois, to review the proceedings of that court, denying the petition of the plaintiff in error to be admitted to practice as an attorney and counsellor of that court; which right was claimed by the plaintiff in error in that court under the XIVth amendment of the Constitution of the United States.

The plaintiff in error is a married woman, of full age, a citizen of the United States and of the State of Illinois; was ascertained and certified to be duly qualified in respect of character and attainments; but was denied admission to the bar for the sole reason that she was a married woman. This is the error relied upon to reverse the proceedings below.

By the rules of this court no person can be admitted to practice at the bar without service for a fixed term in the highest court of the State in which such person resides. Consequently a denial of admission in the highest court of the State is an insurmountable obstacle to admission to the bar of this court.

This record, therefore, presents the broad question, whether a married woman, being a citizen of the United States and of a State, and possessing the necessary qualifications, is entitled by the Constitution of the United States to be admitted to practice as an attorney and counsellor at law in the courts of the State in which she resides. This is a question not of taste, propriety, or politeness, but of civil right.

Before proceeding to discuss this question, it may be well to distinguish it from the question of the right of female citizens to participate in the exercise of the elective franchise.

The great problem of female suffrage, the solution of which lies in our immediate future, naturally enough, from its transcendent importance, draws to itself, in prejudiced minds, every question relating to the civil rights of women; and it seems to be feared that doing justice to women's rights in any particular would probably be followed by the establishment of the right of female suffrage, which, it is assumed, would overthrow Christianity, defeat the ends of modern civilization, and upturn the world.

While I do not believe that female suffrage has been secured by the existing amendments to the Constitution of the United States, neither do I look upon that result as at all to be dreaded. It is not, in my opinion, a question of *woman's rights* merely,

but in a far greater degree, a question of man's rights. When God created man, he announced the law of his being, that it was not well for him to be alone, and so he created woman to be his helpmate and companion. Commencing with the barbarism of the far East, and journeying through the nations toward the bright light of civilization in the West, it will everywhere be found that, just in proportion to the equality of women with men in the enjoyment of social and civil rights and privileges, both sexes are proportionately advanced in refinement and all that ennobles human nature. In our own country, where women are received on an equality with men, we find good order and good manners prevailing. Because women frequent railroad cars and steamboats, markets, shops, and post offices, those places must be, and are conducted with order and decency. The only great resorts from which woman is excluded by law are the election places; and the violence, rowdyism, profanity, and obscenity of the gathering there in our largest cities are sufficient to drive decent men even away from the polls. If our wives, sisters, and daughters were going to the polls, we should go with them, and good order would be observed, or a row would follow, which would secure order in the future.

I have more faith in female suffrage, to reform the abuses of our election system in the large cities, than I have in the penal election laws to be enforced by soldiers and marines. Who believes that, if ladies were admitted to seats in Congress, or upon the bench, or were participating in discussions at the bar, such proceedings would thereby be rendered less refined, or that less regard would be paid to the rights of all?

But whether women should be admitted to the right of suffrage, is one thing; whether this end has already been accomplished, is quite another. The XIVth amendment forbids the States to make or enforce any law which shall abridge "the privileges or immunities" of a citizen. But whether the right to vote is covered by the phrase "privileges and immunities," was much discussed under the provisions of the old Constitution; and at least one of the earliest decisions drew a distinction between "privileges and immunities" and political rights. On the other hand, Mr. Justice Washington,[68] in a celebrated case, expressed the opinion, that the right to vote and hold office was included in this phrase. But in neither of the cases was this point directly involved, and both opinions are *obiter dicta* in relation to it.

But the XIVth and XVth amendments seem to settle this question against the right of female suffrage. These amendments seem to recognize the distinction at first pointed out between "*privileges and immunities,*" and *the right* to vote.

The XIVth amendment declares, "all persons born and naturalized in the United States, &c., are citizens of the United States, and of the State wherein they reside." Of course, women, as well as men, are included in this provision and recognized as citizens. This amendment further declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." If the privileges and immunities of a citizen cannot be abridged, then, of course, the privileges and immunities of all citizens

must be the same. The second section of this amendment provides, that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians, not taxed. But when the *right to vote* at any election, &c., is denied to any of *the male inhabitants*, being twenty-one years of age, &c., the basis of representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of *male citizens* twenty-one years of age in such State."

It cannot be denied, that the right or power of a State to exclude a portion of its male citizens from the right to vote, is recognized by this second section; from which it follows, that the *right* to *vote* is not one of the "privileges or immunities" which the first section declares shall not be abridged by any State. The right of female suffrage is also inferentially denied by that provision of the second section, above quoted, which provides, that when a State shall deny the right to vote to any *male citizen*, "the basis of representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of *male citizens* in such State."

In the first place, it is to be observed that the basis of representation in a State, which is the whole number of persons—male and female, adults and infants—is only to be reduced when the State shall exclude a portion "of the male inhabitants of such State." The exclusion of female inhabitants, and infants under the age of twenty-one years, does not effect a reduction of the basis of representation in such State. And, again, when a State does exclude a portion of its male inhabitants, &c., the basis of representation in such State is not reduced in the proportion which the number of such excluded males bears to the number of persons—male and female—in such State; but only "in the proportion which the number of such (excluded) male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." This provision assumes that females are no part of the voting population of a State.

The XVth amendment is equally decisive. It recognizes the right—that is, power—of any State to exclude a portion of its citizens from the right to vote, and only narrows this right in favor of a particular class. Its language is: "The right of citizens of the United States to vote shall not be denied or abridged, &c., on account of race, color, or previous condition of servitude." This amendment was wholly unnecessary upon the theory that the XIVth amendment had established or recognized the right of every citizen to vote. It recognizes that the right of a State to exclude a portion of its citizens, and only restrains that power so far as to provide that citizens shall not be excluded on account of race, color, or previous condition of servitude. In every other case, the power of exclusion recognized by the XIVth amendment is untouched by the XVth amendment.

It is also worthy of notice that, throughout the XIVth and XVth amendments, voting is not treated as, or denominated, a privilege, and, evidently was not intended to be, nor regarded as, included in the "privileges or immunities" of a citizen, which no State can abridge for any cause whatever.

I have taken this pains to distinguish between the "privileges and immunities" of a citizen, and the "right" of a citizen to vote, not because I feared that this court would deny one, even if the other would follow, but to quiet the fears of the timid and conservative.

I come now to the narrower and precise question before the court:—Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the XIVth amendment, the privilege of earning a livelihood by practicing at the bar of a judicial court?

It was provided by the original Constitution, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Under this provision each State could determine for itself what the privileges and immunities of its citizens should be. A citizen emigrating from one State to another carried with him, not the privileges and immunities he enjoyed in his native State, but was entitled, in the State of his adoption, to such privileges and immunities as were enjoyed by the class of citizens to which he belonged by the laws of such adopted State. A white citizen of one State, where no property qualification for voting was required, emigrating to a State which required such qualification, must conform to it before he could claim the right to vote. A colored citizen, authorized to hold property in Massachusetts, emigrating to South Carolina, where all colored persons were excluded from such right, derived no aid, in this respect, from the Constitution of the United States, but was compelled to submit to all the incapacities laid by the laws of that State upon free persons of color born and residing therein. A married woman, a citizen of the State of Wisconsin, where by law she was capable of holding a separate estate, and making contracts concerning the same, emigrating to a State where the common law in this regard prevailed, could not buy and sell property in her own name, or contract in reference thereto.

But the XIVth amendment executes itself in every State of the Union. Whatever are the privileges and immunities of a citizen in the State of New York, such citizen, emigrating, carries them with him into any other State of the Union. It utters the will of the United States in every State, and silences every State constitution, usage, or law which conflicts with it. If to be admitted to the bar, on attaining the age and learning required by law, be one of the privileges of a white citizen in the State of New York, it is equally the privilege of a colored citizen in that State; and if in that State, than in any State. If no State may "make or enforce any law" to abridge the privileges of a citizen, it must follow that the privileges of all citizens are the same.

We have already seen that the right to vote is not one of those privileges which are declared to be common to all citizens, and which no State may abridge; but that it is a political right, which any State may deny to a citizen, except on account of race, color, or previous condition of servitude. It therefore only remains to determine whether admission to the bar belongs to that class of privileges which a State may not abridge, or that class of political rights as to which a State may discriminate between its citizens.

In discussing this subject, we are compelled to use the words "privileges and immunities" and the word "right" in the precise sense in which they are employed in the Constitution. In popular language, and even in the general treatises of law writers, the words "rights" and "privileges" are used synonymously. Those privileges which are secured to a man by the law are his rights; and the great charter of England declares that the ancient privileges enjoyed by Englishmen, are the undoubted rights of Englishmen. But, as we have seen, the XIVth and XVth amendments distinguish between privileges and rights; and it must be confessed that it is paradoxical to say, as the XIVth amendment clearly does, that the "privileges" of a citizen shall not be abridged, while his "right" to vote may be. But a judicial construction of the Constitution is wholly different from a mere exercise in philology. The question is not whether certain words were aptly employed—but the context must be searched to ascertain the sense in which the words were used.

It is evident that there are certain "privileges and immunities" which belong to a citizen of the United States as such; otherwise it would be nonsense for the XIVth amendment to prohibit a State from abridging them; and it is equally evident from the XIVth amendment that the right to vote is not one of those privileges. And the question recurs whether admission to the bar, the proper qualification being possessed, is one of the privileges which a State may not deny.

In Cummings *vs.* Missouri, 4 Wall., 321,[69] this court say:

"In France, deprivation or suspension of civil rights, or some of them—and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning—are punishments prescribed by her code.

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or extension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

No broader or better enumeration of the privileges which pertain to American citizenship could be given. "Life, liberty, and the pursuit of happiness; and in the pursuit of happiness, all avocations, all honors, all positions, are alike open to every one; and in the protection of these rights all are equal before the law."

In *ex parte* Garland (4 Wall., 378)[70] this court say:

"The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of

the court, admitted as such by its order, *upon evidence of their possessing sufficient legal learning and fair private character.*

* * * The order of admission is the judgment of the court, that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, *and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been offered.* (*Ex parte* Heyfron 7 How., Miss., 127; Fletcher *v.* Daingerfield, 20 Cal., 430.)[71] Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases.

* * * The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a *right* of which he can only be deprived by the judgment of the court, for moral or professional delinquency. The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of the ordinary avocations of life."

It is now well settled that the courts, in admitting attorneys to, and in expelling them from, the bar, act judicially, and that such proceedings are subject to review on writ of error or appeal, as the case may be.

Ex parte Cooper, 22 N.Y., 67.

Strother *v.* Missouri, 1 Mo., 605.

Ex parte Secomb, 19 How., 9.

Ex parte Garland, 4 Wall., 378.[72]

From these cases the conclusion is irresistible, that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, they cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a State legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. This would be the exclusion of all colored citizens, without regard to age, character, or learning. Such an act would abridge the rights of all colored citizens, by denying them admission into one of the avocations which this court has declared is ["]alike open to everyone." I presume it will be admitted that such an act would be void. I am certain this court would declare it void. And I challenge the most astute mind to draw any distinction between such an act and a custom, usage, or law of a State, which denies this privilege to all female citizens, without regard to age, character, or learning. If the legislature may, under pretence

of fixing qualifications, declare that no female citizen shall be permitted to practice law, they may as well declare no colored citizen shall practice law. It should be borne in mind that the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is that provision that "No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen." If this provision does not open all the professions, all the avocations, all the methods by which a man may pursue happiness, to the colored as well as the white man, then the legislatures of the States may exclude colored men from all the honorable pursuits of life, and compel them to support their existence in a condition of servitude. And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.

Why may a colored citizen buy, hold, and sell land in any State of the Union? Because he is a citizen of the United States, and that is one of the privileges of a citizen. Why may a colored citizen be admitted to the bar? Because he is a citizen, and that is one of the avocations open to every citizen; and no State can abridge his right to pursue it. Certainly no other reason can be given.

Now, let us come to the case of Myra Bradwell. She is a citizen of the United States, and of the State of Illinois, residing therein; she has been judicially ascertained to be of full age, and to possess the requisite character and learning. Indeed, the court below, in their opinion, found in the record, page 9, say: "Of the ample qualifications of the applicant we have no doubt."

Still admission to the bar was denied the petitioner, not upon the ground that she was not a citizen; not for want of age or qualifications; not because the profession of the law is not one of those avocations which are open to every American citizen as matter of right, upon complying with the reasonable regulations prescribed by the legislature; but upon the sole ground that inconvenience would result from permitting her to enjoy her legal rights in this, to wit, that her clients might have difficulty in enforcing the contracts they might make with her, as their attorney, because of her being a married woman.

Now, with entire respect to that court, it is submitted that this argument *ab inconvenienti*, which might have been urged with whatever force belongs to it, against *adopting* the XIVth amendment in the full scope of its language, is utterly futile to resist its full and proper operation, now that is has been adopted. Concede, for argument, that the XIVth amendment ought to have read thus: "No State shall make or enforce any law which shall abridge the privileges or immunities of any citizens except married women;" yet that exception is not found in the sweeping provision of this amendment. It is provided that citizens may be disfranchised for treason; but it is nowhere provided that a citizen shall be disfranchised for being a married woman. The opinion of the court below puts a limitation upon this unlimited constitutional provision. If this court shall approve this exception, in the very teeth of the unambiguous language of the Constitution, where may we expect judicial legislation to stop? Can this

court say that married women have no rights that are to be respected? Can this court say that, when the XIVth amendment speaks of all persons, &c., and declares them to be citizens, it means all male persons and unmarried females? Or can this court say that, when the XIVth amendment declares "the privileges of no citizen shall be abridged," it means that the privileges of no male citizen or unmarried female citizen shall be abridged? This would be bold dealing with the constitutional provision. It would be excluding a large proportion of the citizens of the United States from privileges which the Constitution declares shall be the inheritance of every citizen alike.

But it is respectfully submitted that the court below erred in holding that a married woman, admitted to the bar under the XIVth amendment, would not be liable on contracts, express or implied, between her and her clients. In Wisconsin, when the Legislature passed the act protecting married women in the enjoyment of their separate estate, our court, upon reasoning that cannot be gainsaid, held, that the Legislature must have intended all the natural and logical results of the act in question; and, therefore, that the contracts of a married woman, relating to her separate estate, were as binding as if made by a *feme sole*. It is submitted that, for still stronger reasons, the great innovation of the XIVth amendment should be carried to its logical conclusion, and that it sweeps away the principles of the common law, as it does the express provisions of State constitutions and statutes.

But again: Mrs. Bradwell, admitted to the bar, becomes an officer of the court, subject to its summary jurisdiction. Any malpractice or unprofessional conduct towards her client would be punishable by fine, imprisonment, or expulsion from the bar, or by all three. Her clients would, therefore, not be compelled to resort to actions at law against her. But if the courts of Illinois should refuse to exercise this summary jurisdiction, and should hold that actions at law could not be maintained on contracts between her and her clients, it might result that she would not be as generally employed as she otherwise would be. But that is no reason why she should be prohibited from appearing and trying causes for clients who are willing to rely upon her integrity and honor.

But let it not be supposed that, in trying to answer as to the inconveniences imagined by the court below, I am at all departing from the broad ground of constitutional right upon which I rest this cause. I maintain that the XIVth amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters, and our daughters. The inequalities of sex will undoubtedly have their influence, and be considered by every client desiring to employ counsel.

There may be cases in which a client's rights can only be rescued by an exercise of the rough qualities possessed by men. There are

> many causes in which the telling sympathy and the silver voice of woman would accomplish more than the severity and sternness of man could achieve. Of a bar composed of men and women of equal integrity and learning, women might be more or less frequently retained, as the taste or judgment of clients might dictate. But the broad shield of the Constitution is over them all, and protects each in that measure of success which his or her individual merits may secure.
>
> MATT. H. CARPENTER,
> *Of Counsel*

More than a year later, the Supreme Court of the United States finally reached its decision in Myra Bradwell's case. By a tally of eight to one, the Justices agreed with the Illinois supreme court decision denying Bradwell a license to practice law. Justices Samuel Miller, Nathan Clifford, David Davis, William Strong, and Samuel Nelson—in the majority—agreed that the recently passed Fourteenth Amendment to the U.S. Constitution should be interpreted narrowly and that it primarily applied to the former slaves, now freedmen, of the South.[73] Justice Miller authored the opinion for the majority.[74] Justices Joseph Bradley, Stephen Field, and Noah Swayne agreed with the judgment but not the majority opinion. Bradley, in writing the separate opinion, was more patriarchal in his assessment of the different roles men and women had in society.[75] Chief Justice Salmon Chase dissented from the judgment and both opinions but did not record a written dissent.[76]

Bradwell was disappointed in the result, but she noted that "although we do not believe the construction of the XIV amendment, as given by a majority of the court, and their definition of the privileges and immunities of citizens of the United States are sound, we take great pleasure in saying that the opinion delivered by Judge Miller is confined strictly to the points at issue, and is just such an one as might be expected from an able and experienced jurist entertaining the views that Judge Miller does upon these constitutional questions. He does not for a moment lower the dignity of the judge by traveling out of the record to give his individual views upon what we commonly term '*Woman's Rights.*'"[77] She was not as complimentary of Justice Bradley's separate opinion, noting that "we regard the opinion of Judge Bradley as in conflict with his opinion delivered in what are known as the New Orleans Slaughter-house Cases,"[78] in which Bradley said "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner." Bradley also added that the granting of licenses for employment "are open to all proper applicants, and none are rejected except those who fail to exhibit the requisite qualifications."[79]

While Bradwell understood and accepted Justice Miller's consistency between his opinion in the *Slaughterhouse Cases* and in *Bradwell*, which were decided within days of each other, she failed to understand the inconsistency between Justice Bradley's opinions in both. In the *Slaughterhouse Cases*, Bradley argued that anyone should be able to obtain employment in their profession of choice; in *Bradwell*, Bradley added, anyone except women.

By the time of the Supreme Court decision in April 1873, the Illinois General Assembly had already passed a law allowing women to become licensed as attorneys.[80] Many states followed Illinois's lead in passing legislation to give women the right to practice law after the Supreme Court affirmed the Illinois supreme court's denial. Bradwell made an impact in raising awareness of the issue, but "having once complied with all the rules and regulations of the court for the admission of attorneys, declined to make any further application, or again ask for admission."[81]

Bradwell never practiced law, even after the Illinois supreme court, on March 29, 1890,[82] granted her a license to practice *nunc*

pro tunc,[83] or retroactive to her date of application. The U.S. Supreme Court also admitted Bradwell to practice in 1892, but she never practiced in either the state's or the nation's highest courts.[84] She was content with editing the *Chicago Legal News*, discovering that she did not need to be a lawyer to be a successful legal publisher.[85] She was also involved in other activities, as a voice for women's suffrage and in bringing the World's Columbian Exposition to Chicago.

Unfortunately, Bradwell had been diagnosed with cancer in 1891. She traveled to Europe with the hope that the tumor would subside. It never did, however, and she soon became unwell and died on February 14, 1894, just two days after her sixty-third birthday. After a large funeral, she was interred at Chicago's Rosehill Cemetery.[86] One contemporary writer described Bradwell as one who inspired others to act, adding "it is almost impossible to be associated with her and not to love her."[87]

ENDNOTES

[1]Jane M. Friedman, **America's First Woman Lawyer: The Biography of Myra Bradwell** (Amherst, NY: Prometheus Books, 1993) is the principal book on Bradwell's life. Articles that have appeared include: Robert M. Spector, "Woman against the Law: Myra Bradwell's Struggle for Admission to the Illinois Bar," *Journal of the Illinois State Historical Society* 68 (June 1975), 228–42; Meg Gorecki, "Legal Pioneers: Four of Illinois First Women Lawyers," *Illinois Bar Journal* 78 (October 1990), 510–15; George W. Gale, "Myra Bradwell: The First Woman Lawyer," *American Bar Association Journal* 39 (December 1953), 1080–83, 1120–21; Nancy T. Gilliam, "A Professional Pioneer: Myra Bradwell's Fight to Practice Law," *Law and History Review* 5 (Spring 1987), 105–33. For additional scholarship on Myra Bradwell, see Jeanine Becker, "Myra Colby Bradwell: Sisterhood, Strategy & Family," and E. Rae Woods, "Myra Colby Bradwell: 'A Living Example,'" both *available at* the Women's Legal History website, http://wlh.law.stanford.edu (last visited Dec. 3, 2011).

[2]With the exception of modernizing unclear punctuation and capitalization, the editor has transcribed the documents exactly, including misspellings and incorrect grammar. Documents were visually collated, then double-proofed. The editor has noted author insertions with carets (^), and author-deleted text is rendered with the ~~strikethrough~~. With regards to formatting, documents are block-indented.

[3]26 *Chicago Legal News* (17 February 1894), 200.

[4]Friedman, *America's First Woman Lawyer*, 41.

[5]40 *Chicago Legal News* (30 November 1907), 126.

[6]Friedman, *America's First Woman Lawyer*, 41.

[7]"All Dabble in the Law," *Chicago Tribune*, 12 May 1889, 26; 26 *Chicago Legal News* 200–201.

[8]40 *Chicago Legal News* 126–2; "All Dabble in the Law," 26.

[9]Bradwell was part of a larger trend of women attempting to enter professions that only men had previously enjoyed. Gorecki, "Legal Pioneers," 510.

[10]Richard H. Chused, "A Brief History of Gender Law Journals: The Heritage of Myra Bradwell's *Chicago Legal News*," *Columbia Journal of Gender and Law* 12 (no. 3, 2003), 421–29.

[11]3 *American Law Review* (January 1869), 362; 26 *Chicago Legal News* 200–201.

[12]"Attorneys and Counsellors at Law," 3 March 1845, **Revised Statutes of the State of Illinois** (1845), 73. Rule 76 states that "applicants for license to practice law in the court of this State, on presenting to any member of this Court a certificate of qualifications signed by the Circuit Judge and State's Attorney of the Circuit in which the applicant may reside, setting forth that the applicant has been examined and found qualified, will be a sufficient voucher on which to grant a license." 38 Ill. 3 (1865), adopted at the November term 1866, at Mount Vernon.

[13]Certificate of examination, 2 August 1869, case file 26853, RS 900.001, Illinois State Archives, Springfield, Illinois. Erastus S. Williams served as judge of the circuit court from 1863 to 1871. Charles H. Reed served as Cook County State's Attorney from 1864 to 1876.

[14]Certificate of Good Moral Character, 10 September 1869, case file 26853, RS 900.001, Illinois State Archives. John L. Beveridge (6 July 1824–3 May 1910) practiced law in Sycamore and Chicago before becoming Governor of Illinois in 1873 when Richard J. Oglesby resigned to become a U.S. Senator. Robert P. Howard, **Mostly Good and Competent Men**, 2d. ed. (Springfield: University of Illinois at Springfield, 1999), 133–36.

[15]Robert Hervey (10 August 1820—15 December 1903) was born in Scotland and moved to Canada in the 1830s. He received his law license in Toronto in 1841 and practiced in Ottawa, Canada until 1852, when he moved to Chicago. He obtained his law license in Illinois that year, practicing in Chicago continuously until 1892. He was employed in many criminal cases and considered one of the finest trial lawyers in Chicago. 36 *Chicago Legal News* (19 December 1903), 141.

[16]Under the second Illinois Constitution, the Supreme Court met in Mt. Vernon, Springfield, and Ottawa. Illinois Constitution (1848), Article V, Section 31.

[17]Written and signed by Myra Bradwell, filed 21 September 1869, case file 26853, RS 900.001, Illinois State Archives.

[18]38 Ill. 3 (1865), adopted at the November term 1866, at Mount Vernon.

[19]"Attorneys and Counsellors at Law," 3 March 1845, **Revised Statutes of the State of Illinois** (1845), 73.

[20]"Revised Statutes," 3 March 1845, **Revised Statutes of the State of Illinois** (1845), 472.

[21]"An Act in relation to the Revised Statutes," 26 February 1845, **Revised Statutes of the State of Illinois** (1845), 591.

[22]"Attorneys and Counsellors at Law," 3 March 1845, **Revised Statutes of the State of Illinois** (1845), 74.

[23]Illinois Constitution, Article XIII, Section 3.

[24]Illinois Constitution, Article XIII, Section 8.

[25]Illinois Constitution, Article XIII, Section 11.

[26]"Forcible Entry and Detainer," 3 March 1845, **Revised Statutes of the State of Illinois** (1845), 256–57.

[27]"Chancery," 3 March 1845, **Revised Statutes of the State of Illinois** (1845), 92–99.

[28]Sidney Breese (15 July 1800–27 June 1878) served on the Illinois supreme court from 1841 to 1843 and from 1857 to 1878. Pinkney H. Walker (18 June 1815–17 February 1885) served on the court from 1858 to 1885. Charles B. Lawrence (17 December 1820–19 April 1883) served on the court from 1864 to 1873. In 1869, Breese was the chief justice. John Clayton, **The Illinois Fact Book and Historical Almanac 1673–1968** (Carbondale, Southern Illinois University Press, 1970), 102, 108, 109–10.

[29]Norman L. Freeman (9 May 1823–23 August 1894) was the Reporter for the Illinois supreme court from 1863 to 1894. He published 120 volumes of the **Illinois Reports**. "In Memoriam: Norman Leslie Freeman," 151 Ill. ix–xix.

[30]Printed letter, 2 *Chicago Legal News* (5 February 1870), 145.

[31]For additional information about the law of coverture, see Claudia Zaher, "When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture," *Law Library Journal* 94 (Summer 2002), 459–86.

[32]Printed document, case file 26853, RS 900.001, Illinois State Archives.

[33]John Bouvier, **A Law Dictionary, Adapted to the Constitution and Laws of the United States of America**, 2 vols. (Philadelphia, Childs and Peterson, 1857), 1: 140.

[34]Joseph Story, **Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence** (Boston: Little and Brown, 1851), 24–25; John Bouvier, **Institutes of American Law**, 4 vols. (Philadelphia: Robert Peterson and Co., 1854), 2: 5–6.

[35]Story, **Commentaries on the Law of Agency**, 9–10.

[36]Bosanquet and Puller's Common Pleas Reports; also known as 126 and 127 E.R. (1796–1804).

[37]Lord Raymond's King's Bench Reports; also known as 91 E.R. (1694–1732).

[38]1859.

[39]Durnford and East's Term Reports, King's Bench; also known as 99 E.R. (1785–1800).

[40]*Capias ad satisfaciendum*: a writ of execution issued upon a judgment in a personal action for the recovery of money, commanding the sheriff to take the defendant and keep him so that he may have his body in court on the return day. Bouvier, **A Law Dictionary**, 1: 201.

[41]1860.

[42]**Report of Cases in Law and Equity of the Supreme Court of the State of New York**, 1861.

[43]1863.

[44]1866.

[45]Actually 37 Ill. 197 (1865).

[46]"An Act to protect Married Women in their separate property," 24 April 1861, **Public Laws of the State of Illinois** (1861), 143.

[47]"An Act in relation to the earnings of married women," 10 June 1869, **Public Laws of the State of Illinois** (1869), 255.

[48]50 Ill. 470 (1869).

[49]44 Ill. 58 (1867).

[50]Arabella "Belle" Babb Mansfield (23 August 1846–1 August 1911) was the first woman to pass the bar exam in the United States in June 1869. She was licensed to the bar of Iowa but never engaged in the practice of law, concentrating instead on traveling with her husband to Europe and teaching upon their return to the United States. Gwen Hoerr McNamee, ed., **Bar None: 125 Years of Women Lawyers in Illinois** (Chicago: Chicago Bar Association, 1998), 3; Karen Berger Morello, **The Invisible Bar: The Woman Lawyer in America, 1638 to the Present** (Boston: Beacon Press, 1986), 11–14.

[51]"An Act to incorporate the Chicago Legal News Company," 27 February 1869, **Private Laws of the State of Illinois** (1869), 876–77.

[52]Affidavit of Myra Bradwell, 31 December 1869, case file 26853, RS 900.001, Illinois State Archives. Section 1 of the Fourteenth Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV, Section 1.

[53]Gwen Hoerr Jordan "'Horror of a Woman': Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological Jurisprudence," *Akron Law Review* 42 (No. 4, 2009), 1224–25.

[54]Printed document, case file 26853, RS 900.001, Illinois State Archives.

[55]36 Cal. 658 (1869); 6 Fed. Cas. 546 (1823).

[56]Written by Charles B. Lawrence, case file 26853, RS 900.001, Illinois State Archives. The printed opinion can be found at 55 Ill. 535 (1869).

[57]60 U.S. (19 How.) 393 (1856). The *Dred Scott* case prevented African Americans from enjoying U.S. citizenship.

[58]2 *Chicago Legal News* (5 February 1870) 147.

[59]Appointed to the U.S. Supreme Court by President Abraham Lincoln, Samuel F. Miller served as Justice from 1862 to 1890. Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789–1995**, 2d ed. (Washington: Congressional Quarterly, 1995), 176–80.

[60]Transcript of Illinois Supreme Court, 2 June 1870; Writ of Error, 23 August 1870, both in case file 5610, RG 267, National Archives, Washington, D.C.

[61]Washington Bushnell, a Democrat from LaSalle County, served as the Attorney General for Illinois under Governor John M. Palmer from 1869 to 1873. Clayton, **The Illinois Fact Book and Historical Almanac**, 112.

[62]Citation, 16 August 1870, case file 5610, RG 267, National Archives, Washington, D.C.

[63]Matthew H. Carpenter (22 December 1824–24 February 1881) was born in Vermont and educated at the U.S. Military Academy at West Point. He studied law under Rufus Choate and was licensed in Massachusetts in 1845. In 1848, he moved to Beloit, Wisconsin. In 1869, he was elected to the U.S. Senate, but lost reelection in 1874. He successfully regained his Senate seat in 1879. 13 *Chicago Legal News* (26 February 1881), 197.

[64]"All Dabble in the Law," 26.

[65]Samuel F. Miller to William Pitt Ballinger, 31 October 1869, Samuel F. Miller Papers, Library of Congress, Washington, D.C.

[66]Engrossed Docket, case file 5610, Engrossed Dockets of the U.S. Supreme Court, Volume L, page 6598, RG 267, National Archives, Washington, D.C.

[67]Printed document, Library of the Supreme Court of the United States, Washington, D.C.

[68]U.S. Supreme Court Justice Bushrod Washington, a nephew of George Washington, was appointed to the Court by John Adams and served from 1799 to 1829. Justice Washington authored the opinion in the previously cited case, *Carfield v. Coryell*, while performing circuit duties. Cushman, **The Supreme Court Justices**, 51–55.

[69]71 U.S. (4 Wall.) 277 (1866).

[70]71 U.S. (4 Wall.) 333 (1866).

[71]8 Miss. 127 (1843); 20 Cal. 427 (1862).

[72]22 N.Y. 67 (1860); 1 Mo. 605 (1826); 60 U.S. (19 How.) 9 (1856); 71 U.S. (4 Wall.) 333 (1866).

[73]Justice Nelson heard arguments in January 1872, but he retired from the Court in November 1872, before the opinion was announced. Justice Ward Hunt joined the Court in January 1873; he was not on the Court when arguments were heard but was on the Court when the opinion was announced.

[74]Opinion of Samuel F. Miller, Manuscript Opinions, Entry 22, RG 267, National Archives, Washington, D.C. The printed opinion can be found at 83 U.S. (16 Wall.) 130 (1872).

[75]Opinion of Joseph P. Bradley, Manuscript Opinions, Entry 22, RG 267, National Archives, Washington, D.C.

[76]Chase was also a distant relative of Myra Bradwell. John M. Palmer, **The Bench and Bar of Illinois: Historical and Reminiscent**, 2 vols. (Chicago: Lewis Publishing, 1899), 1: 277.

[77]5 *Chicago Legal News* (10 May 1873), 390.

[78]The *Slaughterhouse Cases*, three separate suits from Louisiana heard together by the U.S. Supreme Court regarding centralizing slaughterhouses in New Orleans, were one of the Court's first opportunities to interpret the Fourteenth Amendment. In his opinion, Justice Miller wrote that the Privileges and Immunities Clause "did not protect such fundamental rights as the right to labor." Four Justices dissented, including Bradley, supporting the notion that the clause protected the right to labor. 83 U.S. (16 Wall.) 36 (1873); Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States** (New York: Oxford University Press, 1992), 789–91.

[79]5 *Chicago Legal News* 390.

[80]"An Act to secure all persons freedom in the selection of an occupation, profession or employment," 1 July 1872, **Public Laws of the State of Illinois** (1872), 578.

[81]"She Waited Twenty Years: How Mrs. Myra Bradwell Secured an Attorney's License," *Chicago Tribune*, 8 April 1890, 3. Jill Norgren, "Ladies of Legend: The First Generation of American Women Attorneys," *Journal of Supreme Court History* 35 (March 2010), 74; Spector, "Woman against the Law," 240–41; Mary L. Clark, "The First Women Members of the Supreme Court Bar, 1879–1900," *San Diego Law Review* 36 (Winter 1999), 87; Jordan, "Horror of a Woman," 1227–28.

[82]Application for License Record, 1889–1891, RS 901.014, Illinois State Archives.

[83]Literally translated "now for then." The phrase was used to express that a thing is done at one time that ought to have been performed at another time. Bouvier, **A Law Dictionary**, 2: 250.

[84]Order, 28 March 1892, Minutes of the Supreme Court of the United States, Vol. 58, RG 267; Attorney Rolls of the Supreme Court of the United States, Vol. 1884–1894, RG 267, both in National Archives, Washington, D.C.

[85]Spector, "Woman against the Law," 241.

[86]"Mrs. Myra Bradwell Dead," *Chicago Tribune*, 15 February 1894, 12; 26 *Chicago Legal News* 200–202.

[87]Stella S. Coatsworth, *The Loyal People of the Northwest* (Chicago: Church, Goodman and Donnelly, 1869), 316.

Wives, Children . . . Husbands: Supporting Roles

CLARE CUSHMAN*

In 1965, Hugo L. Black asked his wife, Elizabeth, to host a dinner party. The purpose: to help him persuade Carolyn Agger, wife of Washington attorney Abe Fortas, to allow her husband to accept President Lyndon B. Johnson's offer of a seat on the Supreme Court. A tax lawyer at the same firm as Fortas, Agger was displeased that the move would mean a big cut in his salary; she thought he should spend a few more years in his lucrative private practice before becoming a judge. After all, he was only fifty-five. Elizabeth Black described the tense occasion in a diary entry:

> We had invited Carol and Abe Fortas for dinner in answer to an SOS by [Justice] Bill Douglas, saying they were having a serious crisis about Abe's going on the Court. Carol told me they had several big things going that now had to be given up [improvements to their house in Georgetown], that they can't live on the small Court salary and may have to give up their new home. Later Hugo talked to Carol in that dear straightforward way of his. I was almost in tears at the things he was saying and it did have a great softening effect on Carol, I could tell. He told how he had deliberately chosen public service; how invaluable his first wife's role was in his work; how unproductive he was in the years when he was alone; and, bless him, how much he was able to do after he married me. How a man needs a wife, in short. Carol asked indignantly if he was suggesting that she give up her law practice which was her life, and Hugo said "Certainly not." And as to whether Abe would have to sit out of some cases because of Carol's involvement, they were only a minute percent of cases. I do believe Hugo's advice helped. They stayed until after midnight.[1]

Fortas relented to the pressure and let Johnson nominate him a few months later.

Agger continued her legal career as a sought-after tax law specialist and became the family's principal breadwinner. She cut a colorful figure in Washington, driving around in her 1953 Rolls Royce and smoking cigars. But she refused to speak to President Johnson, a close friend, for months after her husband's appointment. Her "life had been ruined,"[2] she said.

Being the wife or, since 1981, husband of a Justice has always entailed some sacrifice and certain constraints. So has being the child of a Justice. While family members may have enjoyed privileged lives and a high social status in the nation's capital, that is not the whole story. A historic examination of the changing role of the Supreme Court spouse and firsthand anecdotes by Justices' children help illuminate the important but often thankless supporting role that family members have played in the development of the Supreme Court.

In the early decades of the Court, the Justices boarded together during the Supreme Court Term while their wives and children remained in their hometowns. These separations were exacerbated by the requirements of riding circuit, and the Justices often struggled to balance work duties with taking care of their families. In the 1790s, Hannah Iredell suffered more than most Supreme Court wives during her husband's absences because she was painfully shy. As long as the Iredells remained in their cozy hometown of Edenton, North Carolina, where Hannah was surrounded by family and old friends, her shyness was not a problem. Unlike most Justices, however, James Iredell moved his family to the capital after his appointment to the Court in 1790, probably for two reasons. First, the climate was thought to be healthier in New York and Philadelphia than in Edenton, where malaria was endemic. In addition, Iredell most likely believed the rumors that Congress would soon abolish the system of circuit riding, in which case he would never have to leave Hannah alone if they lived in the capital.

Circuit riding, of course, was not abolished, and Hannah was on her own in the capital for long months at a time, expected to participate in the elaborate social rituals of the new federal government—attending receptions and paying and receiving social calls, or "visits." This would have been near torture for someone who described herself as "almost as helpless as a Child amongst Strangers,"[3] and sometimes it all became too much for her. Hannah wrote to her circuit-riding husband:

> I have made no visits. I could not prevail on myself to run about the town alone after people whom I had never seen & whom I did not care if I [ever] saw again. It is impossible for you to make a fashionable woman of me & therefore the best thing you can do with me I think will be to set me down in Edenton again where I should have nothing to do but attend to my Children & make perhaps three or four visits in the year, what a dreadful situation that would be for a fine lady, but to me there could be nothing more delightful.[4]

Eventually, after three years in the capital, the Iredells returned to North Carolina. But Iredell still spent many months on the road, during which he fretted about how Hannah and the children were faring in Edenton's unhealthy climate. Two years after their move back home, Iredell was still trying to persuade his wife (unsuccessfully) to consider a return to Philadelphia:

> I am perfectly well, but extremely mortified to find that the Senate have broken up without a Chief Justice being appointed, as I have too much reason to fear that owing to that circumstance it will be unavoidable for me to have some Circuit duty to perform this fall . . . I will at all events go home from the Supreme Court if I can stay but a fortnight—but how distressing is this situation? It almost distracts me. Were you & our dear Children anywhere in this part of the Country I should not regard it in the

least—But as it is, it affects me beyond all expression.

The state of our business is now such that I am persuaded it will be very seldom that any Judge can stay at home a whole Circuit, so that I must either resign or we must have in view some residence near Philadelphia, I don't care how retired, or how cheap it is. The account of your long continued ill health has given me great pain, and I am very apprehensive you will suffer relapses during the Summer My anxiety about you and the Children embitters every enjoyment of life. Tho' I receive the greatest possible distinction and kindness everywhere, and experience marks of approbation of my public conduct highly flattering, yet I constantly tremble at the danger you and our dear Children may be in without my knowing it in a climate I have so much reason to dread.[5]

Justice William Cushing routinely brought his wife, Hannah Cushing, along on his travels and even had his one-horse shay outfitted with special receptacles for the books she read to him during their trips. Although often in frail health, Julia Ann Washington also insisted on accompanying her husband, Justice Bushrod Washington. While the Cushings and Washingtons were thus spared the anxiety caused by long separations, the travel was nonetheless arduous and undignified. Writing to a relative, Hannah Cushing described herself and her husband as "traveling machines [with] no abiding place in every sense of the word."[6] And in a chatty letter to her friend Abigail Adams, Mrs. Cushing recounted their difficulty in merely trying to get across the Hudson River at a time when New York City was the site of a yellow fever outbreak:

> We have been roving to & from, since we had the pleasure of meeting you.... To avoid N. York we crossed White plains to Dobb's ferry... & after staying there two nights without being able to cross, the wind continuing very high we went up 20 miles further to Kings ferry... where the river is not so wide & the boats better & after waiting there also two nights we safely passed the ferry, rejoicing as though we had been released from prison.[7]

Not coincidentally, Hannah Cushing and Julia Ann Washington were the only Justices' wives in the Court's early decades who were childless; the others generally had to stay home to look after their families and household affairs. Some of these women may have enjoyed the relative independence they had as a result of their husbands' absences. Chief Justice Jay's wife Sarah—who had six children to tend to—teased her husband when he was riding circuit in 1790: "We make out very well. Aint you a little fearful of the consequences of leaving me so long sole mistress?"[8] But even Mrs. Jay had her moments of anxiety and distress about how her husband was faring on the road. In one letter, at the close of a litany of illnesses afflicting the family at home, she wrote to her husband:

> "Oh! my dear Mr. Jay should you too be unwell & be absent from me, & I deprived of the satisfaction & consolation of attending you how wretched should I be!... Oh my dear Mr. Jay how I long to see you."[9]

Chief Justice John Marshall and his wife, Polly, also maintained a strong union despite their frequent physical separation. The commuter aspect of their marriage was compounded by the fact that Polly Marshall suffered nervous disorders and could not leave their Richmond, Virginia, home. At Polly's death in 1831 after forty-nine years of marriage, John nonetheless reflected on the critical support she had given him: "Her judgment was so sound and so safe that I have often relied upon it in situations of some perplexity. I do not remember ever to have regretted the

adoption of her opinion. I have sometimes regretted its rejection."[10] Marshall's friend Joseph Story sadly conveyed to his own supportive wife, Sarah, the depth of Marshall's grief and loneliness:

> On going into the Chief Justice's room this morning, I found him in tears. . . . I saw at once that he had been shedding tears over the memory of his own wife, and he has said to me several times during the term, that the moment he relaxes from business he feels exceedingly depressed, and rarely goes through a night without weeping over his departed wife. She must have been a very extraordinary woman so to have attached him, and I think he is the most extraordinary man I ever saw, for the depth and tenderness of his feelings.[11]

Mary Willis Ambler (Polly) and John Marshall raised six children to adulthood in their modest Richmond home. Although Polly suffered from chronic illness and was housebound, she served as an advisor to her husband; he mourned her death after forty-nine years of marriage with these words: "her judgment was so sound and so safe that I have often relied upon it in situations of some perplexity. I do not remember ever to have regretted the adoption of her opinion. I have sometimes regretted its rejection."

In 1830, Justice John McLean, who had been serving as Postmaster General in Washington before his Court appointment, opted out of the group boardinghouse arrangement and chose to live with his wife, Rebecca, instead. As the city of Washington developed more pleasantly and the Supreme Court's Term lengthened, other Justices began bringing their families to the nation's capital. Wives were tossed into the social whirl and expected to perform. This meant receiving and returning daytime social calls, and attending and hosting formal dinners in the evening—all while navigating the elaborate rules of protocol that governed polite society.

The arrival of the Court each year marked the beginning of Washington's social season. Each Justice paid a formal social call to all the Justices more senior to him and to all members of the Cabinet. These calls were then reciprocated. There was very little of the formal separation between the Justices and members of the political branches (or the Justices and members of the Supreme Court bar) that there is today. According to nineteenth-century protocol, Supreme Court Justices ranked above Cabinet officials in the social pyramid: they were on par with U.S. Senators (although the order of precedence between a Senator and a Justice was the subject of much controversy), just one rung below the President.

Arriving from Keokuk, Iowa, Eliza Miller, the wife of Justice Samuel F. Miller (1862–1890), threw herself into the role of Washington socialite. She immersed herself in the rules of protocol governing the Justices and fully leveraged the prestige of her husband's title. According to one society reporter:

> Mrs. Miller, a matronly lady, bearing a feminine resemblance to her husband, is held in high esteem among the ladies of the Court circle as the authority on the social etiquette which attaches to their position in fashionable life. The Justice being the senior member of the

> Court, in this respect even out-dating the Chief Justice, is recognized as the patriarch of the body, and Mrs. Miller is the acknowledged referee and umpire on all social questions.[12]

Another reported:

> Mrs. Justice Miller . . . assisted by her grand-daughter . . . gives elegant dinners, not only to the Supreme Court, but other distinguished people at the Capital. She is a charming hostess. Her residence is in the best of taste, and in all her surroundings, there are many marks of luxurious refinement. . . . Justice Miller has abstracted hours, but is full of life and fun when wakened up in society. The nation owes them all a world of gratitude for their purity of character on the Supreme Bench . . . [The Justices] all stand high in Washington, making no dinner or reception quite complete, without one or more of the Supreme Bench and their families.[13]

But Eliza Miller may have been too socially ambitious. When Miller sought to be elevated to Chief Justice, his brother-in-law fretted: "I am afraid his wife will hurt him. . . . She is ambitious, imprudent & unscrupulous."[14] Miller was indeed passed over, and Eliza's star faded as the city of Washington began attracting the newly rich and she was no longer able to entertain in style on a judicial paycheck.

Malvina Harlan, wife of Kentuckian John Marshall Harlan (1877–1911), was unquestionably an asset to him. She did her duty by receiving visitors at home on Mondays, the designated day for Supreme Court wives to host. This meant providing an elaborate spread

Malvina Harlan, wife of John Marshall Harlan (pictured here on their wedding day in 1856), received visitors at home on Mondays, the designated day for Supreme Court wives to host, and provided an elegant tea service for hundreds of callers. Her Northern background—she was from Indiana—and abhorrence of slavery influenced her husband, a Kentuckian.

for tea and music for dancing—often for as many as three hundred callers. But she also stepped beyond the hostess role to play a highly symbolic hand in inspiring John to write the Supreme Court's most famous dissent. Unbeknownst to her husband, Malvina had neglected to make good on a promise to a friend to give away Harlan's heirloom inkstand—the one that Chief Justice Roger B. Taney had used in 1857 to write the Court's ignominious decision in *Dred Scott*. Almost forty years later, Justice Harlan wrestled with his dissent in *Plessy v. Ferguson*—an 1896 decision in which the other Justices reaffirmed the notion that blacks and whites were not equal, thus providing the legal justification for segregation that would endure for six decades. Malvina sneakily brought out the tainted inkstand to help him formulate his lone dissent. She described the ploy in her memoirs:

> His dissent (which many lawyers consider to have been one of his greatest opinions) cost him several months of absorbing labour—his interest and anxiety often disturbing his sleep. Many times he would get up in the middle of the night, in order to jot down some thought or paragraph which he feared might elude him in the morning. It was a trying time for him. In point of years, he was much the youngest man on the Bench; and standing alone, as he did in regard to a decision which the whole country was anxiously awaiting, he felt that, on a question of such far-reaching importance, he must speak, not only forcibly but wisely.
>
> In the preparation of his dissenting opinion, he had reached a stage when his thoughts refused to flow easily. He seemed to be in a quagmire of logic, precedent and law. Sunday morning came, and as the plan which had occurred to me, in my wakeful hours of the night before, had to be put into action during his absence from the house, I told him that I would not go to church with him that day. Nothing ever kept him from church.
>
> As soon as he had left the house, I found the long-hidden Taney inkstand, gave it a good cleaning and polishing, and filled it with ink. Then taking all the other ink-wells from his study table, I put that historic, and inspiring inkstand directly before his pad of paper; and, as I looked at it, Taney's inkstand seemed to say to me, "I will help him."
>
> I was on the look-out for his return, and met him at the front door. In as cheery a voice as I could muster (for I was beginning to feel somewhat conscience-stricken as I recalled those "evasive answers" of several months before), I said to him: "I have put a bit of inspiration on your study table. I believe it is just what you need and I am sure it will help you." He was full of curiosity, which I refused to gratify. As soon as possible he went to his study. His eye lighting upon the little inkstand, he came running down to my room to ask where in the world I had found it. With mingled shame and joy I then "'fessed up," telling him how I had secretly hidden the inkstand . . . because I knew how much he prized and loved it, and felt sure it ought really not to go out of his possession. He laughed over my naughty act and freely forgave it.[15]

The inkstand did prove inspirational to Harlan's dissent. After dipping his pen in it he wrote the visionary words: "Our Constitution is color blind, and neither knows nor tolerates classes among citizens." In doing so, he made a small scratch at undoing the stain of *Dred Scott* on the Court and on the nation. According to Malvina:

> The memory of the historic part that Taney's inkstand had played in the Dred Scott decision, in temporarily tightening the shackles of slavery upon the negro race in the antebellum days, seemed, that morning, to act like magic in clarifying my husband's thoughts in regard to the law that had been intended by [Senator Charles] Sumner to protect the recently emancipated slaves in the enjoyment of equal "civil rights." His pen fairly flew on that day and, with the running start he then got, he soon finished his dissent.
>
> It was, I think, a bit of "poetic justice" that the small inkstand in which Taney's pen had dipped when he wrote that famous (or rather infamous) sentence in which he said that "a black man had no rights which a white man was bound to respect," should have furnished the ink for a decision in which the black man's claim to equal civil rights was as powerfully, and even passionately asserted, as it was in my husband's dissenting opinion in the famous "Civil Rights" case.[16]

As the twentieth century arrived, Supreme Court wives and their husbands continued to enjoy a high social status in the nation's capital, dining at the White House, with members of Congress, and with foreign ambassadors. In 1906, Justice David J. Brewer expressed doubts that his friend and bench-mate Henry Billings Brown would retire as promised at age seventy because Supreme Court "wives cut an important figure, and of course they are always opposed to it [their husbands retiring]."[17]

The growing sophistication of the city of Washington rendered the social duties of a Supreme Court wife increasingly elaborate. By 1926, Milton Handler, a law clerk to Justice Harlan Fiske Stone, viewed these rituals as excessive:

> It was customary in that era in Washington for visitors to leave cards when making a call. Mrs. [Agnes] Stone, for example, would go out some days in her chauffeured car with as many as 20 to 30 cards. She would drive to the embassies, to the homes of the Supreme Court Justices and Cabinet Secretaries, and to the White House. The chauffeur would hand the Stones' card to the Butler of the establishment. Similarly, visitors would drive up to the Stones and deposit their cards, just to show that they were maintaining social relations between dinner parties, which the Stones attended practically every night.[18]

Another Stone clerk, Warner W. Gardner, confirmed that the pace had not abated a decade later:

> The Stones in 1934–1935 carried through an appalling social calendar. My impression at the time was that they dined in company every night of the week, month in and month out. The cost was not too great, since both were completely temperate and never left later than ten-thirty. But, neither then nor now, was the regime understandable to me. Stone, however, was a good conversationalist and enjoyed it, and Mrs. Stone seemed, too, to find a real pleasure in the social life of Washington. [19]

But not all Justices' wives played the game. Dean Acheson, Louis D. Brandeis' law clerk from 1919 to 1921, noted that the Brandeises did not attend many social functions. Alice Brandeis kept their social life more low-key, welcoming visitors from her husband's coterie of progressives in a modest and intimate way.

> The Brandeises' "at home" was purposeful and austere. The hostess, erect on a black horsehair sofa, presided at the tea table. Above her,

A clerk to Justice Harlan Fiske Stone in the 1930s recalled that the Stones had a relentless social life: "My impression at the time was that they dined in company every night of the week, month in and month out. The cost was not too great, since both were completely temperate and never left later than ten-thirty." Pictured are Supreme Court wives Winifred Reed, Antoinette Hughes, Agnes Stone, and Elizabeth Roberts at a breakfast honoring the First Lady, Eleanor Roosevelt, in 1938.

an engraved tiger couchant, gazing off over pretty dreary country, evoked depressing memories of our dentist's waiting room. Two female acolytes, often my wife and another conscripted pupil of Mrs. Brandeis's weekly seminar on child education, assisted her. The current law clerk presented new-comers. This done, disciples gathered in a semicircle around the Justice. For the most part they were young and with spouses—lawyers in government and out, writers, conservationists from Agriculture and Interior, frustrated regulators of utilities or monopolies, and, often, pilgrims to this shrine.[20]

And what of Justices who were unmarried? Thrice-widowed Chief Justice Salmon P. Chase (1864–1873) relied on his charming and talented daughter, Kate, to serve as his social escort and hostess. She delighted in the role and was the toast of the town. When she married a wealthy Senator, William Sprague, the couple decided to live with her father in his Washington home, where they entertained lavishly. Although the Spragues spent more than six months of the year in William's home state of Rhode Island, the Senator paid for the expansion and upkeep of Chase's house, and for his servants. This was a relief to the Chief Justice, who had a hard time reciprocating the many elegant dinners he was invited to without straining his modest budget.

Thrice-widowed Chief Justice Salmon P. Chase relied on his charming and talented daughter, Kate, to serve as his social escort and hostess. She delighted in the role and was the toast of the nation's capital. When she married a wealthy Rhode Island Senator, William Sprague, the couple decided to live with her father in his Washington home, where they entertained lavishly.

Unfortunately, Sprague, a heavy drinker, also had a nasty streak. He sat on the Senate Appropriations Committee and was in the position to vote for a badly needed salary augmentation for the Justices. In 1866, Chase found himself in the position of lobbying his own son-in-law:

> No judge can now live and pay his travelling expenses on his salary . . . Its amount practically is not as large as it was at the organization of the Government. That of the Chief Justice should be at least 12,000 and that of each Associate 10,000."[21]

The Committee did raise the salaries, but only to $8,000 (Associate Justices) and $8,500 (Chief Justice). The higher figures originally requested had failed to pass by a single Senate vote—Sprague's. Kate divorced him soon after.

Lifelong bachelor James C. McReynolds (1914–1941) resorted to pressing his clerks into taking on some of the social duties of a wife. According to John Knox, his clerk in the

1936 Term, the irascible Justice found it tiresome to explain how the calling-card system worked—training he had to give every time he broke in a new clerk. A flat card meant it was delivered by a chauffeur; if the corner was bent then the sender had delivered it in person. Justice McReynolds informed his clerk:

> When all these people leave their calling cards for me here at 2400 [my apartment], it is then up to me to decide which cards I wish to acknowledge. Most of them will be ignored, as I haven't the time or the inclination to meet many people. The cards which have been acknowledged can be kept in a small pile, but the others thrown away. And my card will almost always be sent flat—meaning that it should be delivered by Harry [Parker, his butler/chauffeur] and not by me, or else sent through the mail. I very seldom make a special trip to leave my calling card in person with anyone.[22]

Unfortunately for Knox, he served as a clerk during the high-profile Court-packing episode, when President Franklin D. Roosevelt proposed a plan to add new Justices to the Court because it had been striking down his New Deal legislation. Snaring a Justice for one of her dinner parties was at the top of every Washington hostess's list that year, as the Court was so much in the spotlight. Knox was saddled with extra work even though the Justice chose to decline these invitations:

> I soon realized that McReynolds was indeed serious about the Washington practice of receiving and sending calling cards. This was no matter which could be treated lightly, at least with him. And once his card was received, the family he had acknowledged was then free to invite the Justice to teas, dinners, receptions, and the like. However, he often declined such invitations after the Court-packing controversy burst so unexpectedly upon the nation in February 1937.[23]

The Depression and World War II put an end to these frenetic social traditions. Chief Justice Charles Evans Hughes's daughter, Elizabeth, reported that her mother had found home-based receptions burdensome in the 1930s and was relieved when the custom ended:

> Those were the days of receptions—not cocktail parties, but afternoon teas. Wives of Cabinet officers and of other officials were "at home" on various days of the week. For example, Mondays were reserved for the Supreme Court ladies, Wednesdays for the Cabinet wives, Fridays for the embassies and legations, etc. In addition, the official wives in all categories often paid calls on others and left calling cards. Such practices fortunately were abandoned during the Second World War. Not only were those elegant teas costly; they were time-consuming and tiring.[24]

In the postwar era, ethical standards evolved to the point that judges were generally expected to distance themselves from members of the legislative and executive branches to maintain impartiality. By the 1960s, the social obligations of a Supreme Court Justice's wife were consequently more subdued. Dorothy Goldberg, who had been a Cabinet wife prior to her husband Arthur's appointment to the Supreme Court in 1962, compared the two roles:

> Formal social life on the Court was quieter than on the Cabinet. Justices and their wives are not expected to reciprocate invitations extended to them by others, nor do they very often accept invitations other than from their private friends. We had, however, become friendly with some of the ambassadors, and

we continued to receive invitations from them and from some members of the Cabinet. We rarely accepted Thursday evening invitations, however—conference was on Friday; and we declined others if they brought the total number of our evenings out to more than one or two a week....

The Supreme Court is the only place in the government where wives and family are accorded a special courtesy and regarded as a group. Of course, it is easier when only nine persons are involved. The Congress has a wives' gallery, to be sure, and the President's family has the first row in the family section on opening of Congress occasions, but the Executive, to my knowledge, makes no provision for the inclusion of family during work hours and probably would prefer that wives remain at home, to emerge for picture-taking purposes only. Early in the Nixon administration, there was an effort to show how wives were included in a briefing with their husbands, but that laudable effort seemed to collapse almost immediately.

On the Court, whenever a case is being argued, there is always room for Court wives in the family pews. There is also a dining room where they may gather for luncheons, though officially it is a place for entertaining visiting foreign jurists or for intimate ceremonial events, such as the presentation of a portrait by members of a Judge's family.

I had not known about the family pews and was surprised to learn from Nina Warren [wife of the Chief Justice] that a wife was expected to be there when her husband delivered an important opinion. Perhaps only Nina expected that. "Dorothy, we haven't been seeing you lately." When I looked as puzzled as I felt, she explained that the wives often appeared for Monday morning opinions, particularly if their husbands were making important contributions. I had thought that Arthur could surely deliver himself of an opinion without my presence. I had never been essential previously, though I had always been present at his steel hearings [Goldberg had been Secretary of Labor], and at conventions and various meetings, but that was because he invited me, not because I was expected.[25]

Josephine Powell apparently slipped up on this etiquette as well. Her husband, Justice Lewis F. Powell, Jr., recalled that she received a gentle teasing from his colleague not long after he joined the Court in 1972:

> There is [a] custom, that we [Mrs. Powell and I] violated the first time I handed down an opinion. The wife of a justice delivering an opinion is expected to be present in the courtroom and to be seated in a particular place. I got the word and I advised Jo and she showed up about 15 minutes late, which is not unusual in the Powell family. She immediately received a note from Justice Potter Stewart, sent there by one of the pages, saying "You just missed your husband's greatest opinion."[26]

Although spouses hold a permanent ringside seat in the section of the Courtroom reserved for family members, few, other than Elizabeth Black and Dorothy Goldberg, have recorded eyewitness accounts. Instead, Supreme Court wives and husbands have prized discretion. In her memoir, Dorothy Goldberg recalled being struck by the emphasis wives placed on this value—and by the courteous manner in which their husbands treated them:

> [T]here is a courtliness in [the Justices'] bearing toward their wives, an observance of old-fashioned manners, at least in their publicly visible relationships. One almost never sees a Justice walking several feet ahead of a wife who is breathlessly trying to walk alongside him as he rushes to talk to another Justice or lawyer. Only rarely does one see a Justice skillfully ignoring a wife or another Justice's wife after the first routine arrival kiss. I saw the Justices and their wives through rose-colored glasses, I suppose, glimpsing only affection, devotion, loving kindness, with everyone trying to avoid the slightest bit of gossip.[27]

In addition to being discreet, Supreme Court spouses have been expected to preserve the dignity of the institution by behaving with decorum. Hugo L. Black, who served on the Supreme Court from 1937 to 1971, made a little speech to this effect when he proposed to his second wife, Elizabeth, in 1957. He made it clear that the Court would always be his first love and that, to honor the institution, her behavior must always be beyond reproach. She recorded in her diary his visit to her house to pop the question:

> He took me by both my hands and sat me down on the sofa next to him. Hugo Black did not speak of marriage. He spoke of love and the Supreme Court. "Who knows what love is?" Hugo asked me musingly. "It is a chemical blend of hormones, happiness, and harmony," he went on to say. "But I have a prior love affair for almost twenty years now with an institution. It is with the Supreme Court. I have a tremendous respect for the prestige of the Court. We have to act on so many controversial matters and we are bound to make some people mad at every decision we make. Therefore, in my personal life I have had to be like Caesar's wife: above reproach. I have to know that the woman I marry is a one-man woman. The woman I marry will be around extremely attractive intellectual men. I am seventy-one years old. You are twenty-two years younger than I. In another five or ten years you may not find me as attractive as you do now. If that were to happen and you wanted a divorce, I would give you one. But I think it would finish me and hurt the prestige of the Court."[28]

Elizabeth Black proved to be a supportive wife and a useful sounding board when her husband was wrestling with difficult cases. Apparently, Justice Black was partial to nocturnal discussions:

> Almost invariably, on an opinion he thinks to be very important, Hugo awakens in the middle of the night thinking about it. Soon he pulls the chain to turn on the light. "Darling," he says to me, "are you awake?" By that time I am, of course, fully awake. "I am bothered about a case." "Tell me about it," I say. "Well this is what it is all about . . . " Then he recounts in detail and with passion the horrible injustice being perpetrated on a person because of his brethren's failure to see it his way. "I will have to write it on very narrow grounds if I want to get a Court," he says, naming those he has with him and those against.
>
> Sometimes this unwinds him, sometimes not. If he doesn't feel he can go to sleep, he says, "Now it's three o'clock in the morning and I have just got to be fresh for the Conference tomorrow. I need sleep. What do you think I ought to do?" Then I suggest, "Why don't you take

> a little bourbon to make you sleepy?" (Hugo is terribly inhibited about taking liquor and usually wants me to be the one to suggest it.) And so he pours a splash of bourbon on ice, fills the glass with water, and soon is sound asleep. The next morning he awakens as bright and clear-minded as can be, and he approaches the day with his usual eager zest for life and vast good humor.[29]

Elizabeth Black also enjoyed helping to look after each year's new crop of clerks by occasionally hosting them in her home. A clerk to Byron R. White (1962–1993) recalls that the Justice's wife, Marion, similarly adopted a nurturing role: "White took a proprietary interest in her husband's law clerks—recording marriages and births, encouraging the unmarried to settle down, and offering advice on the proper balance between career and family."[30] To enhance clerks' year-long stay in the nation's capital, many wives have organized sightseeing expeditions for them. Dottie Blackmun, for example, arranged for clerks to visit the FBI and the White House, and she accompanied them to see the cherry blossoms every spring.

Wives have traditionally had to tread carefully when participating in public life, as even volunteer activities could potentially pose a conflict of interest for the Justice. If such a conflict were to occur, the Justice may decide he should disqualify himself, leaving only eight Court members to decide the case and introducing the possibility of a stalemate. To drive home the point, Arthur Goldberg once admonished his wife: "Listen, Do[rothy], when I took the oath of office, whether you know it or not, you did too. Get it?"[31] For Dorothy, the hardest part of being a Supreme Court wife was being told to restrict her involvement in political activism and having to turn down all but a few charity organizations that sought her help. Nina Warren, the Chief Justice's wife, told her that she supported the Salvation Army in part because it was a safe choice. One incident in particular made Dorothy realize her position:

> The code was brought home to me personally in November 1962, on the occasion of the Thanksgiving Day football match between a predominantly black Washington high school and a predominantly white school. A fracas ensued that went beyond any usual team competitiveness and was the first of the bitter racial clashes erupting publicly; It was, at least, the first of which I was aware. I thought it important to call Charles Horsky, Presidential Assistant for the District of Columbia, to tell him that it was a sign that something had better be done quickly to alleviate rising tensions. He agreed. It occurred to me to invite the high school superintendent, the administrative staff, and Mr. Henley of the Urban Service, the newly funded school-volunteer program, to meet with Mr. Horsky and the others to discuss what the schools could do to avoid similar situations and what the private sector and government might do to help. I unthinkingly sent out invitations to a meeting in the wives' dining room of the Court, since I had always had full permission from Arthur to do so in the Department of Labor.
>
> When I phoned Nina Warren [the Chief Justice's wife] to invite her, she said, "Have you talked with Mrs. McHugh?" (Mrs. Margaret K. McHugh was secretary to the Chief.) I said no, I hadn't thought to invite her. Nina said nothing further, but that evening, at a dinner at the embassy of Israel, the Chief came up to me and said earnestly, while wagging his index finger, "Dorothy, Mrs. McHugh tells me you're

John O'Connor (right) became the first Supreme Court husband in 1981. He was joined by Martin Ginsburg (left) in 1993. A talented chef, Ginsburg relished taking his turn cooking for Supreme Court spouse luncheons. "Aware that one aspect of a spouse's job is to bind in an institution defined by differences, he seemed eager to do his part," recalls Cathleen Douglas Stone, widow of Justice William O. Douglas.

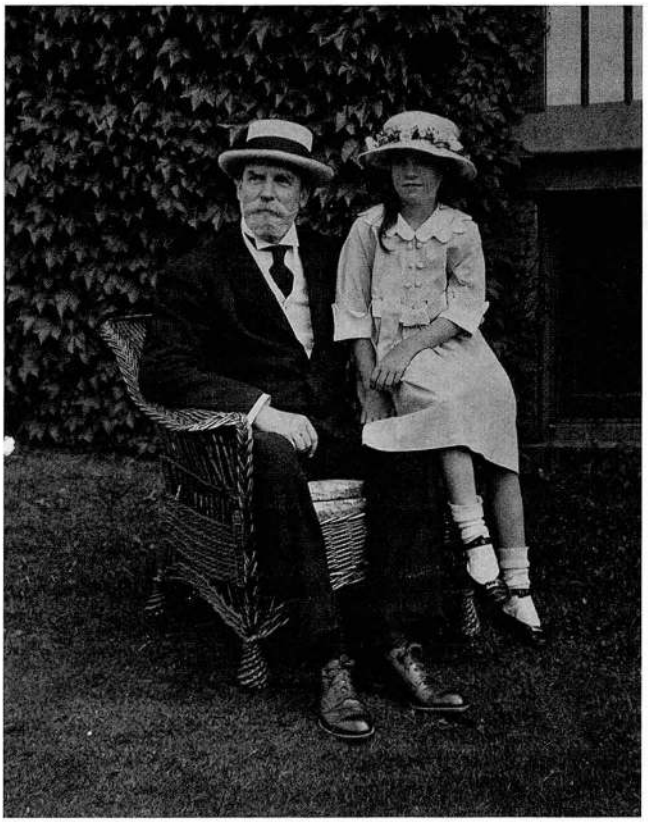
> planning on inviting school officials to the Court. That is impermissible. Arthur would have to disqualify himself if a case arose involving the schools." I was vexed with my obtuseness at having to learn the hard way all the fundamental facts of everyday life. A person of my age should not have been that naïve, I realized, and now again I was marching into new areas without first having thought to ask about directions.[32]

Many contemporary Justices now arrive at the Court with spouses, like Carolyn Agger, who have careers of their own. Conflict-of-interest concerns, particularly for wives and husbands working in the legal profession or in politics, are increasingly an issue. A spouse's job may also engender conflicts of interest in more indirect ways as well. For example, in 1997, Martin Ginsburg, a prominent tax lawyer and professor at Georgetown University Law Center, ordered his broker to sell all the stocks in his individual retirement account so that his wife, Justice Ruth Bader Ginsburg, would not have to worry about disqualifying herself when a company in the account was represented in a case before the Supreme Court. He had earlier sold the couple's jointly held stocks when his wife became an appellate court judge.[33] Despite these limitations, Martin Ginsburg dismissed any notion of personal sacrifice because of his wife's career: "I have been supportive of my wife since the beginning of time, and she has been supportive of me. It's not sacrifice; it's family."[34] Indeed, Martin, who died in 2010, took over responsibility early in the marriage for preparing meals both for family suppers and for the gourmet dinners they hosted. On one occasion he may even have tried to be *too* supportive. When Ruth joined the Court in 1991, Martin decided to devise a unique response system to relieve his wife

from the burden of answering the daily flood of correspondence that came her way. Justice Ginsburg humorously described this attempt to protect her:

> During my first months on the Court I received, week after week, as I still do, literally hundreds of letters—nowadays increasingly fedexes, faxes, and emails—requesting all manner of responses. Brought up under instructions that plates must be cleaned and communications answered, I was drowning in correspondence despite the best efforts of my resourceful secretaries to contain the flood.
>
> Early in 1994, Justice Scalia and I traveled to India for a judicial exchange. In my absence, my spouse tested his conviction that my mail could be handled more efficiently. He visited chambers, checked the incoming correspondence, grouped the requests into a dozen or so categories, and devised an all-purpose response for my secretaries' signature. When I returned, he gave me the form, which to this day, he regards as a model of utility and grace. I will read a few parts of the letter my husband composed. You may judge for yourself its usefulness and grace.
>
> "You recently wrote Justice Ginsburg. She would respond personally if she could, but (as Frederick told Mabel in Gilbert & Sullivan's Pirates of Penzance) she is not able. Incoming mail reached flood levels months ago and shows no sign of receding. To help the Justice stay above water, we have endeavored to explain why she cannot do what you have asked her to do. Please refer to the paragraph below with the caption that best fits your request.
>
> "Favorite Recipes. The Justice was expelled from the kitchen nearly three decades ago by her food-loving children. She no longer cooks and the one recipe from her youth, tuna fish casserole, is nobody's favorite.
>
> "Photograph. Justice Ginsburg is flattered, indeed amazed, by the number of requests for her photograph. She is now 61 years of age ah, those were the days!—and understandably keeps no supply.
>
> "Are We Related? The birth names of the Justice's parents are Bader and Amster. Many who bear those names have written, giving details of origin and immigration. While the information is engrossing, you and she probably are not related within any reasonable degree of consanguinity. Justice Ginsburg knows, or knew, all of the issue of all in her family fortunate enough to make their way to the U.S.A."
>
> I will spare you my husband's thoughts on Fund-raising, School Projects, Congratulatory Letters, Document Requests, Sundry Invitations, and proceed to one last category:
>
> "May I Visit? If you are any of the Justice's four grandchildren and wish to visit, she will be overjoyed. If you are a writer or researcher and want to observe the work of Chambers, the answer is 'no.' Confidentiality really matters in this workplace."
>
> My secretaries, you will not be surprised to learn, vetoed my husband's letter, and in the ensuing years they have managed to cope with the mail flood through measures more sympathique.[35]

Being the child of a Supreme Court Justice can also be a complex proposition. It has its privileges, but also its responsibilities. In the early decades of the Court, children, like their mother, had to endure long separations



Elizabeth Hughes (shown here at age 9) enjoyed the privileges of being the daughter of a Supreme Court Justice when her father was appointed in 1910, but also learned discretion. "Although father never discussed cases pending before the Court, of course, he occasionally expressed a confidential opinion on current events; but he always cautioned us with the remark: 'This is not to be repeated to anyone.'"

from their father when he left for a Supreme Court session or to ride circuit. When Chief Justice Oliver Ellsworth embarked in 1797 on the 1,800-mile Southern circuit encompassing North Carolina, South Carolina and Georgia, he made a promise to his son back in Connecticut:

> Daddy is going about a thousand miles further off, where the oranges grow—and he will begin to come home & come as fast as he can, and will bring some oranges.[36]

Charles Evans Hughes's daughter, Elizabeth, said she greatly enjoyed the privileges of being the daughter of a Justice when he was appointed in 1910. She learned, however, to be circumspect about any remarks she overheard:

> I remember well the rides in mother's electric automobile to take father to the Court and often call for him there. During that period I began to realize that my family was different and I felt a compelling need to do the best I could so as not to "let father down." There was no mention of this at home; but my brother, sisters, and I just felt it and carried on as best we could. . . . I was allowed to join the family at dinner at an unusually early age, because my parents realized that otherwise I would be alone. Thus I was fortunate enough to be allowed to listen and absorb when guests came; and distinguished ones some of them were! Children were "seen and not heard" in those days, and to me that seemed an advantage. I wouldn't have ventured a remark in any event, but I listened carefully and tried to understand what I heard. Although father never discussed cases pending before

> the Court, of course, he occasionally expressed a confidential opinion on current events; but he always cautioned us with the remark: "This is not to be repeated to anyone." We never did and were benefited by that early training.[37]

Children can also be an important pipeline of information to the Justices by keeping them abreast of what is going on outside the Court's marble pillars. Sometimes, though, even solicited advice from children can be burdensome. Justice Harry A. Blackmun's youngest daughter, Susan, remembers advising her father on the issue of abortion in 1972 before he wrote the Court's opinion in *Roe v. Wade.* It was a long way from the "seen and not heard" days of Elizabeth Hughes:

> All three of us girls happened to be in Washington soon after Justice [Warren] Burger had assigned the opinion to Dad. During a family dinner, Dad brought up the issue. "What are your views on abortion?" he asked the four women at his table. Mom's answer was slightly to the right of center. She promoted choice but with some restrictions. Sally's reply was carefully thought out and middle of the road, the route she has taken all her life. Lucky girl. Nancy, a Radcliffe and Harvard graduate, sounded off with an intellectually leftish opinion. I had not yet emerged from my hippie phase and spouted out a far-to-the-left, shake-the-old-man-up response. Dad put down his fork midbite and pushed down his chair. "I think I'll go lie down," he said. "I'm getting a headache."[38]

Having a parent on the Supreme Court can impact a child's career path. Elizabeth Hughes's older brother, Charles, found this out the hard way when he was serving as Solicitor General in the 1930s. His father had stepped down from the Court in 1916 to run, unsuccessfully, for President on the Republican ticket. Facing a vacancy upon the death of Chief Justice William H. Taft, President Herbert Hoover was advised that he should offer the seat to Hughes senior, now a New York lawyer, as a courtesy. The assumption was that he would not accept the offer, as going on the Bench meant that his son would have to resign as Solicitor General to avoid a conflict of interest. The hope was that Hoover then could promote Associate Justice Harlan Fiske Stone to the center chair and appoint Learned Hand, a New York judge of enormous talent and national reputation, to fill Stone's seat. This did not work out as planned.

Joseph P. Cotton, Acting Secretary of State and an old and trusted friend of President Hoover's, told his friend, Harvard law school professor Felix Frankfurter, the inside story on this father/son incident. A year later, Frankfurter related Cotton's account to Frederick Bernays Weiner, his former student. Weiner relays it here:

> News of the impending Taft retirement reached the president while Mr. Cotton was with him. The latter immediately said, in substance—and the conversations that follow are, necessarily, given in substance—"That provides you with a great opportunity, Mr. President. Now you can promote Justice Stone to be Chief justice." Justice Stone was not only a member of Hoover's medicine ball cabinet [his work-out group] that met daily on the White House lawn at 7:30 A.M., but Justice and Mrs. Stone had long been close friends of the Hoovers, an intimacy reflected in their Sunday evening suppers together over many years. "And then," continued Cotton, "you can appoint Judge Learned Hand to fill Stone's place, and thus put on the Supreme Court the most distinguished judge on the bench today."

> The President had his doubts. "[Promoting Associate Justice Stone] would be fine, very fine. But I feel I must offer the chief Justiceship to Governor Hughes. As a former Justice there can be no question of his qualifications, and I feel so greatly obliged to him for that splendid speech he made for me on the Sunday before the election that it would be unforgivable ingratitude on my part not to offer him this position."
>
> "But Mr. President," said Cotton, "Hughes can't take it. His son Charles, Jr., is your Solicitor General, and in that job he handles all government litigation before the Supreme Court. That comes to about 40 percent of all the cases there. Consequently, if the father is Chief Justice, the son can't be Solicitor General. That means that Governor Hughes won't accept. "Well," said the President "if he won't, that solves our problem. Then I can promote Stone and appoint your friend Hand. But, since the public knows Hughes and not Hand, it would be fine to announce that I had offered the post to Hughes before appointing Stone and Hand. So I really must make the offer to Hughes."
>
> Which he proceeded to do, over the telephone . . .
>
> And then—here I quote Cotton as related by Frankfurter, this time verbatim—"The son-of-a-bitch never even thought of his son!" For Hughes accepted then and there.[39]

When this story came out, Hoover denied it. The President even wrote to Hughes directly to contradict it. Frankfurter later retracted the part about Hughes accepting the offer without hesitation over the telephone and Hoover criticizing Hughes for not having given his son a second thought. Apparently, two conservative Justices already had been sent up to New York to sound out whether Hughes would take the Chief's job, if offered. Hughes thus had been afforded plenty of time to think over the offer and consult with his son before accepting.

Although this eyewitness account is third-hand and suspect, the facts nonetheless remain. Hughes did indeed take the Chief Justice job, and his son resigned the Solicitor Generalship—perhaps the most prestigious job for a lawyer in America. Hughes, Jr., stepped down the day after his father was sworn in and never held federal office again.[40]

A similar father/son episode occurred in 1967, but in reverse. President Lyndon B. Johnson wanted to remove Truman appointee Tom C. Clark (1949–1967) from the Court so he could fill the vacancy with his own pick. He seized on the idea of appointing Ramsey Clark, the Justice's son, as Attorney General, to force a conflict of interest (the Court gets many of its cases from the Department of Justice). Ramsey tried to persuade the President that as Attorney General he would not be influenced by his father, and vice versa. Unlike the Solicitor General, who argues frequently, the Attorney General usually only presents one token case before the Court. Ramsey told President Johnson that his father would not resign because, at age sixty-seven, Clark Sr. was at the peak of his powers: "I felt that . . . my dad's career had been the great pride of our family and that it was unthinkable that he would resign. I told him that and that was the extent of the discussion. It was a little comment that was made several times but I thought it was unthinkable that he would resign."[41] He also said it would be impolitic for Johnson to force him off the Court: "In the police community and some other conservative areas Dad ranks awfully high. For you to replace him with a liberal would hurt you."[42] But, according to Clark, Jr., Johnson was stubborn:

> [I]f my judgment is that you become attorney general, [Tom Clark] would

Justice Tom Clark graciously gave up his seat on the Court in 1967 so that his son, Ramsey Clark (at left, being sworn in by his father as assistant attorney general), could serve as Attorney General. "He gave what once seemed to me too much: career, power, prestige—the work of a lifetime—cut off prematurely as he retired from the Supreme Court. He never discussed it," recalled Ramsey Clark.

> have to leave the Court. For no other reason than the public appearance of an old man sitting on his boy's case. Every taxi driver in the country, he'd tell me that the old man couldn't judge fairly what his old boy is sending up [laughter].[43]

Much to Ramsey's surprise, Justice Clark did resign in 1967, giving up his lifetime seat so his son could serve what turned out to be two years as Attorney General. Still energetic, Clark accepted invitations to sit on federal courts in all judicial circuits in the country to help with heavy caseloads. Ramsey Clark eulogized his father in 1977 with these words:

> Tom Clark was a giver. He gave what once seemed to me too much: career, power, prestige—the work of a lifetime—cut off prematurely as he retired from the Supreme Court. He never discussed it. He never even mentioned it. Instead, he turned to things like traffic courts and for three years he labored that the good people of this land brought before municipal courts would see principle possessed there, truth found and applied in their cases.[44]

But a son or daughter need not be a top government attorney to face conflicts of interest. For example, Eugene Scalia, one of Justice Antonin Scalia's nine children, is currently a labor-law specialist and a partner at a Washington law firm whose appellate

The children of Earl Warren (top left, in this 1937 photo) were used to the political spotlight having grown up in the California Governor's mansion. But when their father later served as Chief Justice, Earl Warren, Jr., (front row second from right) called it "[s]howdown time, a period of about 20 years when we would be forced to defend or refute what the Supreme Court was doing. And it was terribly difficult—for regardless of political persuasion or personal feelings, we, as individuals, had to take stands."

lawyers often present cases before the Court. Federal law requires that, like other federal judges, Justice Scalia would have to disqualify himself if the outcome of a case would "substantially" affect his son's earnings. The Supreme Court has issued a written policy that Justices will remove themselves from cases when a relative is a partner in a firm handling the case, unless the firm has provided the Court with "written assurances that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares." Eugene Scalia's firm has supplied such assurances to the Court. Accordingly, he receives a smaller paycheck than his law partners because his father sits on the High Bench.[45]

When a Justice's decisions come under criticism, his or her children are often affected. After Hugo L. Black cast his vote to desegregate schools in 1954, he was so vilified in his native Alabama that his son had to give up his law practice in Birmingham and move to Florida because he, too, was ostracized. Perhaps the most poignant description of the complexities of having a parent on the Supreme Court comes from Chief Justice Earl Warren's son, Earl, Jr. He and his five siblings found themselves being held accountable for the groundbreaking and controversial direction their father's Court was taking in the 1950s and 1960s. Under Warren, the Court overturned precedents of earlier Courts and greatly expanded constitutional rights for individuals. According to Warren, Jr., living far away from Washington did not insulate him from the repercussions of what was happening on the Court at the time:

Then came my father's appointment to the Supreme Court, which was a turning point in all our lives. We were basically adults at the time, so only our parents moved to the District of Columbia. Now we were separated geographically. Now we were no longer politically naive, but acutely aware of what my father had been, what he had done, what he was, and what he believed in. But none of us envisioned the controversy which would follow his appointment, nor the impact on our individual lives which would result. We were then, and subsequently, politically divided; some Republicans, some Democrats, some Independents, some decidedly liberal, others ultraconservative, and some middle-of-the-roaders. In this respect, I am including an "expanded family" which includes spouses and their families, for our family has always been deemed to include all involved in it. It should be emphasized that my mother was always apolitical and that my father never tried to impress any particular political philosophy on any family member.

Whereas we had previously felt some focusing of the political spotlight upon us, this was Showdown time, a period of about 20 years when we would be forced to defend or refute what the Supreme Court was doing. And it was terribly difficult—for regardless of political persuasion or personal feelings, we, as individuals, had to take stands. There was a stigma to being in the family and it took many strange turns. Friends became enemies. Enemies became friends. And, in most cases, both became skeptics. We had to explain, disavow or support, for the Court was one of the major issues of our time. And this affected our personal lives immensely. Yet through all of this, my father and mother remained the same as always—stoic, serene, totally understanding, and one-hundred-percent parents. And because of this, they became the greatest sources of earthly strength that we had, as well as symbols of what we should strive to be.[46]

ENDNOTES

*Editor's Note: This article is excerpted from Clare Cushman, **Courtwatchers: Eyewitness Accounts in Supreme Court History** (Roman & Littlefield, 2011) and is reprinted with permission.

[1]Elizabeth Black, diary entry, March 1, 1965, reprinted in Hugo L. Black and Elizabeth Black, **Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black** (New York: Random House, 1986), 120–21.

[2]In a phone conversation between Lyndon B. Johnson and Mike Mansfield, July 30, 1965, President Johnson mentions that Agger used this phrase. Citation #8415, WH6507.09, LBJ Library, at http://whitehousetapes.net/exhibit/lbjs-nomination-abe-fortas-supreme-court-july-1965 (last visited Dec. 4, 2011). Apparently, Fortas even asked the White House to delay his Senate nomination hearings to give him time to persuade his wife to support his nomination.

[3]Letter from Hannah Iredell to James Iredell, October 21, 1790, reprinted in Natalie Wexler, **A More Obedient Wife: A Novel of the Supreme Court** (Washington, D.C.: Kalorama Press, 2006), 53. Thanks to Natalie Wexler for her considerable help with this discussion of Hannah Iredell.

[4]Letter from Hannah Iredell to James Iredell, November 7, 1790, reprinted in Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789–1800**, 8 vols. (New York: Columbia University Press, 1980–2009), 2:105.

[5]Letter from James Iredell to Hannah Iredell, July 2, 1795, reprinted in Marcus, **Documentary History**, 3:66.

[6]Quoted in **Old Scituate** (Boston: Chief Justice Cushing Chapter, Daughters of the American Revolution, 1921), 37.

[7]Letter from Hannah Cushing to Abigail Adams, October 8, 1798, reprinted in Marcus, **Documentary History**, 3:296.

[8]Letter from Sarah Jay to John Jay, May 15, 1790, reprinted in Henry P. Johnston, ed., **The Correspondence and Public Papers of John Jay,** 4 vols. (New York: Burt Franklin, reprinted, 1970), 3:399.

[9]Letter from Sarah Jay to John Jay, November 13, 1791, reprinted in **Selected Letters of John Jay and Sarah**

Livingston Jay: Correspondence by or to the First Chief Justice of the United States and His Wife, eds. Landa M. Freeman. Louise V. North, and Janet M. Wedge (Jefferson, N.C.: McFarland Co., Inc., 2005), 201.

[10]John Marshall's Eulogy of Polly Marshall, December 25, 1832, by John Marshall, reprinted in John Edward Oster, ed., **The Political and Economic Doctrines of John Marshall** (New York: The Neale Publishing Co., 1914), 203.

[11]Letter from Joseph Story to Sarah Story, March 4, 1832, reprinted in William W. Story, **Life and Letters of Joseph Story**, 2 vols. (Boston: Little & Brown, 1851), 2:86–87.

[12]Randolph Keim, **Society in Washington: Its Noted Men, Accomplished Women, Established Customs and Notable Events** (Washington, D.C.: Harrisburg (Pa.) Publishing, 1887), 122–24.

[13]Mrs. E. N. Chapin, **American Court Gossip; or, Life at the National Capitol** (Marshalltown, Ia.: Chapin & Harwell, 1887), 249.

[14]William Pitt Ballinger, diary entry, October 14, 1871, Box 2Q425, Briscoe Center for American History, University of Texas at Austin.

[15]Malvina Harlan, **Some Memories of a Long Life, 1854–1911** (New York: Modern Library, 2002), 112–13. Malvina says her husband worked "several months" on the opinion, but it was argued in April and decided in May. She also remarks that he was the "youngest man on the Bench," when David J. Brewer, Henry B. Brown, and Edward Douglass White were younger. Thanks to Ross E. Davies for pointing out these inaccuracies.

[16]*Id.*, 113–14.

[17]**Memoir of Henry Billings Brown, Late Justice of the Supreme Court of the United States,** ed. Charles A. Kent (New York: Deerfield & Co., 1915), 96.

[18]Milton Handler and Michael Ruby, "Justice Cardozo: One Ninth of the Supreme Court," *Yearbook of the Supreme Court Historical Society*, 1988, 54.

[19]Warner W. Gardner, "Harlan Fiske Stone: The View From Below," *Supreme Court Historical Society Quarterly* 22, no. 2 (2001), 11.

[20]Dean Acheson, **Morning and Noon: A Memoir** (Boston: Houghton Mifflin, 1965), 49–50.

[21]Letter from Samuel Chase to William Sprague, July 25, 1866, Chase Collection, Historical Society of Pennsylvania, quoted in Alice Hunt Sokoloff, **Kate Chase for the Defense** (New York: Dodd, Mead & Co., 1971), 191.

[22]Dennis J. Hutchinson and David J. Garrow, eds., **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington** (Chicago: University of Chicago Press, 2002), 105.

[23]*Id.*

[24]Elizabeth Hughes Gossett, "Charles Evans Hughes: My Father the Chief Justice," *Yearbook of the Supreme Court Historical Society* 1976, 11.

[25]Dorothy Goldberg, **Private View of a Public Life** (New York: Charterhouse, 1975), 140, 143.

[26]Lewis F. Powell, Jr., "Impressions of a New Justice," *Report of the Virginia Bar Association*, 1972, 219.

[27]Goldberg, **Private View of a Public Life**, 144. The social role of Supreme Court Justices' wives was evidently still important enough in 1970 for Richard Nixon to query Harry Blackmun about his wife's social adroitness when he was interviewing him for the nomination. In an oral history interview, Blackmun recalls this cryptic interchange with the President: "What kind of a woman is Mrs. Blackmun?" "What do you mean?" "She will be wooed by the Georgetown crowd, can she withstand that kind of wooing?" "I said that she could." The Justice Harry A. Blackmun Oral History Project, quoted by Nina Totenberg, March, 8, 2004, at *www.npr.org/templates/story/story.php?storyId=1751391.*

[28]Elizabeth Black, diary entry, September 9, 1957, reprinted in Black and Black, **Mr. Justice and Mrs. Black**, 85.

[29]Elizabeth Black, diary entry August 10, 1965, reprinted in *id.*, 103–4.

[30]Unidentified law clerk, quoted in Dennis J. Hutchinson, **The Man Who Once Was Whizzer White: A Portrait of Byron R. White** (New York: Free Press, 1998), 438–39.

[31]Goldberg, **Private View of a Public Life**, 154.

[32]*Id.*

[33]Gardiner Harris, "M.D. Ginsburg, 78, Dies; Lawyer and Tax Expert," *New York Times*, June 28, 2010.

[34]*Id.*

[35]Ruth Bader Ginsburg, "The Lighter Side of Life at the United States Supreme Court," speech, New England Law School, March 13, 2009, *available at* Supreme Court of the United States, Speeches, http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_03-13-09.html (last visited Dec. 4, 2011).

[36]Postscript on a letter from Oliver Ellsworth to Abigail Ellsworth, March 20, 1797, reprinted in Marcus, **Documentary History**, 3:101.

[37]Gossett, "Charles Evans Hughes," 8.

[38]Susan Blackmun recounted this episode at a dinner honoring her father. Quoted in Linda Greenhouse, **Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey** (New York: Times Books, 2005), 83.

[39]Eyewitness Joseph P. Cotton told the story to his friend Felix Frankfurter, who told it to his former student Frederick Bernays Wiener, who recounts it in "Justice Hughes' Appointment—The Cotton Story Reexamined," *Yearbook of the Supreme Court Historical Society*, 1981, 79–80. *See also* James M. Buchanan, "A Note on the 'Joe Cotton Story,'" *Yearbook of the Supreme Court Historical Society*, 1981, 92–93, which emphasizes the relevance of the visit to Hughes by Justices Willis Van Devanter and Pierce Butler prior to the President's phone call.

[40]He did hold one minor, temporary, public office in his state before predeceasing his father.

[41]Transcript, Ramsay Clark Oral History Interview I, 10/30/68, Internet Copy, Lyndon Baines Johnson Library, 18, *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/ClarkR/clark-r1.pdf (last visited Dec. 4, 2011).

[42]Phone conversation between Ramsey Clark and Lyndon B. Johnson, 1/25/67, 8:22 p.m., tape no. K67.01, PNO: 6, Lyndon Baines Johnson Library, Austin, Texas.

[43]*Id.*

[44]Ramsey Clark, "Tom Clark Eulogies," *Yearbook of the Supreme Court Historical Society*, 1978, 5–6.

[45]See Tony Mauro, "For Scalia's Son, Turning Away Income May Help Father Stay on Wal-Mart Case," *National Law Journal*, March 16, 2011.

[46]Earl Warren, Jr., "My Father the Chief Justice," *Yearbook of the Supreme Court Historical Society*, 1982, 9.

Courting the Right: Richard Nixon's 1968 Campaign against the Warren Court

CHRIS HICKMAN*

When you look at what the United States Supreme Court has done to hamper law enforcement and realize the difficulties the police now have in getting convictions in the first place, I wonder if we truly have representative government anymore.[1]

The main emphasis is on demagogic appeal; crime is the communism issue of 1968. This is the extent to which apparently there is a new Nixon.[2]

In February 1956, Richard Nixon, then Vice President to Dwight Eisenhower, endorsed Earl Warren and the Supreme Court's desegregation imperative. In a Lincoln Day speech before the New York City National Republican Club, Nixon hailed the desegregation decisions as the work of "a great Republican Chief Justice."[3] Whatever rationales existed for the endorsement, political necessity was not one of them. Eisenhower might have been under some increased scrutiny on his right flank, but conservatives had failed to secure the nomination for Robert Taft in 1952; their chances would be no better in 1956. Nixon had, one must recall, come to the ticket as a mild gift to the conservative wing of the GOP in 1952. Perhaps, then, the Eisenhower administration had merely decided to remind Republicans of their relevance as the other major party dealt with its own fissures. After all, the Democratic party had the more difficult time at that juncture in American history figuring out its civil rights identity. African Americans had become part of the "New Deal coalition," but the Southern Democrats had other ideas about reliance upon these voters, let alone accomplishing anything that improved the cause of civil rights. As the Democrats dealt with their regional squabbles, the Eisenhower administration did not need to make an overwhelming appeal to the region of the country that had provided most of its support for Adlai Stevenson and the Democrats in 1952 and did so again that November.

Even then, at the youthful political age of forty-three, Nixon harbored animosities with the best of them. He distrusted others easily and could likewise easily earn their distrust. Nixon and Warren both were California natives from humble backgrounds who later sought legal training and developed political skills, but their similarities ended there. The two men detested one another from the time that an even younger Nixon first sought out a U.S. congressional seat in his 1946 contest against incumbent Democrat Jerry Voorhis. Warren, then governor of California, refused to endorse Nixon in a contest he later won—a slight that Nixon undoubtedly never put behind him.[4] Nixon had already learned to despise the establishment and those who put obstacles in front of him; Warren just became another individual against whom Nixon held a grudge. Therefore, it must have been difficult in 1956 to offer public praise, however insincere, for a political rival who had become Chief Justice. Dutiful Vice Presidents learn to put aside some of their own ambitions and animosities; Nixon did his part.

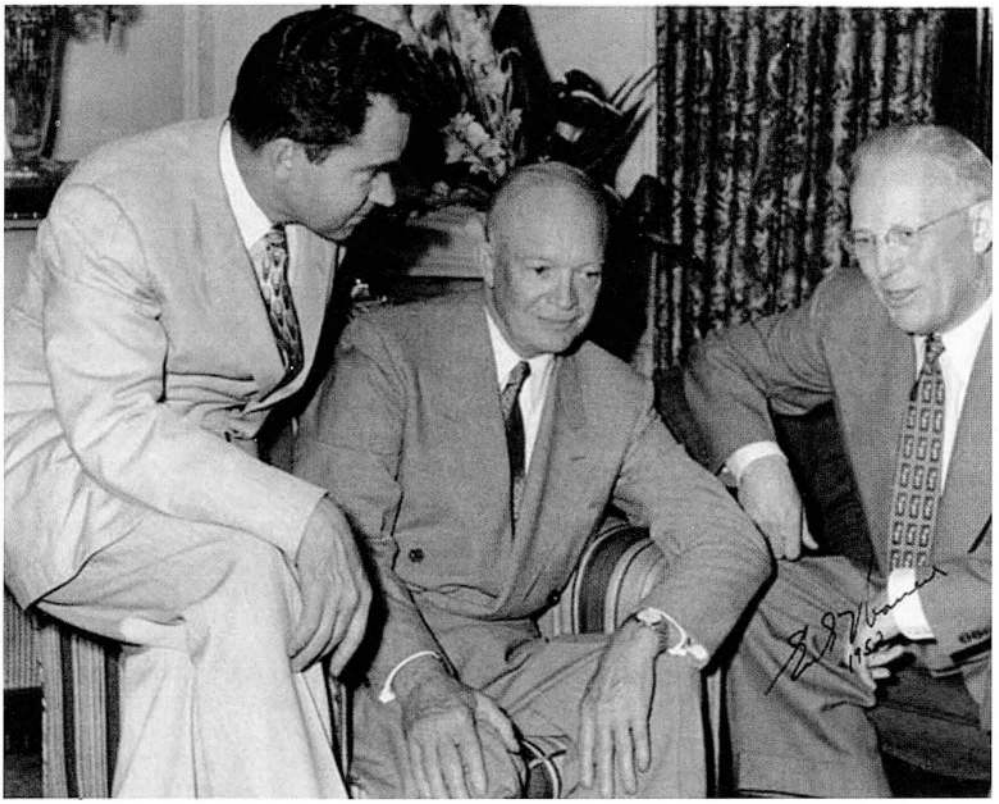
Twelve years later, however, Nixon unequivocally recanted his endorsement of Earl Warren and the work of the Supreme Court. Enough had happened since 1956 to ensure the evolution of Nixon's views. Most importantly, Nixon had stepped out from behind Eisenhower. After a 1960 loss in the presidential election, Nixon did not just vanish. He worked to become the clear favorite to again obtain the Republican nomination in 1968.[5] In making his pitch again to lead the country, he afforded particular attention to the Warren Court. If Eisenhower's "middle way" politics had mandated Nixon's 1956 endorsement, by 1968 the essential conservatism of the country in general and the years of criticism of the Court in particular ensured that the Warren Court had a prominent place in the presidential election.

Condemning the Court too directly, however, had possible drawbacks. Court assailants within the Nixon campaign apparatus often debated whether criticizing the Warren Court too directly might produce an unwelcome backlash for Nixon.[6] Accordingly, Nixon often made sure to voice his support for the High Court (as well as other courts) as a respected part of government, but whatever respect he had for the institution could not impel him to refrain from criticizing decisions, particularly those that involved protections for those accused or convicted of crimes.[7] Circumstances beyond the Nixon camp's control, notably the fiasco that developed around Earl Warren's resignation in June 1968, also helped keep the Court in the news, but the campaign itself made sure that that Warren Court remained in the headlines throughout the election cycle. Ultimately, all the years of withering—at times, outrageous—criticism of the Warren Court protected Nixon, as his campaign against the Court could appear moderate by comparison.

****

Geography, his youth, and his appeal had helped Nixon secure the vice-presidential spot on the 1952 Republican ticket. Two terms as Eisenhower's Vice President put Nixon in a good position to become the effective leader of the Republican party. Yet, a slightly younger—and certainly more telegenic—politician from Massachusetts, who had also joined Congress in 1946, prevented Nixon's election to the presidency in 1960. John F. Kennedy became yet another establishment fixture to whom Nixon could direct his frustrations and resentment.

Nixon had to become the ultimate political comeback kid in the 1960s, even as circumstances and his efforts ensured that he was never a long shot for the nomination in 1968. America let him back in. Following his loss in the close 1960 presidential election and failure to secure the governorship of California in 1962, Americans could have remembered Nixon principally as the oleaginous, drunken man who railed against the press and his enemies in the 1962 "last press conference"



As Vice President to Dwight D. Eisenhower, Richard Nixon publicly hailed the appointment of Governor Earl Warren as Chief Justice in 1953. But Nixon and Warren (pictured here in 1952), both Californians, had long harbored mutual animosity.

following his gubernatorial loss to Pat Brown. Merely because of his disdain for the media, which at times bordered on the hysterical but reflected some sense of reality, one could then doubt if Nixon, in the mid-1960s, would ever revivify his prospects for elective office. The sour relationship with the media only compounded his problems. He had acquired the reputation of a political loser. The media, the American public, and many in the Republican party wondered about Nixon's abilities to shed his loser image. Some had even written Nixon off.

The hardened orthodoxy on Nixon as a loser had to be overcome if he was to stand any chance at securing the presidential nomination in 1968, let alone the White House. As a case in point, even as Nixon went about remaking his image, in November 1966 the fledgling pundit Robert Novak voiced a conventional opinion on Nixon and his prospects. In predicting the direction the GOP would take in 1968, Novak told William F. Buckley Jr., the host of "Firing Line," "This is not a throwaway election; this is a serious election. They [the GOP] want a winner, and Mr. Nixon is a loser. So, I think they'll look primarily to George Romney."[8] Luckily for Nixon, and as a sign of the growing conservative support for his sequel attempt at the White House, the program's host scolded Novak for his anti-Nixon views. Though he stood far short of endorsing Nixon that far in advance of the 1968 contest, Buckley provided a clear indication that Nixon had repaired some of his wounds and, at the least, represented a far more palatable opportunity for conservatives than Romney or New York Governor Nelson Rockefeller.

What, then, had made this ideologically flexible, high-profile campaign loser a national political figure Buckley could defend? Moreover, what did Nixon do to continue to reach out to American conservatives and, equally important, remake himself as the political comeback kid of the 1960s? Both factors beyond Nixon's control and others he directly managed contributed to his political comeback, which included important appeals to the American right. His relationship to conservatives and conservatism made his campaign against the Warren Court a byproduct of his effort to win over and maintain the supporters of Barry Goldwater.

Lining up key conservative figures thus proved crucial for Nixon as he worked to recover from his high-profile losses in 1960 and 1962. Barry Goldwater advised and supported Nixon throughout his years in the political wilderness.[9] "A candidate who had Goldwater's endorsement," vocal conservative William Rusher explained later, "was virtually immunized against effective criticism from the right."[10] Campaigning for Goldwater in 1964, Nixon played the role of loyal Republican party man even as others distanced themselves from the Arizonian and his often reckless, though in many ways ominous, campaign. One contemporary Nixon observer called this participation in the 1964 election as a Goldwater supporter Nixon's "single most important move in his advance on 1968."[11] Goldwater did not forget this support: after his crushing defeat by LBJ, he took on an important task in convincing conservatives of Nixon's bona fides.[12] In fact, he became an early and, over time, stalwart supporter of Nixon as an acceptable—indeed, preferable—option for conservatives. He advised Nixon and openly called for Nixon to be the 1968 candidate well in advance of the general election.

Nixon also earned the support of other prominent conservatives.[13] In addition to

Nixon's campaign strategy involved shoring up his appeal to conservatives and campaigning against the Supreme Court. He criticized Warren for leading a Court that issued rulings that were soft on crime. Pictured, Warren swore in Nixon as President in January 1969.

Goldwater's support, Nixon received backing from conservative darling John Ashbrook (R-OH), then the chairman of the American Conservative Union. He also benefited from the support of new Republican Strom Thurmond.[14] Thurmond's support helped Nixon gather up Republicans in the South and lessen support for the popular California governor, Ronald Reagan. His support also helped work against the eventual third-party challenge from Alabaman George Wallace. Nixon's pledges to appoint Justices of different leanings, and in general his campaign against the Court, served him well in securing Thurmond's assistance.[15] Thurmond had long bemoaned the Court's role in civil rights changes, not to mention how it had frustrated efforts to identify, heap scorn upon, and punish domestic communists. Nixon's conservative line on future appointments thus enabled him to shore up support with this key Southern voice.[16]

Changing the Court and campaigning against it came to exist as a vital part of Nixon's "Southern Strategy." It had an indubitable connection to his appeal to conservatives. That former Alabama governor Wallace existed as more than just a fringe, third-party candidate also pushed Nixon further to the right on issues of race.[17] Wallace's presence worked in Nixon's favor: the stridency of Wallace's denunciations could make Nixon seem the mainstream, polite opponent of the Warren Court. The *Chicago Daily Defender* certainly recognized both Wallace's and Nixon's interests in reshaping the Court: on the heels of some criticism of the Court as insufficiently supportive of civil rights and the NAACP agenda, one writer cautioned readers not to stay home, as not voting would only end up helping the enemies of the Court—Wallace and Nixon.[18]

If key support from prominent conservatives helped Nixon, the alarming milieu in the United States shaped the entire campaign. In 1968, in particular, the United States experienced domestic disquiet it had not experienced since the Great Depression. An unpopular war in Vietnam persisted, assassins took the lives of prominent leaders, and cities, college campuses, and the Democrats' disastrous convention in Chicago evinced the fissures of the era. Indeed, Nixon's vice-presidential choice, Maryland Governor Spiro Agnew, owed his new prominence to his own role in appearing tough on the era's malcontents. President Johnson had wagered that toughness in Vietnam could help provide cover as he built a Great Society at home. Signal civil rights and social insurance legislation came at a great cost, but it was the war that had undermined his presidency. By 1968, Johnson's "deadly bet" had undermined the country as well.[19] Notably, the Tet Offensive in January and February 1968, though a tactical victory for the United States military in the divided Vietnam, represented one more political and psychological defeat that widened the "credibility gap" and made more Americans aware that victory in Southeast Asia seemed increasingly unlikely.[20]

Incumbency could not protect Johnson. Senator Eugene McCarthy's insurgent effort to take the nomination from LBJ seemed all the more viable after Tet. McCarthy won nearly 42 percent of the vote in the March 1968 New Hampshire primary; while LBJ commanded a slightly larger percentage of the vote there, the close result counted as a victory for McCarthy and a cause of further party disarray. The results in New Hampshire enticed Robert Kennedy to join the race. With his brother interred at Arlington National Cemetery, the forty-two-year-old first-term Senator from New York had revitalized ambitions to restore Camelot. Kennedy had feared causing a split in the party, but McCarthy's success in New Hampshire revealed fissures that Kennedy could claim he alone did not cause.[21] Johnson's abysmal approval ratings, his relatively poor showing in the New Hampshire primary, and the unpopularity of the war in Vietnam led to his decision, announced to the nation on March 31, 1968, not to seek renomination.

On the domestic scene, the April 4, 1968 assassination of Reverend Martin Luther King, Jr. and the June 5, 1968 assassination of Robert Kennedy the night he won the California primary provided further evidence of a country undergoing an internal war. Major U.S. cities, including the nation's capital, suffered immediate and long-term damage during the riots that followed James Earl Ray's murder of Reverend King. Observers wasted little time connecting these tragic events to the continued call for "law and order" and the need for the judiciary to enforce the law against criminals. Even the memorializing of Robert Kennedy that occurred in Congress featured the ritualistic complaints about the crime problem. Sirhan Sirhan's violent act revealed nothing about the *Miranda v. Arizona*[22] ruling, but commentators were quick to connect these and other public tragedies to the Warren Court. Tellingly, as right wing radio commentator Clarence Manion put it late in the campaign season:

> Many of the things that make this Presidential campaign so critical and dangerous are traceable directly to the injudicious, revolutionary conduct of the United States Supreme Court under the leadership of Chief Justice Earl Warren.[23]

A presidential election could either lessen these societal tensions or exacerbate them. Along with third-party candidate Wallace, Nixon opted to exacerbate these tensions. "Law and order" tactics, rhetoric, and proposals threatened to divide the country further, even as the proponents of this vision argued that getting tough on crime would ensure order. Eventual Nixon campaign advisor and policy researcher Martin Anderson, as but one voice, had already argued that the crime concerns would be crucial in the 1968 election.[24] Others in the Nixon campaign effort endorsed crime—and thus, by inclusion, the Warren Court—as the pre-eminent domestic campaign concern. The GOP concurred, recognizing crime as the top domestic campaign issue in 1968.[25] Internal campaign chatter and Republican National Committee material frequently mentioned the Warren Court, its softness on crime, and the importance of highlighting this theme.[26] During Nixon's campaign, the Republican Task Force on Crime, under the leadership of Richard Poff (R-VA), both listened to and assisted the Nixon effort.[27] Such coordination provided one more obstacle for the Democrats to overcome if they hoped to keep the White House.

****

Along with its emphasis upon crime and the willingness to politicize the crime problem, the Nixon camp refused to acknowledge that stoking further discord could backfire. If anything, the Nixon campaign continuously recognized that the mood demanded that the country stay divided. Campaigning aggressively but carefully against the Warren Court offered a means by which Nixon could remind the electorate what had helped cause these divisions: the excesses of liberalism in general with the assistance of an overinvolved Supreme Court in particular. The Nixon campaign apparatus and Nixon the candidate devoted near-excessive attention to the Warren Court.

Nixon's presentations on crime and the Warren Court could never be mistaken for Abraham Lincoln's tour-de-force rebuttal to the Supreme Court at Cooper Union from February 1860, but they are nonetheless potent reminders of just how consequential that Court had become by the late 1960s. For instance, in the aftermath of the 1967 riots in Detroit and Newark, Nixon's September 1967 *Reader's Digest* article (ghostwritten by the staunchly conservative Patrick Buchanan) represents as good a place as any to gather the candidate's overarching positions.[28] In the article, Nixon noted that only a few years before—conveniently, at or near the beginning of LBJ's

first full term—the United States did not suffer from urban disorder, rising crime rates, and turmoil. Even before this piece, Nixon had come to recognize the importance that crime and the Court could have in his electioneering, but, as the electioneering became more intense in 1967, this article served as a key sign that Nixon would play up crime over the next year. Well in advance of the November election, Nixon bluntly asked in this piece: "What has happened to America?" The answers the article provided could surely remind the uneasy electorate and the conservatives within the GOP that Nixon had taken notice of the top domestic problem; he might have even done enough to convince some voters that he wanted to use the presidency to combat that problem. Typical of the reactions that Nixon undoubtedly hoped this piece might have, Dorothy Webb of Forest Hills, New York, thought the article revealed a "marvelous understanding of the problems." Nixon would gain supporters, Webb contended, because of this article and his obvious awareness of the important domestic issue. If Webb responded favorably, so might others.[29]

In the article, Nixon argued that, in the 1960s, the United States had become a wretched place. "Far from being a great society," he vented, "ours is becoming a lawless society."[30] Borrowing language from legendary columnist Walter Lippmann, Nixon put blame on "[j]udges [who] have gone too far in weakening the peace forces against the criminal forces."[31] One could attempt to spread the blame around, but, by assailing courts and judges in 1967 and 1968, it was abundantly clear that the Warren Court was the actual enemy. Nixon suggested that solutions were available. The country had to face its tormentors, using tough measures to punish and banish those who presumably made American streets and sidewalks unsafe at any hour.

Nixon's description of the problem did not ignore racial issues but dwelled most upon the idea of a collapsing societal respect for public order, which could still easily be interpreted as putting blame on civil-rights agitation and the fallout from the country's history of racial injustice. Nixon made sure these interpretations were likely. As his campaign progressed over the next year, it became particularly adept at using coded language and going just far enough in its rhetoric to ensure that race connected to these problems of lawlessness. Such collapsing respect, the article contended, had its root causes in "permissiveness" and "sympathy for the past grievances of those who have become criminals." Yet, such talk of public order connected to the profile that many Americans had of criminals and deviants. Nixon and those in his campaign structure knew that he could not invoke racism as explicitly as Harry Byrd machine Democrats or segregationists; he could, however, make appeals in a subtler but still effective manner. Unlawfulness and disorder therefore connected to urban unrest and African Americans. Being tough on crime presented an effective means by which Nixon could communicate his sympathies to disenchanted white Americans.

Through 1967 and on into 1968, Nixon argued prominently that sociological thinking about crime obscured the individual culpability that lay at the core of criminal behavior. On matters of the Court and crime in particular, Nixon often seemed to accept the argument that criminals, in paroxysms of rationality, had picked up on signals from the Warren Court. These signals from the Court in turn led potential criminals to view crime as a prudent choice. Society and the Court ensured that the adversarial process of justice took the utmost care in handing out punishment to the accused; hence, individuals came to believe the individual benefits outweighed the costs of engaging in crime.[32] The hyperrationality of this argument alone reveals its perennial absurdity, but Nixon and his advisors knew the politics of the matter. Therefore, the campaign had to question any view that social conditions and economic inequalities served as a major determinant in causing criminal behaviors.

Inside the campaign, far more debate occurred over the question of environmental, poverty-related, and sociological factors of crime. Yet the debate often had its inspiration in managing the disdain such sociological acknowledgements might produce with those voters who wanted to hear that criminals became criminals because of their own choices. In other words, the politics of acknowledging that criminals did not just choose crime had more importance to the campaign than a commitment to empiricism, let alone curtailing the causes of crime over the long term. While a commitment to politics and winning was not the creation of Richard Nixon, that the Nixon camp fretted so much over how far it could go in blaming the criminal, only to then blame the criminal so frequently during the campaign, reveals the clear hard-line conservatism of the campaign. Throughout 1967 and 1968, Nixon took on the questions about the causes of crime differently, sometimes carefully, but always with an appreciation for his audience and the potential political gain that would attend to any position.

Frustrating as always to those who study his life and political career, Nixon most likely knew that sociological factors were an important element in explaining crime. He had come from a humble background; there would always be some doubts in his mind that such factors trumped individual choices. Pressures, electoral and otherwise, however, undoubtedly led him to downplay such talk. Another late 1967 essay reveals that, at least in some instances, Nixon had a willingness to present a more nuanced view of crime. In an article for the American Trial Lawyers Association's journal *Trial*, he spoke highly of combating crime through improving social conditions.[33] Had he written a piece for the American Bar Association, perhaps it would have represented a different view; after all, the trial lawyers maintained a far different vantage point on the criminal justice process. Be that as it may, Nixon's flexibility and presumed appreciation for where the article appeared did not obscure the essential conservatism behind his views. His acknowledgments of sociological factors in explaining crime were still laden with sordid presumptions about the underclass and urban slums as crime centers.[34] Even when he attempted to connect crime to sociological conditions, he relied upon a worldview shaped first and foremost by images and reporting from riots in Detroit and Newark.

Certain key domestic policy campaign advisors did not even have Nixon's willingness to entertain sociological and environmental factors. In fact, individuals in and around the Nixon campaign often seemed to compete for the role of pushing Nixon away from anything more than a mild acknowledgment of the environmental causes of crime. Campaign position papers on crime and comments on those documents proved time and again that the only valid positions were dismissals of the complications of crime and pointed disagreement with those who spoke of such complications. For instance, Evelle Younger, the district attorney of Los Angeles and the chairman of Nixon's Advisory Council on Crime and Law Enforcement, made sure to emphasize that the Nixon campaign had to avoid the cowardly talk of poverty and environment. Even focusing upon those factors, according to Younger, would not produce less crime. Younger incorrectly believed that Johnson's Task Force on crime had mainly issued a report that was an extension of the Great Society. In other words, Younger thought that Great Society liberalism simply endorsed increasing social spending as the means to cut back on crime. Unwilling to gamble that any expansion in social insurance initiatives would do anything other than add to the dole, Younger contended that the Johnson approach to decreasing crime involved nothing more than bribing the underclass into good behavior. During an election cycle, it was unsurprising that Younger elided the obvious consensus that existed across the political spectrum on targeting criminals. Though he exaggerated the extent to which liberals hoped to "bribe" criminals into good behavior, his

analysis did recognize that liberals at least had a more nuanced, sociologically friendly view of the causes of crime.

Campaign advisor Anderson also encouraged a rejection of anything other than a mild emphasis upon environmental explanations and palliatives. In commenting upon the Kerner Report, which had resulted from a Johnson Administration task force's review of riots from the mid-1960s, Anderson disparaged the attention granted to economics and urban decay.[35] The February 1968 Kerner Report only seemed to confirm that liberals and the administration, even as they often backed away from the findings, had gone too far in putting blame on society for riots, disorder, and crime. Anderson and others in the Nixon effort, not to mention conservatives more broadly, looked upon the Kerner Report as a boost to their complaints that liberalism did not have the answers to the country's problems. Speaking of race and poverty so openly surely rendered the Kerner findings different from those in the 1967 report from LBJ's Crime Commission. Unsurprisingly, in the spring of 1968, Nixon came out as a forceful critic of the Kerner Report, a move that *Human Events* contended "substantially helped him with Republican conservatives."[36] As Nixon fought as a "new Nixon" throughout the primary season, even casual observers could notice that he had little use for explanations of crime rooted in anything other than the guilt of the accused.

Arguably, then, the key Nixon campaign concern in late 1967, through the primary season, and throughout 1968 was how to position Nixon and the crime problem to the electorate.[37] With the Nixon position on the causes of crime quite clear, the other important question involved just how far the candidate could take his criticism of the Warren Court. One of the most telling Nixon campaign documents on this issue resulted from the efforts of Martin Pollner. Reactions to his "Crime—The Supreme Court: A Proposed Program of Action" from both within the formal campaign team and those who had informal roles provide useful insights on the campaign's efforts to ensure that the Warren Court earned an acceptable amount of blame for the country's crime problem.

Along with Anderson, Pollner, who had worked at the U.S. Justice Department and later in private legal practice at Nixon's law firm in New York (Nixon, Mudge, Rose, Guthrie and Alexander), served as one of the key campaign voices on crime. His fifty-one-page proposal represented the authoritative campaign template on politicking against the Court. Put together most likely in mid- to late 1967, the document represented a mild betrayal of the hard-line approach in its acknowledgment that sociological conditions had an important role in causing crime. Nevertheless, even after this sop to the liberal worldview, Pollner's indictment of the Court and prescription for this problem stood out principally for the care he counseled. Going after the Warren Court, while desirable, had to be done without earning the campaign clear association with those Americans who thought "Impeach Earl Warren" billboards belonged on every highway in the country.[38] The campaign wanted their votes but did not want to risk the potential backlash of too aggressively assailing an entire branch of the federal government. Unsurprisingly, not everyone in and around the campaign agreed with this call to moderation.

As did numerous others in the campaign, Pollner wisely counseled Nixon to avoid mere grumbling about these decisions. Instead, he suggested that all of the grumbling and grievances had to feature some sophistication that might, in turn, lessen any drawbacks to attacking the High Court.[39] Pollner captured the peril and limitations of Court-bashing when he wrote that:

> Complaining about Supreme Court decisions will not put one criminal behind bars. Further, such complaints, from responsible sources,

> tend to destroy confidence in our system of government. If the courts continue to criticize police practices and law enforcement officials continue to criticize the courts—how then can the citizen retain his faith in either?[40]

Yet, as had and would others in the Nixon campaign apparatus who contributed to the discussion of the Court and crime, Pollner, after admitting in numerous instances that the Court was not directly responsible for the crime rate, proceeded to hold the Court responsible. The Court had certainly made things more difficult. He did not yet blame the Court for the rise in crime, but he envisioned a future in which its decisions would cause crime. While Pollner bluntly termed the idea of the Court causing the crime rate to rise as "unfair," the decisions portended a far more unwelcome future. His argument implicitly hinted that, if the Warren Court's brand of criminal procedure liberalism were to persist, one day the Court would cause the crime rate to rise. He called upon his fortune-telling skills in contending:

> The Supreme Court's primary purpose appears to be to attempt to establish safeguards against isolated police abuses. However laudable this goal may appear, and although the Court's sweeping decisions may indeed prevent isolated abuse, they also prevent proper, previously court-sanctioned investigations and convictions.[41]

This call for care in doling out criticism produced notable responses from others in positions to influence the Nixon campaign. Others were far more explicit in 1967 and throughout 1968, reminding the Nixon campaign that it could go too far and seem unfair in its criticisms. Budding academic William Gangi, who went on to a long career at St. John's University, encouraged Nixon to realize that "any condemnation of the Court will be interpreted as fascist."[42] Closer to the general election, the Nixon campaign and its advisors did worry over the extent to which attacks upon the Court might prove counterproductive, at least providing circumstantial proof of the importance of Pollner's template. Others connected to the campaign in some manner also counseled restraint. Much later in the campaign cycle, key Republican members of Congress and governors encouraged Nixon to avoid "a direct attack on the Supreme Court as an institution."[43] All of these understandable worries might have come from sincere respect for the Court, but they more probably resulted from fears of earning the campaign an association, in the public mind, with the far right.

Reactions to the Pollner piece came to the Nixon campaign in the fall of 1967 and thereafter. All throughout the next year, even after Nixon had secured the nomination, the campaign still debated how to explain crime to the electorate and how far Nixon could go in assailing the Court. For instance, scholar Jerome Hall of Indiana University Law School called Pollner's work "wholly inadequate."[44] Some reviewers of the essay found it unsatisfactory because it had not spelled out more clearly how a Nixon administration would deal with the crime problem. Other individuals in and around the campaign urged a far more open criticism of the Court that still did not go so far as to become overtly disrespectful. Two Minnesotans, in particular, argued for this more direct citation of the Warren Court. But even these voices counseled that such criticism had to come across as more than just disagreement with how the Court had ruled in high-profile cases.

One of the Minnesotans was George MacKinnon. MacKinnon, who worked at the time as chief counsel for Investors Mutual Funds and whom Nixon would later appoint to the federal Bench, urged Nixon to campaign against the Court with care. While MacKinnon made sure to emphasize that appellate work and important American justice credos guaranteed that law enforcement and prosecutorial efforts would always have obstacles put before them, he nevertheless argued that "Recent

Supreme Court decisions . . . added to that burden. To the extent that they change pre-existing law and their new decisions have retroactive effect, they are unreasonable." MacKinnon backtracked by commenting that, although the Supreme Court rulings on crime represented one important part of the problem, to attack those rulings alone did not represent the "soundest basis for action."[45] In one sign of a different age, MacKinnon encouraged Nixon to back federal gun laws. In the final analysis, however, he urged the campaign, much as Pollner had, to be careful before getting into a public and long-term spat with the Warren Court.

MacKinnon served as the Minnesota campaign chairman for Nixon. While Nixon did not carry Minnesota in the general election, earlier on it mattered because of significant support in that state for GOP moderate New York governor Nelson Rockefeller. Perhaps of greater long-term significance, MacKinnon provided a valuable contact point for the campaign to benefit from the advice of another Minnesotan, Warren Burger. Future Supreme Court Chief Justice and Nixon's gift to the Warren Court's foes, Burger counseled the Nixon campaign to be forceful in its criticisms. More importantly, he took a hard line on "law and order" politics and prescriptions. Some of his international comparisons, which supported his frustrations with the U.S. criminal justice process, had later parallels in Nixon's campaign rhetoric. Indeed, his role and overlooked access to the campaign help explain his later appointment to the Supreme Court.[46]

Burger had served in the Eisenhower Justice Department before his appointment to the Court of Appeals for the District of Columbia in 1956. On that court, he served as the conservative counter to Judge David Bazelon. Judge Burger's voting habits, speeches, articles and public commentary plainly revealed his own discomfort with the Warren Court. In particular, he expressed frustration over the Warren Court's rulings on the exclusion of evidence. More broadly, while he wanted to

Under some cover of anonymity, Warren Burger, while serving on the D.C. Court of Appeals, recommended that the Nixon campaign provide blunt criticism of the Supreme Court. He felt that the Court's rulings on criminal procedure were vague and naïve and threatened to stymie legitimate police actions. Pictured, Nixon introduced his newly appointed Chief Justice to the press in May 1969.

ensure that law enforcement followed rules and treated the accused with fairness, the way to reach these ends did not feature reliance upon courts of law alone. Tainted evidence and disreputable practices deserved exclusion, but the courts, with so many vague pronouncements and tendentious and naïve rulings, threatened to stymie legitimate police actions. Moreover, Burger did not think these rulings had been successful in deterring the few cases of police misconduct. Of particular interest, Burger also encouraged frequent cross-national comparisons, particularly to Western Europe; he thought that these comparisons revealed the merit of these systems of justice. Endless delays and protections, as part of the adversarial system in the United States, had simply gone too far. Western European countries had avoided these delays; hence, the United States could learn something from looking abroad.[47] Conservatives of later generations who recoil at citations of international law and evolving cross-national norms, or worry about the invasion of Islamic law would blanch at the countless instances in the historical record in which their forefathers from the contested "long Sixties" urged international perspectives to reveal the abuses of the Warren Court.

Unmistakably, Burger's record and well-known frustration with Warren Court jurisprudence made him an attractive candidate both for contributing to the campaign and, later, as a Supreme Court nominee. He had a sterling reputation as a spokesperson for the counter-arguments to the liberal criminal procedure rulings. As an illustration of Burger's reputation, Brian Gettings, lead counsel and executive director of the Republican Task Force on Crime, encouraged Representative Poff (R-VA), who himself would later see his name circulate as a possible High Court nominee, to enlist Burger's help, calling the judge "a standout on an otherwise radical court."[48] Free from any obligation to censor his comments and under some cover of anonymity, Burger recommended that the Nixon campaign provide blunt and direct criticism of the Supreme Court. Burger's remarks made their way to the Nixon camp, most likely, as a pseudo-anonymous response to "Crime—The Supreme Court: A Proposed Program of Action." Above all else, Burger encouraged the campaign to take a far more forceful position on the Warren Court. Exempting the Warren Court from criticism never had a fierce advocate in the campaign, but Burger encouraged an open battle with the Court that surpassed what even Nixon most often provided.[49]

Burger forcefully encouraged the campaign to exclude talk of poverty and environmental causes for crime. He did not deny the causal role of such factors but argued against their citation; he made it clear that the campaign did not want to send mixed signals to voters and others who had already made up their minds. He held the Court's recent decision in *United States v. Wade* in particular contempt.[50] *Wade* was yet another of these contested 5–4 criminal procedure decisions, coming down the same day that the Court decreed Virginia's antimiscegenation statute unconstitutional in *Loving v. Virginia*.[51] *Wade* had developed in response to a 1964 bank robbery in Texas, which initially led to a conviction. But the consequential Warren Court confirmed a Court of Appeals ruling that the original trial court had erred in not excluding the testimony of witnesses who had identified Wade in a police lineup. Wade had already been indicted prior to the lineup. The defendant's counsel had argued, among other things, that this testimony's inclusion violated a constitutional right to legal counsel. Filed alongside a confusing arrangement of concurrences and dissents, Justice William Brennan's majority opinion essentially held that defendants subject to lineup identification should benefit from Sixth Amendment guarantees of legal counsel. Burger had a predictably raw reaction to a ruling he labeled "a miserable example of overreaching." Thereafter, the Nixon campaign position papers and other public offerings singled out *Wade* as worthy of criticism.

In calling attention to *Wade*, campaign chatter acknowledged Burger's exact language in his characterization of the ruling.

Within Burger's obvious tryout for the Supreme Court appointment shortlist, he stuck to his interests in comparing the United States criminal appeals process to that elsewhere, in particular Europe. Cross-cultural comparisons revealed that the United States could not even keep up with its developed-world peers. They provided an alarming truth that he believed the country would not be able to handle. He wrote in an amazingly scornful tone that:

> A great many civilized countries do better justice at the lower levels than we do by rather summary administration type dispositions. The judicial decisions which expanded post-conviction remedies have nearly destroyed finality in the criminal law. Future scholars will look back on much of this and regard many judges as congenital idiots. They won't be far off target.

Burger's most important point of criticism of Pollner's crime and the Court template was that it had not gone far enough. He reacted sternly to analysis that sometimes reflected "too much anxiety about offending the Supreme Court." Burger thought such anxiety unwarranted. He thought it "imperative that there be criticism of the Supreme Court's holdings." What is more, Burger even suggested that disobedience and criticism of the Court's work already had the support of thoughtful judges and lawyers; Nixon only had to repeat the standard practice of citing the dissenting language from the contested Warren Court decisions. Backtracking somewhat, he noted that perhaps blaming the Warren Court too directly for the crime rate could have political drawbacks. Nonetheless, he did not think it "unfair" to credit the Court with causing crime. Politics demanded some hesitance, but the man who would later replace Earl Warren had no doubt that the Court's decisions had an ample role in causing the crime problem. His reactions were significant because the future Chief Justice of the U.S. Supreme Court instructed Nixon to wage an all-out political battle with the Warren Court. Whatever else one can say of this analysis, it came from someone comfortable with playing politics with the Court.

****

Even though the Nixon campaign debated how far it could go in assailing the Supreme Court in 1967, the following year, after Nixon had cemented his front-runner status, he made sure the electorate knew where he stood. For instance, in Nixon's May 8, 1968 address "Toward Freedom from Fear," he hit on points that paralleled the longstanding concerns of Burger and countless Americans who rejected the permissive new rules that enabled criminals to go free. Nixon decried that confessions had been set on a path to extinction and that the notable rulings had sent the message to criminals, potential and actual, that crime could go unpunished. He further lamented that the "barbed wire . . . legalisms that a majority of one of the Supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment as provided in the prior laws." In a campaign stop in Dallas later that month, Nixon's rebuke to the High Court continued to emerge clearly. During a press conference there, Nixon cited cases in which the Court had unleashed lawlessness upon the country. Rising crime rates, while not entirely the fault of judicial missteps, gained considerable influence from bad law and overinvolved judges.[52]

That spring, Nixon also encouraged Congress to pass the portion of the omnibus crime bill then under consideration that would curtail the supposed evils of the *Miranda v. Arizona* and *Escobedo v. Illinois*[53] rulings. Absent success on that front, he even counseled amending the Constitution.[54] When that crime bill passed the Senate in May, Nixon praised

the passage as a necessary first step in helping rescue the country from crime. Yet that legislation merely represented a first step. The election in the fall presented a further opportunity to fix years of inattention to this problem.[55]

Criminals are easy to campaign against. Nixon's efforts, far more than Goldwater's in 1964, ensured that national political races for the next generation would require candidates to outdo one another in appearing tough on crime. Those who did not, such as Massachusetts governor and Democratic presidential candidate Michael Dukakis in 1988, suffered the consequences. A tough stance on crime in 1967 and 1968 apparently mandated a firm stance on the consequential Warren Court. The Nixon nomination and campaign effort had to skillfully denounce the Warren Court liberals and courts more broadly for leniency and fashioning rules that frustrated the cause of punishing criminals. Clearly, preexisting animosity for the Supreme Court featured far more than just the putative connections between legal developments and increases in crime. The Nixon campaign did not have to go out of its way to deride decisions involving school prayer, desegregation, civil rights or apportionment. The Court's critics already knew of the Court's misdeeds in these areas. All of the animosity for the Court could best be directed to electoral advantage in focusing upon issues of the utmost contemporary currency. Crime had just such currency with American voters, many of whom would help move the country securely to the right in the years ahead.

With Nixon's narrow November 1968 victory, conservatives had reason for optimism; they seemed to have found a winner. Conservative leader John Ashbrook enthusiastically welcomed the Nixon victory, telling one constituent that Nixon had created the hope of new, tough positions on crime in particular.[56] Not long after the election, Ohioan John Schaffer wrote to Ashbrook that "the most important thing that needs to be done *right now* is a reform of the Supreme Court." Unsurprisingly, Ashbrook agreed with Schaffer; reliably conservative Americans would have also.[57] How this might come about was far less clear, but Earl Warren had already attempted to retire in 1968. The effort to replace him already represented a substantial blunder for the Johnson White House. The Court's foes could see that Nixon would, upon Warren's eventual re-retirement, put someone of an entirely different legal and political philosophy at the head of the Court. Warren Burger had at least done his part to ensure that he would be part of the discussion in any move to replace Warren.

Richard Nixon will never entirely escape the tarnish of Watergate and his August 1974 resignation from the presidency. Most likely, he will also not escape the attention of those who write history and find in his political resurrection in 1968 an important seedtime in the era of conservative prescriptions and pronouncements that have dominated American political life ever since. Nixon's second campaign for the White House did not pioneer criticism of the Warren Court; it just perfected it.[58]

ENDNOTES

*The author wishes to thank George Washington University History Department faculty members William Becker, Edward Berkowitz, Robert Cottrol, Cynthia Harrison, and Leo Ribuffo. He is also grateful to Sara Berndt of the Office of the Historian at the U.S. Department of State, Andrew Hartman of the Illinois State University History Department, Bruce Ragsdale of the Federal Judicial Center, and the helpful staff at the Richard Nixon Presidential Library and Museum in Yorba Linda, California.

[1]Robert Decker to Birch Bayh, July 31, 1966, Birch Bayh Papers, Box 161, Wells Library, Modern Political Papers Collection, Indiana University, Bloomington, Indiana.

[2]Alexander Bickel, "Crime, the Courts, and the Old Nixon," *The New Republic*, June 15, 1968, 8.

[3]"Bad Taste and Bad History," *New York Times*, February 16, 1956, 28.

[4]For this account of their animosity, see Jim Newton, **Justice for All: Earl Warren and the Nation He Made** (New York: Riverhead Books, 2006), 199–200.

[5]John Morton Blum, **Years of Discord: American Politics and Society, 1961–1974** (New York: W&W Norton and Company, 1991), 311–12.

[6]This topic is debated ad nauseam in the Nixon campaign materials. That the campaign even had to worry about this question reveals the power of the apolitical Supreme Court myth. Forces internal and external to the campaign endlessly cited and cultivated a cherished myth of a Court above politics. For instance, this point is well-articulated in a document within the Republican Task Force on Crime materials in the Richard Poff Papers. *See* "Recommendations Submitted by RN's Advisory Council on Crime and Law Enforcement for Use in Major Speeches, Programs and Media," Richard Poff Collection, Box 223, Small Special Collections Library, University of Virginia (hereinafter RPP).

[7]See, for just one example, an interview with Nixon, "Nixon Tells How 68 Race Stands," *US News and World Report*, November 20, 1967, 79.

[8]"Firing Line," program number 037, recorded November 21, 1966, Box 51, Folder 37, Firing Line Collection, Hoover Institution Archives, Stanford University, Stanford, California.

[9]William Rusher, **The Making of a New Majority** (New York: Sheed and Ward, Inc., 1975), 53–54. Rusher later argued that Goldwater's endorsement, unsurprisingly, was the most salient factor in Nixon's rise with the conservative base. On Nixon stumping for Goldwater, see Rick Perlstein, **Before the Storm: Barry Goldwater and the Unmaking of the American Consensus** (New York: Hill & Wang, 2001), 505–6. *See also* Irwin Unger and Debi Unger, **Turning Point: 1968** (New York: Charles Scribner's Sons, 1988), 454.

[10]Rusher, **Making of a New Majority**, at 65.

[11]Ralph de Toledano, **One Man Alone: Richard Nixon** (New York: Funk & Wagnalls, 1969), 329.

[12]Barry Goldwater to Richard Nixon, November 20, 1964, Pre-Presidential Materials, Campaign Research Files: Barry Goldwater, Box 2, Campaign 1968, Richard Nixon Library and Birthplace Foundation, Yorba Linda, California (hereinafter RNL).

[13]*Battle Line*, April/May, 1967, 3 reported that Gallup Poll data indicated that GOP county chairmen, many of whom had supported Goldwater, supported Nixon nearly three to one over George Romney in a head-to-head race and nearly four to one over Romney in a race that included all other competitors. Reagan at that stage came in third in the voting. Even this early in the effort to secure the nomination, Nixon had support from conservatives at the local level.

[14]Thurmond only switched to the Republican party in September 1964.

[15]Though perhaps representative of exaggeration as much as true sentiment, Strom Thurmond earned the designation "the greatest conservative in the Party" from the American Conservative Union. "Nixon Staff Plans Anti-Wallace Drive," *Republican Battle Line*, November 1, 1968, 2.

[16]Lewis Gould, **1968: The Election That Changed America** (Chicago: Ivan R. Dee, 1993), 68–69.

[17]On this point, see Dan Carter, **The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics** (New York: Simon & Schuster, 1995), 324–30.

[18]Audrey Weaver, "Critic Takes Liberal Tag from Supreme Court," *Chicago Daily Defender*, October 26, 1968, 11.

[19]This line comes from Walter LaFeber, **The Deadly Bet: LBJ, Vietnam and the 1968 Election** (Lanham, MD: Rowman & Littlefield Publishers, 2005).

[20]On the Tet Offensive and the 1968 election, see Maurice Isserman and Michael Kazin, **America Divided: The Civil War of the 1960s** (New York: Oxford University Press, 2000), 222–25.

[21]William Chafee, **Unfinished Journey: America Since World War II**, 5th edition (New York: Oxford University Press, 2003), 337.

[22]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[23]Clarence E. Manion, "Fifteen Years of Warren Court Arrogance Can Be Arrested in Fifteen Minutes," *The Manion Forum*, October 20, 1968, Ms. 76, Gordon Hall and Grace Hoag Collection of Dissenting and Extremist Printed Propaganda, Brown University Library, Providence, Rhode Island. Clarence Manion not only had training as a lawyer but also had served on the law school faculty at Notre Dame for over two decades. In reaching an audience through his radio program, Manion did not always present "big-tent" conservatism, but his criticisms of the Court usually came across as mainstream.

[24]Martin Anderson to Leonard Garment, September 8, 1967, Len Garment 1968 Campaign File, Anderson Folder, Name File Box 67, Nixon Presidential Returned Materials Collection: White House Central Files, RNL.

[25]"Crime Tabbed as No. 1 Issue in Campaign," *Republican Congressional Committee Newsletter*, July 1, 1968, Pre-Presidential Materials, Campaign Research Files, Box 23 Crime, Campaign 1968, RNL.

[26]The RNC's "The Answer Desk," a summary of news developments, quotes, polling data, campaign developments, information to challenge Humphrey and Wallace, and other relevant issues in the political arena, regularly found its way to Nixon campaign advisers Martin Anderson, Patrick Buchanan, and H.R. Haldeman. Frequently, it revealed a concern with the Supreme Court, in particular under the heading of "law and order." In addition to quoting the dissenting opinions from key, unwelcome cases, the "Answer Desk" made sure to stay on target in placing the Court as an important cause in the crime problem. Humphrey's views on crime, developments with the Abe Fortas fiasco, and the Court also frequently interested the Nixon campaign team. "The Answer Desk," available in

Sub-Series D, Boxes 2 and 3, The H.R. Haldeman Collection, RNL.

[27]*See, e.g.*, Richard Poff to Patrick Buchanan, April 22, 1968, RPP.

[28]Richard Nixon, "What Has Happened to America?" *Reader's Digest*, October 1967, 50, Pre-Presidential Materials, Campaign Literature, Box 2, Folder 1 Contents of a Notebook of Presidential Literature, Campaign 1968, RNL.

[29]For this comment on Nixon's article, I draw from Dorothy Webb to Richard Nixon, February 16, 1968, PPS 165, Box 4a, Campaign 1968 Collection, RNL.

[30]Nixon, "What Has Happened to America?" Former President Eisenhower echoed some of the same themes, including the problems created by the Supreme Court, in the same publication only two months before. See, Dwight D. Eisenhower, "We Should Be Ashamed," *Reader's Digest*, August 1967, 67–71, 68: Americans, in Ike's scolding words, "ought to be ashamed."

[31]Nixon, "What Has Happened to America?," 50. On the heels of Nixon's *Reader's Digest* piece, advice came from his law-school classmate Charles Rhyne. That any advice for Nixon on this front came from a lifelong friend is not surprising, but Rhyne had argued before the Supreme Court for those who sought to challenge Tennessee's legislative apportionment setup in *Baker v. Carr*. He encouraged Leonard Garment, and hence Nixon, to tread carefully: attacks upon the Court could easily backfire, since the Court, in his opinion, remained a venerated body. One might wonder, though, whether the notion of a Court beyond reproach still had viability after the preceding fourteen years. Even with this cautionary suggestion, Rhyne did not instruct the campaign to refrain from citing unpopular decisions; he just did not think it would do any good for Nixon to call out certain members of the Court or deride the body. On Rhyne's comments, I draw on Leonard Garment to Richard Nixon, September 27, 1967, Len Garment 1968 Campaign File, Nixon-Garment Memos, Name File Box 68, Nixon Presidential Returned Materials Collection:White House Central Files, RNL.

[32]*See* **Nixon on the Issues** (New York: Nixon-Agnew Campaign Committee, 1968), 86–87.

[33]Richard Nixon, "On Crime in the United States," *Trial*, October/November 1967.

[34]Nixon, "On Crime in the United States." Tellingly, Nixon also said: "If the people of means and education were terrorized in such a manner, it would not be tolerated, and it cannot much be longer tolerated in the urban slums." This was pseudopopulism. It was easily those most un- or underaffected but still vexed whom Nixon hoped to charm with his rhetoric.

[35]Martin Anderson, Memorandum, "Report on the National Advisory Commission on Civil Disorders," March 4, 1968, Campaign Research Files, Box 17 Civil Rights, Riots Commission Report, Campaign 1968 Collection, RNL.

[36]*Human Events*, March 16, 1968, 5.

[37]Victories in early primaries, his campaign aides believed, would help Nixon overcome the image of a loser that he carried because of the defeats in 1960 and 1962. Throughout 1967, he made sure, in his public presentations, to identify the primaries as a crucial source for sorting out the Republican candidates. In making these suggestions about the importance of the primaries, the Nixon campaign brilliantly shaped a campaign narrative that the media later chose to articulate. Goldwater encouraged Nixon to consider skipping out on the New Hampshire primary; Nixon wisely ignored this advice, and earning a victory in New Hampshire helped him stake out a lead he never relinquished. On encouragement for Nixon to use the primaries and build up expectations for victories there, I draw upon Leonard Garment to Richard Nixon, April 25, 1967, Len Garment 1968 Campaign File, Nixon-Garment Folder, Name File Box 68, Nixon Presidential Returned Materials Collection: White House Central Files, RNL. Goldwater's advice came in communication to Nixon available in Barry Goldwater to Richard Nixon, July 5, 1967, Pre-Presidential Materials, Campaign Research Files: Barry Goldwater, Box 2, Campaign 1968, RNL. On Nixon speaking of the importance of the primaries see, for instance, "Nixon Tells How 68 Race Stands," *U.S. News & World Report*, November 20, 1967, 74–80.

[38]Martin Pollner, "Crime —The Supreme Court: A Proposed Program of Action" (undated), Pre-Presidential Materials, Campaign Research Files, Box 22, Folder Martin Pollner Reports, Campaign 1968, RNL.

[39]*Id.* at 18–19.

[40]*Id.* at 19.

[41]*Id.* at 51.

[42]William Gangi to Richard Nixon, November 26, 1967, Pre-Presidential Materials, Campaign Research Files, Box 21, Folder 18, Campaign 1968, RNL.

[43]*See, e.g.*, Senator John Tower to Richard Nixon, September 16, 1968, Pre-Presidential Materials, Campaign Research Files, Box 23 Crime, Folder 6 (Crime-Republicans), Campaign 1968, RNL.

[44]Jerome Hall to Patrick Buchanan, October 23, 1967, Len Garment, 1968 Political Campaign File, Box 7, Nixon Presidential Returned Materials Collection:White House Central Files, RNL.

[45]George MacKinnon to Richard Nixon, September 18, 1967, Pre-Presidential Materials, Campaign Research Files, Box 21 Crime, Miscellaneous Folder, Campaign 1968, RNL. MacKinnon also indicated that Warren Burger intended to supply his own views on the Nixon crime piece.

[46]Martin Pollner mentions Burger's role in an undated memorandum to Richard Nixon and Leonard Garment.

Burger had provided a review of Pollner's "Crime—The Supreme Court: A Proposed Program of Action." *See* Martin Pollner to Richard Nixon and Leonard Garment, (n.d.), Pre-Presidential Materials, Campaign Research Files, Box 23 Crime, Campaign 1968, RNL. George MacKinnon also mentions Burger's help. *See* George MacKinnon to Richard Nixon, September 18, 1967, Box 18, Folder 3, George MacKinnon Papers, Minnesota Historical Society, St. Paul, Minnesota (hereinafter GMP). The memo that I believe Burger wrote does not have a date, though if the memo is one that MacKinnon had promised Nixon, it would have arrived after MacKinnon's September 18 note. For what I believe is the memorandum from Burger, see an undated letter to George MacKinnon, "Crime as a National Issue," Webber to MacKinnon, (n.d.), Campaign Research Files, Box 21, Crime-General, Campaign 1968, RNL.

[47]*See, e.g.*, "What to Do about Crime in the U.S.: A Federal Judge Speaks," *U.S. News and World Report*, August 7, 1967, 70–73. The article is based on excerpts from Burger's May 1967 address at Ripon College. He did speak humanely, though, of the cause of rehabilitation and of ensuring that those criminals with mental impairments received adequate care. Burger's Ripon College speech circulated within the Nixon campaign and the Republican Task Force on Crime.

[48]Brian Gettings to Richard Poff, August 25, 1967, Box 223, RPP. Getting was referring to the Court of Appeals for the District of Columbia.

[49]In addition, it is possible that material from August 1968 was also the handiwork of Burger. There is a six-page memorandum in the George MacKinnon Papers that he claims "was prepared by one of our judicial friends in Washington." MacKinnon passed on the document about crime, the care with which Nixon should criticize the Court, and encouragement for Nixon to appeal to the "quiet Americans." Interestingly, the document, if from Burger, represented some backtracking on the issue of assailing the Court. The document asserted that by the fall of 1968, the public already knew what courts were to blame for the crime problem. See George MacKinnon to Rose Mary Woods, August 5, 1968, and the untitled memorandum, Box 18, Folder 3, GMP.

[50]*United States v. Wade*, 388 U.S. 218 (1967).

[51]*Loving v. Virginia*, 388 U.S. 1 (1967).

[52]Richard Nixon, "Toward Freedom from Fear," Campaign Literature, Pamphlet Series Folder 1, Box 1, Campaign 1968 Collection, RNL. "Nixon Links Court to Rise in Crime," *New York Times*, May 31, 1968, 18.

[53]*Escobedo v. Illinois*, 378 U.S. 478 (1964).

[54]Richard Nixon, "Toward Freedom from Fear," Campaign Literature, Pamphlet Series Folder 1, Box 1, Campaign 1968 Collection, RNL.

[55]Statement of Richard Nixon, Portland, Oregon, May 24, 1968, Pre-Presidential Materials, Campaign Research Files, Box 23, Folder 6 (Crime: Republicans), Campaign 1968, RNL.

[56]Congressman John Ashbrook to Murray Bullock, December 18, 1968, Box 4, Folder 21, John Ashbrook Collection, Ashland University Archives, Ashland, Ohio (hereinafter JAC).

[57]John C. Schaffer to John Ashbrook, December 3 1968, and John Ashbrook to John C. Shaffer, December 13, 1968, JAC, 1969 Congressional Office Files, Box 7 (emphasis in original).

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

Spring and summer of 2011 brought to mind two instructive American chronological landmarks: the 235th anniversary of the signing of the Declaration of Independence and the 150th anniversary of the outbreak of the Civil War. One was as uplifting as the other was disheartening.

In launching a nation, the Declaration captured the core of democratic theory in its reference to "[g]overnments... deriving their just powers from the consent of the governed." Eighty-seven years later, as the American states were at war with each other after eleven of them refused to accept the outcome of the election of 1860, President Abraham Lincoln restated the principle of consent on the battlefield at Gettysburg as "government of the people, by the people, and for the people." However phrased, this founding principle had to be made operational. Otherwise, the "dependence on the people" that James Madison acknowledged in 1788 in **The Federalist, No. 51**, as "the primary control on the government" would not be achieved.

The Framers deployed the principle of consent in various ways in the plan of government they devised in Philadelphia in the summer of 1787. The Constitution entrusted the conduct of elections for national offices to the popularly elected legislatures of the pre-existing states, subject to modifications that Congress might make. People eligible to vote for "the most numerous Branch of the State Legislature" elected members of the House of Representatives, as Article I dictated. State legislatures designated members of the Senate. Electors, in numbers apportioned among the states in accord with the size of their congressional delegation and "appoint[ed], in such Manner as the Legislature [of each state]... may direct," chose the President and Vice President, as Article II dictated. Except for constitutional amendments that instituted popular election for Senators and significantly broadened the franchise, these provisions still control the election of national officers. By determining peacefully those who shall govern and by bestowing legitimacy on the decisions they make, the provisions have provided workable answers to the crucial question faced by every political system: who shall govern?

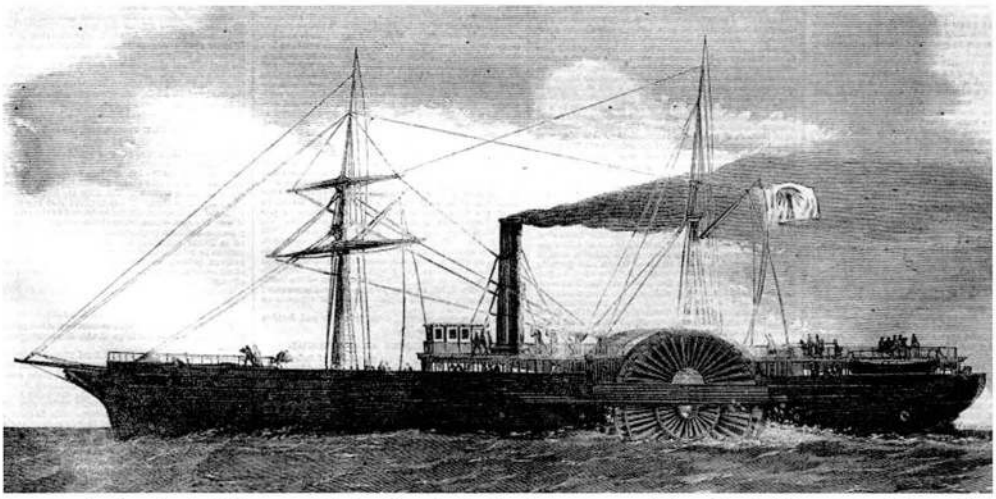
Yet, how did the Framers link the Supreme Court to the principle of consent? They deliberately detached that body from any meaningful "dependence on the people." The President, "by and with the Advice and Consent of the Senate," was to "appoint... Judges of the supreme Court" who, along with judges of the "inferior Courts" were to "hold their offices during good Behavior" and to enjoy "a Compensation, which shall not be diminished during their Continuance in Office," as Article III outlined. Thus, in April 1788, when Alexander Hamilton in **The Federalist, No. 78** imagined the Supreme Court and a national judicial power, he defended this "independence of the judges" as "an essential safeguard" against popular sovereignty, "against the effects of occasional ill-humors in the society." Of primary concern to Hamilton were "infractions of the constitution," which the anticipated power of judicial review would not only block and contain once they had occurred but perhaps even prevent. As Princeton's Professor Edward S. Corwin would observe 160 years later, "judicial review represents an attempt by American Democracy to cover its bet."[1]

Hamilton, however, strove valiantly in the seventy-eighth **Federalist** to lodge consent in the Court. Judicial review, he argued, did not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both." It was this convergence of an appointed Bench with the popular will that Chief Justice John Marshall articulated in *Marbury v. Madison*,[2] the first defense of judicial review in a decision by the U.S. Supreme Court. "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental.... Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law,... reduce[] to nothing, what we have deemed the greatest improvement on political institutions, a written constitution..."[3]

For Marshall, consent consequently had two dimensions: popularly derived authority to rule combined with popularly derived limits on that rule. This is the link Justice Robert H. Jackson succinctly captured almost a century and a half later in the *Steel Seizure Case*: the command of Article II that the President "shall take Care that the Laws be faithfully executed... gives a governmental authority that reaches so far as there is law," advised Jackson. Likewise, the Fifth Amendment's command that "[n]o person shall be... deprived of life, liberty or property, without due process of law... gives a private right that shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."[4]

Of course, John Marshall continues to cast a large shadow on the Constitution and on the development of American political institutions. To write about the fourth Chief Justice after 1800 is to write about the Supreme Court, and—with only a few exceptions, such as William Johnson and Joseph Story—to write about the Supreme Court in the first third of the nineteenth century is to write about John Marshall. Indeed, Marshall is sometimes referred to as the Great Chief Justice, as if no one else could ever be his equal. His place in the American pantheon means, therefore, that he has rarely been allowed to stray far from the center of scholarly attention. Alongside several biographies[5] is a host of more narrowly focused volumes, reams of articles, plus countless other studies in which Marshall's handiwork figures prominently. At the 1955 bicentennial of his birth, one bibliography counted nearly 750 titles.[6] The intervening years have surely pushed that number above 1,000.

To the current count one must now add two recent books on *Gibbons v. Ogden*,[7] one of the Marshall Court's most significant



Two new books about *Gibbons v. Ogden* illuminate the importance of that Marshall Court decision, which involved a steamship monopoly.

decisions. Indeed, for Indiana Senator Albert J. Beveridge, Marshall's first major biographer, that opinion "has done more to knit the American people into an indivisible Nation than any other one force in our history, excepting only war."[8] Both of these new books on *Gibbons* carry the case name as their titles. The first of these, ***Gibbons v. Ogden*, Law, and Society in the Early Republic**, is by Thomas H. Cox, who teaches history at Sam Houston State University in Huntsville, Texas.[9] Originally written as a doctoral dissertation at the State University of New York at Buffalo, Cox's book happily reads more like a freshly commissioned work and less like a treatise amassed for a doctoral examining committee.[10] The second treatment is ***Gibbons v. Ogden*: John Marshall, Steamboats, and the Commerce Clause** by Herbert A. Johnson[11] of the University of South Carolina School of Law, formerly editor of the *Papers of John Marshall*. The Johnson volume is one of the latest books to appear in the Landmark Law Cases & American Society Series. Published by the University Press of Kansas under the general editorship of Peter Charles Hoffer and N.E.H. Hull, this series of case studies now claims nearly five dozen titles, almost all of them treating decisions by the United States Supreme Court.[12] As a distinct scholarly category, the case study has been a venerable part of the literature on the judicial process for at least the past five decades, easily predating even the Landmark Law Cases series.[13]

Johnson's book on *Gibbons* had the benefit of Cox's research, in that Cox shared his dissertation with Johnson prior to its publication by the Ohio University Press.[14] The result is a pair of well-researched, readable, and insightful contributions to American constitutional history. Not surprisingly, Cox's is the stronger in the depth of the detail it provides about the case itself, while Johnson's makes the stronger link between Marshall's opinion and recent controversies under the Commerce Clause. Each is a valuable resource.

Except for those who live within view of a seaport or major navigable river, most Americans probably think about waterborne commerce today only when some calamity of nature such as flooding or a hurricane shuts it down. In an age when the country is dotted by airports and crisscrossed by railroads and interstate highways, it may be difficult to imagine a time when much of the movement of people and merchandise was by water, not by land or air. But that was the nature of transportation for much of the inland United

States in the first third of the nineteenth century, before railroads began to displace mule-drawn and pole-pushed canal boats and coast-hugging sailing vessels. *Gibbons v. Ogden* arose as a result of the introduction of a revolutionary contrivance into this way of life: the steamboat. This invention opened up unparalleled possibilities, because, in combining speed and power, it freed water transportation from reliance on wind and currents. Now commerce and communication in what had become the United States would be able to move beyond the four-mile-per-hour world they had long inhabited. As Cox explains, perhaps "nothing symbolized the economic growth of the young nation more than the spectacle of steam power, a scientific marvel that promised economic progress through technological innovation with minimal social upheaval. Unlike British factories, which invoked images of oppression and drudgery, steamboats appeared to early Americans as floating symbols of progress that would bring raw goods to market and refinement to the backcountry."[15]

Such opportunities were bound to breed conflict. In 1798, Chancellor Robert Livingston secured a monopoly from the New York legislature over steam travel in local waters, and he partnered with Robert Fulton in 1807 to produce the first practical steamboat. Ex-Governor Aaron Ogden of New Jersey held a license under the monopoly to operate a steam-powered ferry between New York and New Jersey. Georgia planter and former Savannah mayor Thomas Gibbons, who possessed a "coasting license" under a congressional statute but no license from the monopoly, operated boats on the same route in competition with Ogden. After litigation commenced, Chancellor Kent of the New York court upheld the monopoly and maintained that Congress had no direct jurisdiction over internal commerce or waters. While the story of the steamboat monopoly is complex, Cox relates it in great detail and, in so doing, opens a window into life and politics in southern New York and northern New Jersey at that time.

When the case reached the Supreme Court in February 1821, it involved the basic clash between the defenders of the monopoly and its enemies. From this distance, the strong-willed litigants and their associates in the various twists and turns of what had become a long-running controversy would today all seem be strong candidates for roles in a television miniseries. There were fortunes to be made, unmade, or retained. There were reputations to be vindicated or destroyed. Opposing counsel included Thomas Emmet, Thomas Oakley, Daniel Webster, and William Wirt. As Justice Joseph Story wrote an acquaintance, "We are to take up in a few days, another question, whether a State can give to any person an exclusive right to navigate its waters with steamboats, against the rights of a patentee, claimed under the laws of the United States . . . The arguments will be splendid."[16]

With extensive newspaper coverage along the East Coast of the oral arguments that stretched over four days in February 1824, interested parties and the general public understandably awaited a decision with great anticipation. At one level, vast sums of money were at stake in this clash between vested rights and the entrepreneurial spirit. At another level was a tangible conflict between states' rights and congressional power. At still another level was the meaning of the Constitution's Commerce Clause itself, and not far removed from any discussion of the commerce power of Congress was slavery and the traffic in slaves. Moreover, although government under the Constitution had been under way since 1789, the Hartford Convention of 1814–1815 was still a haunting and very recent reminder that a union of the states might still not be a truly accomplished fact.

Even the composition of the Bench that would decide the case had been uncertain for a time, after Justice Brockholst Livingston died in March 1823. For a successor, President James Monroe informally offered the seat

to Smith Thompson, his Navy Secretary and a former New York judge who had ruled in favor of the monopoly in one of the saga's earlier courtroom bouts in state court. As Cox explains, however, Thompson had presidential aspirations and equivocated. Wirt then urged the President to nominate James Kent instead, but the Republican Monroe was hesitant to put a strong Federalist on the Court. When early summer arrived with the seat still vacant, Justice Story wrote Chief Justice Marshall about his "deep anxiety as to the successor of our lamented friend, Judge Livingston. I have heard strange rumors on the subject. If the President does not make a very excellent appointment, he is utterly without apology, for there was never a more enlightened bar from which to make the best selection."[17] Having concluded by December that his presidential hopes were too tenuous, Thompson agreed to accept the seat. Yet he had no part in resolution of the steamboat case: his daughter's untimely death delayed his swearing in until after the case had already come down.

Moreover, to the consternation of many, the Court had to delay its planned announcement of the decision. Returning from dinner at the White House in February, the Chief Justice stepped on some ice and fell, dislocating his shoulder and briefly losing consciousness. "Although I feel no pain when perfectly still," he wrote to his wife Polly, "yet I cannot get up and move about without difficulty & cannot put on my coat. Of course I cannot go to court."[18] Before the decision was actually announced on March 2, rumors even surfaced that Justice Story was writing the opinion.

The opinion, however, not only carried Marshall's name but reflected his jurisprudence, approach to constitutional interpretation, and style. As was his custom, he wrote a good deal more than was necessary to decide the case, in that a simple resolution could have been had at the outset merely by finding a conflict between the congressionally based license and the state-conferred monopoly. The Supremacy Clause of Article Six would have then dictated the outcome. Marshall, however, seemed to have larger purposes on his mind and was successful in persuading his colleagues to follow his lead as he navigated around the interpretive shoals. For example, he expounded on the nature of the commerce power before finding the existence of a conflict. Counsel for Gibbons had contended that navigation was separate from commerce. Marshall insisted on a broad reading of the word: "This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation."[19] Similarly, "the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. . . . If congress has the power to regulate it, that power must be exercised whenever the subject exists."[20]

Significantly, Marshall linked his definition of commerce to his theory of national power. "This power, like all others vested in congress," he declared, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government."[21]

Recall that the steamboat case was decided only five years after the famous bank case of *McCulloch v. Maryland*,[22] in which the Chief Justice had laid out not only his doctrine of national supremacy but also his doctrine of implied powers. Not only did the Necessary and Proper (or elastic) Clause of Article One,

Section 8 give Congress a choice of means in carrying out the powers that the Constitution expressly granted, but by "necessary" Marshall reasoned that the powers so implied needed to be merely convenient and appropriate, not essential. Thus, Congress possessed not only those powers granted by the Constitution but an indefinite number of others as well unless prohibited by the Constitution. Joined with that understanding of implied powers, the authority of Congress to regulate commerce possessed a staggeringly broad potential—a potential probably beyond the capacity of most early nineteenth-century minds even to envisage.

Moreover, the breadth that the Constitution allowed in a choice of means was largely a matter for Congress, not the judiciary, to decide. That is, the limits on Congress were largely to be electoral or political, not judicial. "The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."[23]

Yet Marshall left unanswered the important question of whether the congressional commerce power was exclusive: "There is great force in this argument, and the Court is not satisfied that it has been refuted."[24] To have adopted an exclusive construction of the commerce power at this point would have cast grave constitutional doubt on the validity of any state law once it was held in fact to be a regulation of commerce.

Only late in the opinion did Marshall turn to the conflict between the congressionally authorized license and the monopoly—the conflict that decided the case. But the final part of the opinion revealed the larger concern on the Chief Justice's mind that probably explains the depth and breadth of the opinion. "Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use."[25]

Marshall thus said not only a good deal more but also a good deal less than was required to decide the case. Moreover, Cox notes, Marshall's overall use of language in this case matched architect Benjamin Henry Latrobe's assessment of the future Chief Justice's rhetorical style from nearly three decades earlier that entailed "placing his case in that point of view suited to the purpose he aims at, throwing a blazing light upon it, and keeping the attention of his hearers fixed upon the object to which he originally directed it."[26]

Cox and Johnson both properly emphasize Justice William Johnson's concurring opinion, in which he ventured a position on the very issue Marshall had only skirted: the exclusivity of the national commerce power. "Power to regulate foreign commerce," Johnson explained, "is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive.... If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction that, if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of would be as strong as it is under this license."[27] In other words, the federal statute in play was of dubious significance in Johnson's view because, even in its absence, the Commerce Clause, by its own force, opened New York's waters to Gibbons and neutralized the

restraints of the monopoly. Ironically, Justice Johnson—whom the third President sent to the Court, after all, in part to provide an intellectual counterweight to Marshall—seems to have out-Marshalled Marshall. Indeed, a newcomer to the case who reads that strongly nationalistic passage may be forgiven for thinking that Johnson had wandered off the Jeffersonian reservation.

Both authors believe that the South Carolinian's views in *Gibbons* rested on broad concerns and that they were reinforced by his own circuit decision in *Elkison v. Deliesseline*,[28] decided in the wake of an attempted slave revolt in South Carolina that prompted the state legislature to pass the Negro Seaman Act. This statute required black sailors to remain quarantined on board ship while their vessels were in port. When the Charleston sheriff arrested Henry Elkison, his attorney contended that the statute violated the Commerce Clause and a treaty with Great Britain. Johnson repudiated this statute "as altogether irreconcilable with the powers of the general government." If the state could flout one national mandate, then "it may be done as to all; and, like the old Confederation, the Union becomes a mere rope of sand."[29] For the first time, an American court had found in the Commerce Clause a basis for invalidating state legislation. The right of the "general government to regulate commerce with the sister states and with foreign nations is a paramount and exclusive right," Johnson declared. The very words of the grant to Congress "sweep away the whole subject, and leave nothing for the states to act upon."[30] Understandably, the decision did not sit well with many of Johnson's fellow South Carolinians. As Marshall wryly remarked to Justice Story, "Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny states' rights in South Carolina, and will find some difficulty, I fear, in getting off on smooth open ground."[31]

A reading of either the Cox or Johnson books will be enriched by revisiting the splendid discussion of Justice Johnson's role in the steamboat case as it is presented in Donald Morgan's insightful biography of Marshall's colleague.[32] Morgan does not overlook the influence of the *Elkison* case, but he argues that something else was at work as well. Indeed, Morgan suggests that, if any one person persuaded Johnson to state his views in the case, "it was not Marshall but Jefferson."[33] Accordingly, Johnson's *Gibbons* opinion expressed an economic philosophy that he had been formulating for many years: an enthusiasm for free commercial enterprise. "[T]his Republican justice found comfort in what he took to be Jefferson's conception of commerce. That leader had done much . . . to stimulate international trade, for commerce between the nations strengthened the bonds of international society, diffused among all countries the achievements of each, and propagated the truths of science and religion."[34]

Justice Johnson's role in *Gibbons* highlights a major theme of Professor Johnson's study: that the case "represents an important transitional point in Marshall's career—and it is also the most significant example of his ability to gain agreement despite the existence of extreme differences among his colleagues." Because of the traditional tendency of scholars of the Marshall Court to see the Chief Justice as a strong leader, the steamboat opinion should instead be studied as a "mediated opinion and a demonstration of the deft use of dicta coupled with a narrow holding" that is "entitled to much closer attention than it has hitherto received."[35]

The concluding chapter of the Johnson volume lends a helpful perspective to the steamboat case. "Historically and geographically, John Marshall's opinion . . . has indeed had a very long and formative impact on American law. It shows no promise of declining in importance as a vital area for the interpretation of federalism in the union, and as an instrument for implementing programs both within the nation and in the international world. Yet *Gibbons* deserves its lasting

reputation as much for what it left unsaid as for what it decided. In its broad and catholic discussion of interstate commerce, it laid down general principles of law and economic regulation that have lasting validity. And, in its balanced approached to federal and state authority, taking care that neither governmental system should improperly usurp the functions of the other, it provided a primer for constitutional thought in the vital areas of business and economics. For these reasons, the passage of time has not diminished the impact of what undoubtedly is one of Marshall's greatest achievements in shaping future constitutional jurisprudence in the United States of America."[36]

At least since publication of Senator Beveridge's mammoth biography of Marshall nine decades ago, any discussion of the fourth Chief Justice usually evolves—sooner rather than later, and for obvious reasons—into a discussion of leadership. A path-breaking paper presented professionally fifty-one years ago (and since reprinted in at least one anthology on judicial behavior) applied the concept of small-group leadership functions—specifically "task" and "social" leadership—to the Chief Justice.[37] From this perspective, a task leader is one who presents views with force and clarity, defends them successfully in discussions with colleagues, provides guidance for handling perplexing situations, and assumes responsibility for orienting conference deliberations and writing opinions.[38] A Chief Justice excelling in social leadership relieves tensions, encourages solidarity and agreement, attends to the emotional needs of colleagues, and may be one of the most liked members of the Bench.[39] This conception of leadership confirms "the common sense observation that a man who wishes to exert influence over his fellows can do so most effectually if he is both intellectually disciplined and tactful in interpersonal relations."[40]

Inhering in the idea of task leadership in a judicial setting, however, are two distinct functions: managerial and intellectual leadership. Considering these separately may offer a clearer window into judicial leadership, especially when a Chief Justice might be stronger with respect to one than to the other.[41] A Chief Justice as managerial leader keeps the Court abreast of its docket, maintains a maximum degree of Court unity, provides expeditious direction of the judicial conference, and assigns opinions thoughtfully and purposefully. A Chief Justice as intellectual leader presents his views persuasively, is a principal source of ideas and doctrine, and provides tactical and strategic guidance in political dilemmas. This division thus allows a probing of three measures of leadership: social, managerial, and intellectual. Moreover, it invites a consideration of leadership with respect to members of the Court other than the Chief Justice.

From this trichotomy, the first element seems especially appropriate in assessing William J. Brennan, Jr., who is now the subject of a substantial and exceedingly admiring study by Seth Stern, who apparently did most of the writing, and Stephen Wermiel, who apparently did most of the research. Stern is a reporter for *Congressional Quarterly*, and Wermiel is the former Supreme Court reporter for the *Wall Street Journal* and now teaches at the law school of Washington's American University. Their **Justice Brennan: Liberal Champion**[42] should be read as an authorized biography, although the authors insist that the Justice never tried to exercise editorial control over the content of the project. He did encourage clerks and family members to cooperate, and the authors report that more than 100 of the some 108 clerks during his years as a sitting Justice agreed to be interviewed.

Without question, Stern and Wermiel have selected a subject particularly worthy of study. Brennan's thirty-four-year tenure on the Court, from his appointment in 1956 until his retirement in 1990, ranks him among the longest-serving Justices appointed during the twentieth century. That time span is all the more noteworthy when one realizes that it includes all but three years of the Warren Court, all of

the Burger Court, and part of the Rehnquist Court. As most students of the Supreme Court are aware, those periods, straddling as they did all or part of the administrations of eight Presidents, qualify as among the most active, fascinating, and legally eventful in American constitutional history. Thus, even had Brennan had only a bit part in the Court's business during that time, he would nonetheless remain an intriguing focus for a book. Brennan, however, was hardly a passive Benchwarmer. Through as many as 1,350 opinions that bear his name, Stern and Wermiel believe that he had a leading part.

Indeed, as not so subtly suggested by the book's subtitle, the theme that runs through their extensively documented book is that of a champion of liberal political values who was not only persistent but also effective. As they insist near the outset,

> [L]ittle in his career as a corporate labor lawyer and New Jersey state judge suggested that William Brennan would emerge as perhaps the most influential justice of the entire twentieth century. No one could ever have predicted that Brennan would become the most forceful and effective liberal ever to serve on the Court. In fact, few if any of the eight men who served as president during his tenure could claim to have had such a wide-ranging and lasting impact. Brennan interpreted the Constitution expansively to broaden rights as well as create new ones for minorities, women, the poor, and the press. His decisions helped open the door of the country's courthouses to citizens seeking redress from their government and ensured that their votes would count equally on Election Day. Behind the scenes, he quietly helped craft a constitutional right to privacy, including access to abortion, and bolstered the rights of criminal defendants. In the process he came to embody an assertive vision for the courts in which judges aggressively tackled the nation's most complicated and divisive social problems.[43]

While much of this impact came through the "extraordinary influence" Brennan exhibited while working alongside Chief Justice Warren, Brennan continued to enjoy nearly as much success under two Republican-appointed successors, "largely holding the line against a conservative retrenchment."[44]

Brennan apparently resented the perception, fueled particularly by publication of **The Brethren** in late 1979,[45] that he "operated in the Court like a savvy Irish ward boss." Yet the authors believe that "the justice himself understated his role as a political operator. Brennan tried to portray himself as someone who remained completely detached in his chambers, relying on formal memos to communicate with colleagues. But he regularly deployed his clerks as a diplomatic corps to gather information and to act as middlemen with other chambers."[46] Stern and Wermiel quote scholar Mark Tushnet's observation that the Justice was successful as a politician in a deeper sense: "Like all good political leaders, Brennan structured the process of decision and gave his colleagues reasons for doing what he understood to be the right thing."[47] This was especially true in the 1980s, when Brennan's leadership skills faced their biggest challenge. It was a time when the Court's liberal bloc had, at most, four members in good standing: Thurgood Marshall, Harry Blackmun, John Stevens, and Brennan himself. In many instances, therefore, it was a story of four votes in search of a fifth if the legacy of the old Warren Court was to prevail.

The authors base their claims about Brennan's leadership upon research that drew not only from conventional published sources and manuscript collections available to any diligent scholar, but also from sources access to which was practically restricted to them. These

include, for example, more than sixty hours of interviews that Wermiel conducted with Brennan in his Chambers, the privilege of being present at morning coffee sessions between Brennan and his clerks, and—perhaps most important—access to Brennan's "Term histories," which apparently have been seen by only a few people outside the Court. According to the authors, one of the others given such access was Professor Bernard Schwartz of New York University for use in his book **Super Chief** about the Warren Court.[48] "Ironically, the book did more to reveal Brennan's significant influence and contributions behind the scenes on the Warren Court than it did to enhance Warren's reputation."[49] While **The Brethren** "provided a glimpse" of that role in the early Burger years, Schwartz's book "was the first to document fully how quietly influential he was during Warren's tenure. Brennan's central role would later be taken for granted, but at the time it was a true revelation."[50] Equally ironic, perhaps, was Brennan's reaction to Schwartz's book: "I must say I had expected something better," the Justice wrote to Judge Ruggero Aldisert in 1984.[51]

As Stern and Wermiel explain, the Term histories were produced in the Court's print shop and "physically resembled the justices' opinions in appearance and style. To be sure, these accounts cannot be relied on as a definitive historical record or as Brennan's personal memoir. Although many were written in the first person, the clerks did nearly all the drafting, usually with little overt instruction or input from Brennan in advance and scant editing upon completion. The resulting products vary greatly in length, quality, and detail. Many were colored by the biases of clerks who wrote them or a desire to please their boss."[52] Nonetheless, Stern and Wermiel find the histories to be a "valuable subjective chronicle of what Brennan and his clerks directly observed and how they perceived events."[53] This they seem to acknowledge for at least two reasons. First, the histories "often provide the only record of private meetings and conversations between justices." Second, they "make it possible to track changes in Brennan's tactics and strategies—and his impressions of colleagues—over time."[54] Still, in the interest of careful scholarship, one would hope that the authors exercised due diligence in their use of the histories, especially in terms of cross-checking with other sources where possible. Instances where the histories might be the sole source would seem to be those that properly call for injecting real hesitancy into any conclusion drawn by either the authors or any reader.

With these limitations as well as advantages, readers should realize that the book is very much a *Supreme Court* biography. That is, the principal focus is on Brennan as Justice. His upbringing, education, law practice, and service on the New Jersey supreme court receive only relatively brief attention. This is hardly a negative comment about the book, only an observation about what the authors presumably thought most important to include within the length of what their editor would allow. As it is, there was enough about Brennan as a member of the U.S. Supreme Court alone easily to fill the nearly 600 pages in the book.

Consider, for example, Brennan's nomination, to which the authors properly devote a full chapter that they fittingly entitle "Ike's Mistake." Among twentieth-century presidents, Eisenhower's impact on the Supreme Court measured solely by number of appointments was substantial. Except for Franklin D. Roosevelt, only William Howard Taft, with six, bested Eisenhower's five. Eisenhower's third opportunity to name someone to the High Court arrived with the retirement of Truman appointee Sherman Minton. After hints of Minton's departure reached the White House, the President directed Attorney General Herbert Brownell to start thinking about "a very good Catholic, even a conservative Democrat." On another occasion Brownell was told to find "an outstanding man, with court experience, regardless of his political affiliation"[55] as well as someone who was in good health

and relatively young. Eisenhower was singularly unimpressed with what he viewed as President Truman's "patronage selections."[56] Emphasis on selection of a Catholic came at the insistence of New York's Cardinal Spellman who, the authors report, "made deals and traded favors with such aplomb that it was as if he operated out of Tammany Hall rather than St. Patrick's Cathedral."[57] The Catholic emphasis— there had been no Catholic on the Court since Justice Frank Murphy's death in 1949—and willingness to consider a Democrat also reflected Eisenhower's impending campaign for a second term.

Assisting Brownell in the process was his deputy attorney general, William Rogers. Both understood that the nomination posed a challenge. "Only a handful of judges in the entire country satisfied all of Eisenhower's criteria . . . There were only two federal judges who qualified, and one of them had never served as an appellate judge. At the state level, Brennan, at fifty, was the only Catholic appellate judge under the age of sixty."[58] With so few candidates, Brennan became an inviting prospect, particularly since the Conference of State Chief Justices had reminded the President that no state judge had been picked for the High Court in nearly three decades. Rogers, who later recalled that he had been the first to put forward Brennan's name because of the New Jersey judge's impressive performance at a Justice Department conference a few months earlier, "quietly began reaching out to people in New Jersey who knew Brennan and researching his opinions."[59] Brownell then quizzed New Jersey's Chief Justice Arthur Vanderbilt in several telephone conversations. According to Stern and Wermiel, the Attorney General later said that he had "read all thousand pages of Brennan's four hundred New Jersey Supreme Court opinions, an unthinkable level of involvement by an attorney general today."[60] As the process moved along, only three weeks lapsed between Minton's formal announcement of his retirement and Brennan's summons to Washington to meet with

According to Seth Stern and Stephen Wermeil's new biography of William J. Brennan, Jr., Deputy Attorney General William Rogers (pictured) and Attorney General Herbert Brownell "appeared to have devoted more energy to ensuring that Brennan was a faithful Catholic than that he was a reliable vote for the Court's conservative bloc."

Eisenhower. According to the authors, Senator Joseph McCarthy of Wisconsin, who had been highly critical of Brennan during the Judiciary Committee's hearings, "uttered the single loud 'no'"[61] when the Senate confirmed the New Jersey judge in March 1957, making permanent the recess appointment Brennan had received in October 1956.

As the authors note, with hindsight it is not hard to find several of Brennan's state court opinions "that might have given a conservative Republican pause,"[62] but the opinions were reasoned and written well, and there were no character concerns with Brennan. Besides, both Rogers and Brownell were moderate Republicans with ties to the Thomas Dewey wing of the party, not to the Robert Taft wing. Moreover, this was at a time long before what are today known as social conservatives came to be a force within the Republican party. "Brownell, who had chaired the Republican National Committee for four years, surely appreciated the value of picking a nominee who might curry favor with Catholic voters

in the Northeast—including Brennan's home state."[63] Thus the authors' analysis suggests that, for both Rogers and Brownell, ideology—at least as ideology came to be understood *after* Brennan ascended the Bench—was not centrally important. They "appeared to have devoted more energy to ensuring that Brennan was a faithful Catholic than that he was a reliable vote for the Court's conservative bloc."[64] Accordingly, at least in this reader's eyes, the chapter might perhaps more accurately be titled "Herb and Bill's mistake."

But it is Brennan's work on the Court that fills the bulk of the volume. Here the book is rich with numerous examples of instances in which a decision bore a heavy Brennan imprint, as the discussion of *Terry v. Ohio*[65] illustrates. Indeed, the authors regard his imprint as sufficiently heavy in this case that they conclude that *Terry* "may be the most formidable example of Brennan [sic] ghostwriting an opinion that term."[66] Decided late in the Warren era, this case presented the Court with circumstances in which a police officer in Cleveland, Ohio confronted suspiciously acting persons on the street and, while frisking one of them, found a weapon. The case involved no search incident to arrest, because no one had been arrested before the frisk. Had the officer acted in accord with the Fourth Amendment?

At conference, "Brennan helped move his colleagues toward the view that any stop and frisk had to be supported by probable cause, as if there were an arrest and search being carried out."[67] Moreover, Brennan apparently assumed that the Chief Justice would assign the opinion to him. Warren, however, self-assigned the Court's opinion. Brennan's disappointment was heightened when he read the first draft that Warren circulated, which "focused largely on the frisk rather than the initial question of whether the officer had justification to stop the suspect." After other Justices had noted their views, "Brennan took the highly unusual step of taking the comments of various other justices and Warren's draft and quietly writing his own version of the opinion."[68] Brennan's draft attempted to modify the tone of Warren's draft, which Brennan believed might encourage police to stop individuals freely, a practice that might inflame racial tensions that were already so evident in the late 1960s. As Brennan confided to his Chief, "In this lies the terrible risk that police will conjure up 'suspicious circumstances' and courts will credit their versions."[69] Presumably, his fear may have been that the stop would become incident to the frisk rather than the frisk remaining incident to the stop.

Yet Brennan abandoned "the use of probable cause as the required threshold for police to stop and frisk,"[70] although the authors do not explain if that was because of Warren's change of mind or because the shift was essential to retain at least five votes. Instead Brennan drew upon the Fourth Amendment's phrasing of "unreasonable" searches and seizures to introduce the standard that should guide police. Brennan must have concluded that the traditional probable cause standard "was simply not a feasible approach to the immediacy of the stop-and-frisk situation."[71] One wonders whether this shift may have been driven at least in part by the particular facts of the case, in which the investigating police officer seemed to take precisely the steps most law-abiding business owners or other citizens on the street would have expected him to take.

As *Terry* came down, Warren's opinion for the majority explained that the officer need have only "reasonable suspicion" (not probable cause) for his action, a standard that has seemed to apply both to the stop and to the subsequent frisk. The initial insistence on probable cause as an essential prerequisite to the initial stop survived only in a solo dissent by Justice William O. Douglas. Neither of the individual concurring opinions filed by Justices John Harlan and Byron White expressed the slightest bit of discomfort with the generous latitude the decision handed to police. *Terry* was thus a remarkable decision. In a

decade characterized by Warren Court rulings expanding the rights of criminal suspects and restricting the police, the holding pointed entirely in the opposite direction.

While still a justice on the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes, Jr. maintained that theory "is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.[72] Happily, Justice Brennan's biographers do not slight theory entirely. In particular, they revisit a debate in which Justice Brennan played a part in the mid-1980s, when Edwin Meese III was Attorney General of the United States, and he and others in the administration of President Ronald Reagan had made changing the direction of the Supreme Court and the lower federal courts a top priority. Indeed, Brennan became "the very archetype of the kind of justice they wanted to avoid appointing. So too would Brennan become the leading target as conservatives sought to articulate what was wrong with the Supreme Court,"[73] which, from the perspective of conservatives, had become in reality a super-legislature.

Meese, in turn, "saw himself engaged in a war of ideas over how to interpret the Constitution."[74] In the wake of the Court's ruling in 1973 creating a constitutional right to abortion,[75] the preferred approach to constitutional interpretation had taken on a degree of urgency and intensity perhaps not felt since the debate over the constitutional validity of the New Deal in the 1930s. With an enlarged public affairs unit at the Justice Department, the Attorney General wanted "to spark a broader public debate" about the "proper role of the unelected Court in a democratic system."[76] Accordingly, Meese used an address to the American Bar Association in July 1985 to speak on a "Jurisprudence of Original Intention" in which he accused the Justices of abandoning the text of the Constitution and construing the document "to mean whatever they wanted. As Meese's advisers hoped, the attack received significant press coverage."[77]

Well before Meese's speech in July, however, Brennan had agreed to participate in a symposium at Georgetown University in October. As early as June, Brennan's clerks had begun work on the October remarks.[78] As delivered, they amounted to a rebuttal of Meese's argument. Attempting to "find legitimacy in fidelity" to the Framers of the Constitution "was little more than arrogance cloaked as humility," Brennan insisted. He accused advocates of originalism of engaging in a "facile historicism."[79]

Newspapers understandably construed the Georgetown speech as a counterattack on Meese, although the authors report that Brennan insisted this was not his intention, a denial corroborated by his clerks.[80] Nonetheless, even if Brennan had not set out to take on Meese, "he nevertheless liked the publicity that resulted when everyone else thought he had."[81] Moreover, the Meese-Brennan debate receded neither quickly nor quietly. The following year, Assistant Attorney General William Bradford Reynolds spoke of Brennan at the University of Missouri School of Law as one "who prefers to turn his back on text and historical context, and argues instead for a jurisprudence that rests, at bottom, on a faith in the idea of a living, evolving Constitution of uncertain and wholly uninhibited meaning."[82] Meese and Brennan did not originate the debate in the American constitutional tradition over originalism, but they certainly made it come to life for a new generation.[83]

A second arena of theory in which Brennan had considerable impact concerns a seemingly mundane topic that some scholars have labeled judicial federalism—the interaction between state and federal courts. Yet, this subject is anything but unexciting or humdrum. One of the dimensions of judicial federalism involves Supreme Court review of state court decisions, which arguably rest on a state, not on the national, constitution. At least since *Cohens v. Virginia*[84] was decided in 1821, it has been textbook political science that the

Supreme Court may properly sit in judgment on the decisions of the highest court of a state when a federal question is involved in a case. Once a federal question is present, the Supreme Court becomes the ultimate arbiter of its resolution. This rule encourages uniformity among the states. In contrast, the absence of a federal question encourages diverse policies, because there is no overarching judicial mechanism for imposing uniform rules of law on the states. In such situations, resolution of an issue rests with the individual states.

In the context of this principle, one of the dramatic changes in American constitutional law wrought by the Warren Court was to accelerate the process by which nearly every provision of the Bill of Rights was applied to the state governments and their municipal subdivisions. Originally added to the Constitution to limit the national government, the Bill of Rights became applicable to the states on a case-by-case basis in the decades following ratification of the Fourteenth Amendment in 1868.[85] This nationalization of almost all parts of the Bill of Rights, which was nearly complete by the 1960s, has had immense consequences for federalism, personal freedom, and judicial power. Until this nationalization became a reality, Americans remained subject to a double standard of justice under the Constitution. For a defendant standing trial, for example, the federal constitutional rights she or he enjoyed depended on whether the trial was in state or federal court. Supreme Court review was far more demanding of the latter than of the former. However, as the Warren Court became the Burger Court in the 1970s, the pace of Bench-imposed reforms slackened, particularly in criminal justice matters. Into this breach stepped some state judges who would give greater protection to a right found in both state and federal constitutions and rest their decision on the former. This process meant that, in some instances, interpretation of a few state constitutions was friendlier to individual freedom than was the High Court's construction of similar provisions in the federal Constitution. In Stern and Wermiel's account, Brennan became an enthusiastic cheerleader for this movement.

The occasion for Brennan's foray into what scholars would later term "the new judicial federalism" was an address to the New Jersey Bar Association in May 1976, in part to honor the Justice's 70th birthday. The setting was the Playboy Great Gorge Hotel, about an hour's drive northwest of Newark, where the carpet was "still patterned with the company's signature bunny logo and cocktail waitresses bedecked as bunnies served drinks."[86] Brennan's speech was a "passionate plea for state courts to take up the mantle of protecting constitutional rights he believed his colleagues on the Supreme Court had abdicated." "State courts no less than federal are and ought to be the guardians of our liberties," and he had come "prepared to cite more than a dozen recent cases where he believed his own Court had interpreted the Bill of Rights too narrowly and a few instances where state courts, including New Jersey's, had stepped into the breach."[87] Whether due to the incongruity between the message and its setting or to the evening's libations, the Justice faced a particularly inattentive audience, cut his speech short, and returned to his seat. Yet, when later published in the *Harvard Law Review*,[88] the aborted remarks "became the most famous and widely quoted of his entire career" and were credited with "helping to launch or at least jump-start a renaissance in state constitutional law."[89]

With either the New Jersey Bar event or the unstaged exchange with Attorney General Meese, Brennan presumably expected some attention in the press. Indeed, based upon **Justices and Journalists,**[90] by political scientist Richard Davis of Brigham Young University, such coverage in the news media would not only be anticipated, but, *because* it was anticipated, be seen by Brennan as desirable. The volume explores the sometimes awkward and occasionally rocky relationship between the Supreme Court and the news media—an awkwardness that derives in part from what

has been termed the Court's "triple debility."[91] The first element of this debility is the Court's ambivalent authority as to the legitimacy of its political function: alongside the express grants of power to Congress and the President in Articles I and II, did the Framers, in their conveyance of "the judicial Power" by way of Article III, truly intend the Court to have a major hand in policymaking? The second element is the Court's antidemocratic function inherent in judicial review—the so-called countermajoritarian dilemma—whereby an unelected branch negates an action of the elected branches. The third element is the Court's apparent aloofness: the electorally unaccountable Court decides cases largely in secret, and its constitutional decisions can be corrected, short of a change of mind by the Court, only through an extraordinary and only rarely successful political exertion called a constitutional amendment. Moreover, in contrast to elected officials—who go out of their way to cultivate positive publicity and to curry favor with voters—the Justices, through their robed appearance, ritual, and formal pronouncements of decisions, historically have seemed to follow a different model.

Or have they? What Davis shows is that, practically from the beginning, the Justices have not been nearly so detached from the world of publicity as they might sometimes pretend and that there have been very good strategic reasons both why news coverage of the Court matters and why the Justices have periodically attempted to shape that coverage. As is true with any good piece of political analysis, Davis's book begins with a question arising from the facts of everyday life. Those facts cause him to suggest that today the "justices have shed their camera shyness" and then to ask, "Is something going on here? Are U.S. Supreme Court justices 'going public'? Have the justices decided to become more visible to attract the attention of the press and the public? Has there been a conscious decision to raise their public profile? If so, why?"[92]

As Davis describes the structure of his book, the first chapter portrays how and why justices "act as strategic actors in their relations with . . . the press and the public." The second chapter "reviews general expectation of judicial behavior vis-à-vis the press and then offers explanations of recent factors that might contribute to a shift in justices' attitudes toward the press and the public."[93] It is here that journalist Adam Liptak's inclusion in his Foreword of a colleague's published observation has relevance: "Justice _____'s 'strange musings' illustrate the danger of allowing Supreme Court justices to go on live television for their book tours."[94] The next two chapters probe the "extent to which the justices in the past have engaged in public relations, particularly via the press, and whether the current justices are acting differently from their predecessors.[95] In the major research contribution of Davis's study, chapter six then presents the results of an extensive content analysis of press coverage of the Justices between 1968 and 2007. The final chapter centers on the recent appointees and discusses the implications of "going public" for individual Justices and for the Court as an institution. There seems to be little or no attention to the possible future role of social media such as Facebook, Twitter, or their probable successors. Attention to the debate over televised coverage of the Court's public sessions falls in chapter two.[96]

Davis's analysis points in different directions. "On the one hand, the record of the past shows us that when justices 'go public,' they can assist the institution," as illustrated by the efforts of both Chief Justice Marshall in "presenting a united front for the Court as well as the writing of essays in the face of external attacks on its role and legitimacy" and Justice Charles Evans Hughes, whose "written communication undermined support for the Court-packing plan."[97] But that kind of behavior is not risk-free, because the "Court's role is still a tenuous one. Public approval, although still higher than that for the other institutions of government, waxes and wanes." The challenge for the current Bench is substantial: "As today's justices encounter their new media environment, the question of how their unique institution, with its antiquated traditions and

mores, survives in a highly contrasting media culture is one that will affect not only them personally but also the institution they represent." The tension they face is one between "their own individual objectives" and "institutional imperatives."[98]

Indeed, any personal effect may depend in part on a Justice's experience in the public arena or the absence of such experience. As Davis observes, with the Court of 1997, five members came to the Bench with "experience as executive political appointees or legislators," but "a little more than a decade later, there were only two—Thomas and newly appointed Justice Elena Kagan,"[99] although it is not clear why the executive branch experience of Justice Alito and Chief Justice Roberts was apparently overlooked. Nonetheless, Davis reports that, except for a decade in the 1970s, this "was the first time since its inception in 1790 that the Court lacked a member who previously had served as an elected official."[100]

Whether the focus is on the current Supreme Court as Davis describes it, the Marshall Court that decided *Gibbons v. Ogden*, or the Court of the Brennan era, the four volumes surveyed here are reminders of the continuing role of the Supreme Court in American government. "Democratic institutions are never done." observed Princeton's Professor Woodrow Wilson over a century ago. "[T]hey are like living tissue—always a-making. It is a strenuous thing, this living of the life of a free people."[101] Because of the Supreme Court, America's democratic institutions seem ever to be in a remaking role, as they reflect and embody the foundational principle of the consent of the governed as both an affirmation of and a limit on majority rule.

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

COX, THOMAS H. ***Gibbons v. Ogden*, Law, and Society in the Early Republic** (Athens: Ohio University Press, 2009). Pp. xvi, 260. ISBN: 978-0-8214-1846-8, paper.

DAVIS, RICHARD. **Supreme Justices and Journalists: The U.S. Supreme Court and the Media** (New York: Cambridge University Press, 2011). Pp. xviii, 241. ISBN: 978-0-521-70466-3, paper.

JOHNSON, HERBERT A. ***Gibbons v. Ogden*: John Marshall, Steamboats, and the Commerce Clause** (Lawrence: University Press of Kansas, 2010). Pp. xv, 198. ISBN: 978-0-7006-1734-0, paper.

STERN, SETH, and STEPHEN WERMIEL. **Justice Brennan: Liberal Champion** (Boston and New York: Houghton Mifflin Harcourt, 2010). Pp. xvi, 674. ISBN: 978-0-547-14925-7, cloth.

ENDNOTES

[1]Edward S. Corwin, Book Review, 56 *Harvard Law Review* 484, 487 (1942).

[2]5 U.S. (1 Cranch) 137 (1803).

[3]*Id.*, 176, 178.

[4]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[5]For example, see Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916–1919); Leonard Baker, **John Marshall: A Life in Law** (1974); Francis N. Stites, **John Marshall: Defender of the Constitution** (1981); and Jean Edward Smith, **John Marshall: Definer of a Nation** (1996).

[6]James Servies, **A Bibliography of John Marshall** (1956).

[7]22 U.S. (9 Wheaton) 1 (1824).

[8]Beveridge, **The Life of John Marshall**, vol. 4 (1919), 429–30.

[9]Thomas H. Cox, ***Gibbons v. Ogden*, Law, and Society in the Early Republic** (2009), hereafter cited as Cox.

[10]A sampling of Cox's research has already been shared with readers of this *Journal*. See Cox's "Contesting Commerce: *Gibbons v. Ogden*, Steam Power, and Social Change," in *Journal of Supreme Court History* vol. 34 (March 2009), 55–73.

[11]Herbert A. Johnson, ***Gibbons v. Ogden*: John Marshall, Steamboats, and the Commerce Clause** (2010), hereafter cited as Johnson.

[12]A current list of titles is available at http://www.kansaspress.ku.edu/printbyseries.html (last visited Dec. 3, 2011).

[13]For example, see Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (1959); and C. Herman Pritchett and

Alan F. Westin, **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963).

[14]As Johnson writes in his acknowledgements, "he kindly permitted me access to the text of his dissertation before its publication, and this was most helpful in allowing me to check various details concerning the case and the social and economic factors touching upon the development of the steamboat and the Livingston-Fulton monopoly." Johnson, xiv.

[15]Cox, x.

[16]Quoted in *id.*, 126.

[17]Quoted in *id.*, 140.

[18]*Id.*, 153–54.

[19]22 U.S. 1, 189–90.

[20]*Id.*, 195.

[21]*Id.*, 196, 197.

[22]17 U.S. (4 Wheaton) 316 (1819).

[23]22 U.S. (9 Wheaton) 1, 197 (1824).

[24]*Id.*, 209.

[25]*Id.*, 222.

[26]Cox, 154.

[27]22 U.S. at 228, 231–32.

[28]8 Fed. Cas. 493, no. 4366 (C.C.D.S.C. 1823).

[29]*Id.*, 496.

[30]*Id.*, 494–495.

[31]Quoted in Cox, 142.

[32]Donald G. Morgan, **Justice William Johnson: The First Dissenter** (1954), 190–206.

[33]*Id.*, 191.

[34]*Id.*

[35]Johnson, xii.

[36]*Id.*, 174–75.

[37]David Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," in Walter F. Murphy, C. Herman Pritchett, and Lee Epstein, **Courts, Judges, & Politics: An Introduction to the Judicial Process** 662, 663 (5th ed. 2002).

[38]*Id.*

[39]*Id.*

[40]Walter F. Murphy, "Marshaling the Court: Leadership, Bargaining, and the Judicial Process," 29 *University of Chicago Law Review* 640, 642 (1962). Of course, the same "common sense observation" would apply to a woman as well.

[41]D. Grier Stephenson, Jr., "The Chief Justice as Leader: The Case of Morrison Remick Waite," 14 *William and Mary Law Review* 899, 900 (1973); Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," *Journal of Supreme Court History* 63, 64 (1991).

[42]Seth Stern and Stephen Wermiel, **Justice Brennan: Liberal Champion** (2010), hereafter cited as Stern and Wermiel.

[43]*Id.*, xiii.

[44]*Id.*

[45]Bob Woodward and Scott Armstrong, **The Brethren** (1979). *See* Stephenson, Book Review, 46 *Brooklyn Law Review* 373–80 (1980).

[46]Stern and Wermiel, 464.

[47]*Id.*

[48]Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (1983).

[49]*Id.*, 491.

[50]*Id.*

[51]*Id.*

[52]*Id.*, 465–66.

[53]*Id.*, 466.

[54]*Id.*

[55]*Id.*, 77.

[56]*Id.*, 74.

[57]*Id.*

[58]*Id.*, 78.

[59]*Id.*

[60]*Id.*, 79. In fact, one would think that 400 state court opinions would greatly exceed 1,000 pages in total length.

[61]*Id.*, 119. The official U.S. Senate internet listing of Supreme Court nominations and confirmation votes shows only a voice vote for Brennan, with no negative votes recorded. United States Senate, Statistics and Lists, *available at* http://www.senate.gov/pagelayout/reference/tnominations/Nominations.htm (last visited Dec. 3, 2011).

[62]Stern and Wermiel, 79.

[63]*Id.*, 79.

[64]*Id.*

[65]392 U.S. 1 (1968).

[66]Stern and Wermiel, 301.

[67]*Id.*, 300.

[68]*Id.*

[69]*Id.*, 301.

[70]*Id.*, 300.

[71]*Id.*, 301.

[72]O. W. Holmes, Jr., "The Path of the Law," 10 *Harvard Law Review* 457, 477 (1897).

[73]Stern and Wermiel, 503.

[74]*Id.*, 503–504.

[75]*Roe v. Wade*, 410 U.S. 113 (1973).

[76]Stern and Wermiel, 504.

[77]*Id.*, 504.

[78]One of the clerks assisting Brennan on his project was Donald Verrilli, much later to be Deputy White House Counsel and confirmed in June 2011 by the Senate as Solicitor General in the Obama administration. Joan Biskupic, "Senate Approves Donald Verrilli as Solicitor General," *USA Today* (June 6, 2011), *available at* http://www.usatoday.com/news/washington/judicial/2011-06-06-Donald-Verrilli-solicitor-general_n.htm?csp = 34news (last visited Dec 3, 2011).

[79]Stern and Wermiel, 505.
[80]*Id.*
[81]*Id.*, 506.
[82]*Id.*, 507.
[83]I had modest contact with both Justice Brennan and Mr. Meese shortly after their exchange. The occasion was the preparation of the eighth edition of **American Constitutional Law: Introductory Essays and Selected Cases,** which I coauthored with Alpheus Thomas Mason and which was published by Prentice Hall in 1986 with a copyright date of 1987. As a pedagogical feature of the book, Professor Mason and I included several classic "unstaged debates" to illustrate certain issues in constitutional interpretation. We decided that the Brennan-Meese exchange would be a timely addition for the new edition. As junior author, I wrote to Justice Brennan and to Mr. Meese as work on the revision began, to obtain their permission to reprint their respective remarks. I received a prompt reply from Justice Brennan, but heard nothing from Mr. Meese. Professor Mason and I then decided to summarize the main points of the exchange in an introductory essay and to reprint Justice Brennan's remarks in the appendix, along with a reference to an insightful analysis of both positions that had been written by Stuart Taylor and published in *The New Republic* (Jan. 6 and 13, 1986, pp. 17–21). Several months later, as production of the new edition was well under way and the book was already in the page-proof stage, I received a telephone call at my campus office from an assistant to Mr. Meese, belatedly giving permission and urging us to include Meese's remarks. By then, of course, it was too late to make the addition, so the eighth edition appeared with only Justice Brennan's remarks, entitled "The Constitution of the United States: Contemporary Ratification." *See* Mason and Stephenson, **American Constitutional Law** (8th edition 1987), 10–11, 607–15.
[84]19 U.S. (6 Wheaton) 264 (1821).
[85]The first example of what came to be called Fourteenth Amendment incorporation was *C. B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), in which the Court applied the Fifth Amendment's Just Compensation Clause to the states and their municipal subdivisions. As of this writing, the most recent example of Fourteenth Amendment incorporation is *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), in which the Court applied the Second Amendment to the states.
[86]Stern and Wermiel, 435.
[87]*Id.*, 435–36.
[88]William J. Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harvard Law Review* 489 (1977).
[89]Stern and Wermiel, 436.
[90]Richard Davis, **Justices and Journalists** (2011), hereafter cited as Davis.
[91]Donald Grier Stephenson, Jr., **Campaigns and the Court: The United States Supreme Court in Presidential Elections** (1999), 23, 234.
[92]Davis, xv, xvi.
[93]*Id.*, xvii–xviii.
[94]*Id.*, xi.
[95]*Id.*, xviii.
[96]*Id.*, 28–33.
[97]*Id.*, 196.
[98]*Id.*
[99]*Id.*, 171.
[100]*Id.*
[101]Woodrow Wilson, **An Old Master and Other Political Essays** (1893), 116.

Illustrations

All images are either public domain or from the Library of Congress, except as listed below:
Page 182, Ellsworth and Patterson, Collection of the Supreme Court of the United States
Page 198, Courtesy of the Architect of the Capitol
Page 201, Collection of the Supreme Court of the United States
Page 208, Collection of the Supreme Court of the United States, photo by Harris & Ewing
Page 228, Collection of the Supreme Court of the United States, composite sketches by Max and Albert Rosenthal
Page 267, Collection of the Supreme Court of the United States
Page 268, Courtesy of Edith Harlan Powell
Page 277, Collection of the Supreme Court of the United States, photograph by Steve Petteway
Page 279, Collection of the Supreme Court of the United States
Page 282, Corbis Images
Page 283, Collection of the Supreme Court of the United States, Commercial Studio Photographers
Page 289, California Secretary of State
Pages 290 and 296, Nixon Presidential Library and Museum

Cover image: The Justices' wives posed for the traditional formal portrait in 1961. From left (sitting) are Mary R. Clark, Elizabeth S. Black, Nina P. Warren, Mercedes H. Douglas, and Winifred Whittaker; (standing) Ethel A. Harlan, Marjorie Brennan, and Mary Ann Stewart. Collection of the Supreme Court of the United States.

Contributors

Peter Bozzo is a senior at Harvard University and a former judicial intern at the Supreme Court.

April Christine is an Assistant U.S. Attorney with the U.S. Attorney's Office in the Central District of California and a former Supreme Court Fellow.

Clare Cushman is the Director of Publications at the Supreme Court Historical Society.

Lilit Sheymajash "Shimmy" Edwards is a first-year law student at the University of Virginia School of Law and a former judicial intern at the Supreme Court.

Tony A. Freyer is University Research Professor of History and Law at the University of Alabama.

Chris Hickman earned a doctorate in history at George Washington University in 2010. His article won the Hughes-Gossett Award.

John A. Lupton is Director of History Programs at the Illinois Supreme Court Historic Preservation Commission.

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

Daniel Thomas is a law student at the University of Alabama School of Law.

Dale Yurs received his master's degree in history at the University of Northern Iowa in 2011.