Introduction

Melvin I. Urofsky

In this first issue of 2012, all of us here at the *Journal* want to wish our readers a happy and healthy year, and we hope that in this year's *Journal* there will be many articles that will capture your interest.

As in nearly all of our issues, articles come to us in a variety of manners. Tim Huebner and I are always on the lookout for what our colleagues in the field of constitutional history are doing, and over the years we are pleased to note that when we attend scholarly meetings people come up to us to see if we would be interested in something they are working on. Tim and I were at the Atlanta meeting of the American Society for Legal History this past November, and the fruits of our conversations there will be appearing in the *Journal* over the next few years.

The first article, by my old friend Jim Ely, grew out of such a conversation. Jim is now emeritus professor at Vanderbilt University Law School, and still an active scholar. His specialty is property and property rights, and he will be one of the speakers in the Society's 2012 Silverman Lecture Series. The article on Justice Rufus Peckham grew out of a symposium on "forgotten" justices who, although we do not pay much attention to them these days, nonetheless had an impact on the law in their times. Peckham, of course, was the author of the majority opinion in *Lochner v. New York* (1905), and Ely's article is part of the current interest in re-evaluating that case.

Ever since the Judge's Bill of 1925 the Supreme Court docket has been devoted primarily to matters of constitutional law and statutory interpretation. Prior to that act, however, the Court decided dozens, even hundreds, of cases annually that came to it on a writ of error by grace of earlier jurisdictional laws. If one spends even a few hours browsing through a volume or two of *U.S. Reports* in those years, one will be amazed at the large number of cases dealing with what we would now consider minor matters for local courts.

Sometimes, however, one of these cases would carry a larger import, not so much for the constitutional or legal principles involved, but because it touched on issues that mattered to the public on an emotional level. Today, we are so familiar with Arlington National Cemetery as a monument to the nation's war dead

that we forget that it was once the home of Robert E. Lee, and the national government seized it during the Civil War. The Lee family began legal proceedings after the war to get compensation for the property seized, and Professor Anthony J. Gaughan of Drake University School of Law guides us through the legal and political labyrinth that led to the Supreme Court finally deciding the matter.

The career of Bessie Margolin, a Labor Department lawyer who argued numerous cases before the Supreme Court interpreting the Fair Labor Standards Act, was remarkable. That she succeeded in an environment that was not always welcoming to women was inspirational to many other women lawyers. Marlene Trestman, a special assistant to the Attorney General of Maryland, is working on a full-scale biography of Margolin.

It is now almost sixty years since the Supreme Court handed down its landmark decision in *Brown v. Board of Education* (1954). Readers of this journal know that we have dealt with that case several times, and, in fact, the Society published a collection of essays to mark the fiftieth anniversary—*Black, White, and Brown.* The case continues to attract attention, and each year a new facet is uncovered.

In this issue, we get to learn more about Dwight Eisenhower's Attorney General, Herbert Brownell, Jr., and his role not only in the selection of Earl Warren as Chief Justice, but the government's role in *Brown.* Many scholars have given Eisenhower poor marks for his seeming failure of leadership on civil rights matters, but Albert Lawrence, associate professor of criminal justice at Empire State College, shows that Brownell played an important role, especially regarding the government's briefs in the case.

As usual, a varied menu, and we hope you enjoy.

The Arlington Cemetery Case: A Court and a Nation Divided

ANTHONY J. GAUGHAN

Seventeen years after the Confederate general Robert E. Lee surrendered at Appomattox, his eldest son won a sweeping victory over the federal government in the United States Supreme Court. On December 4, 1882, the Supreme Court upheld a federal trial court's ruling that the United States government's claim of title to Arlington National Cemetery rested on an invalid tax sale. The Justices thus affirmed the lower court's verdict that George Washington Custis Lee ("Custis Lee"), eldest son of Mary and Robert E. Lee, held legal title to Arlington. The Supreme Court also upheld the lower court's decision to permit Custis Lee to bring suit against the government officers who occupied Arlington. On the latter point, the Justices split 5 to 4, with a majority ruling for Custis Lee. The outcome of *United States v. Lee,* commonly known as the Arlington case, made it clear that the Lee family, and not the United States government, owned Arlington.

The Arlington case arose from a fascinating historical background. Prior to the Civil War, Arlington was a slave plantation owned by Mary Lee, the wife of Robert E. Lee and the great-granddaughter of Martha Washington. The Lee family home—known as Arlington House—stood atop a sprawling, 1100-acre hillside estate along the Virginia side of the Potomac River. Arlington's location provided its residents with a spectacular view of the nation's capital. But the qualities that made the Lee estate so attractive also posed a threat to the City of Washington. Arlington House stood just over two miles from the White House and three and a half miles from the Capitol building; the estate property near the Potomac was even closer. If the Confederates had occupied Arlington, they could have rained artillery shells on the White House and other government buildings. Federal control of Arlington was thus essential to the security of the nation's capital.[1]

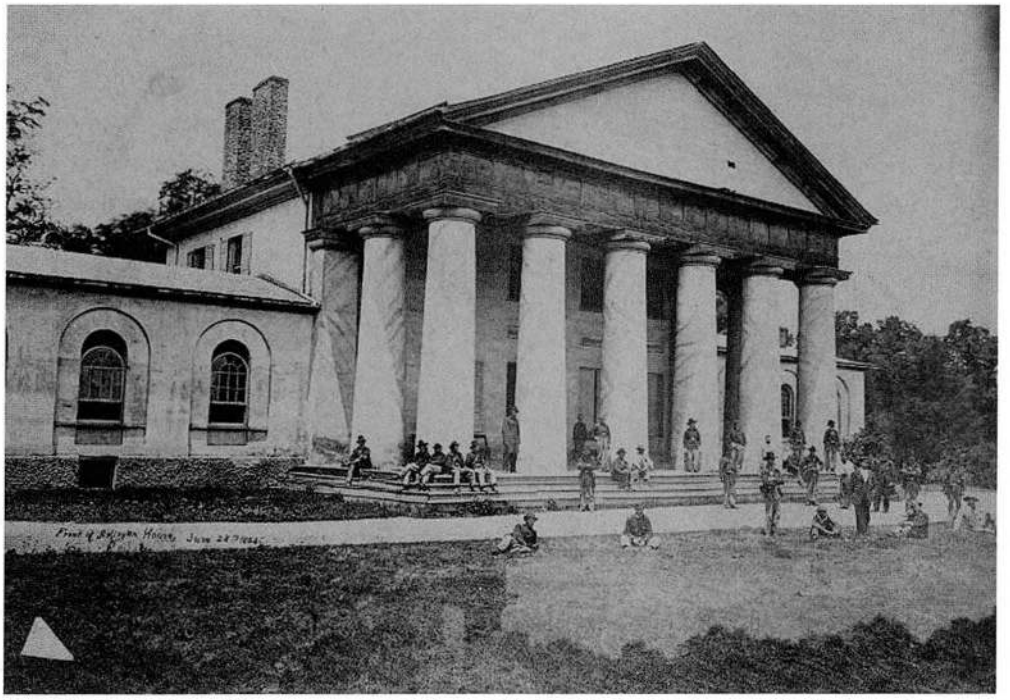
As the Civil War began, the Lee family home at Arlington stood in the line of fire between North and South. For three decades before the war, Robert E. Lee served as a career United States army officer. But after the Confederate attack on Fort Sumter in April

Mary Lee, the wife of Robert E. Lee and the great-granddaughter of Martha Washington, inherited Arlington House, a slave plantation that stood atop a sprawling, 1,100-acre hillside estate along the Virginia side of the Potomac River. Robert E. Lee's bedroom is pictured above.

1861, Lee resigned from the U.S. Army and accepted a commission as a general officer in the Confederate Army. Lee's decision to side with his home state of Virginia and the Confederacy sealed Arlington's fate. On the night of May 24, 1861, 10,000 Union soldiers commanded by General Charles W. Sandford crossed the Potomac River from Washington D.C. and occupied the Lee estate at Arlington. When the Union troops arrived at Arlington House, they discovered that the Lees had already departed to Richmond. Only the family's servants remained behind to be awakened by the soldiers.[2]

There was no question that the army had a legal right to seize the Arlington estate. The courts have long recognized that the President and the military have the authority to seize private property during wartime emergencies. In the 1851 case of *Mitchell v. Harmony*, the Supreme Court held, "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy."[3]

At the same time, however, the Court also emphasized that the Takings Clause of the Fifth Amendment remained in effect during wartime. However, as the Justices noted in their ruling in *Mitchell*, "Unquestionably, in such cases, the government is bound to make full compensation to the owner" of property seized by the military.[4] Nevertheless, for more than twenty years after Arlington's seizure, Congress refused to pay compensation to Mary Lee, Arlington's legal owner, or her son and heir, Custis Lee. In the government's view, the Fifth Amendment did not apply to the



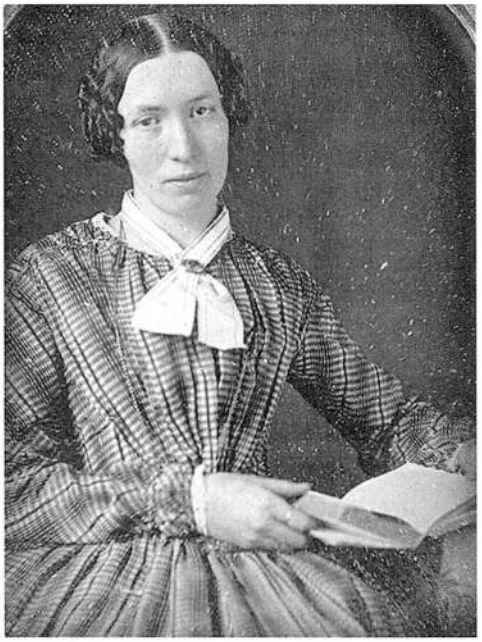
When 10,000 Union soldiers commanded by General Charles W. Sandford crossed the Potomac River from Washington, D.C. on May 24, 1861, they discovered that the Lees had already departed to Richmond. The Union troops occupied the estate, which posed a threat to the city of Washington.

Arlington case because the War Department had asserted title to the estate through a tax sale rather than through eminent domain.

The basis of the government's claim to Arlington was highly unusual. During the Civil War, Congress enacted a land tax in the Confederate states. Sen. James Doolittle of Wisconsin authored the act in order to punish leading Confederates and raise revenue for the Union war effort. As the estate's legal owner, Mary Lee owed ninety dollars and seven cents for Arlington's assessment. When Phillip Fendall—a first cousin of Robert E. Lee and a prominent Washington D.C. attorney—attempted to pay the tax on Mary Lee's behalf in late December 1863, the commissioners refused to accept payment. They insisted that Mary Lee cross Union and Confederate lines and appear in person to pay the tax. Under the commissioners' interpretation of the law, no friend, relative, or agent could pay on the owner's behalf. When Mary Lee failed to appear, the Treasury Department auctioned the property to the War Department. The government's claim to Arlington thus hinged on the legality of the commissioners' unprecedented "payment in person" policy, a requirement they imposed without any authorization in the Doolittle Act.

In 1863, the government converted a portion of the Lee estate into a refugee camp for runaway slaves and in 1864, the army established a cemetery at Arlington. The creation of Arlington cemetery resulted directly from battlefield developments. In the spring of 1864, General Ulysses S. Grant and the Army of the Potomac launched a massive offensive against Lee's Army of Northern Virginia. The month of May alone saw the Union army suffer 44,000 casualties and the Confederates 25,000. President Lincoln lamented that the war had "carried mourning to almost every home, until it can almost be said that 'the heavens are hung in black.'" As Lee and Grant fought their way across Virginia, the City of Washington faced a public health

During the Civil War, Congress enacted a land tax in the Confederate states known as the Doolittle Act after its author, Sen. James Doolittle of Wisconsin (pictured). The aim was to punish leading Confederates and raise revenue for the Union war effort.



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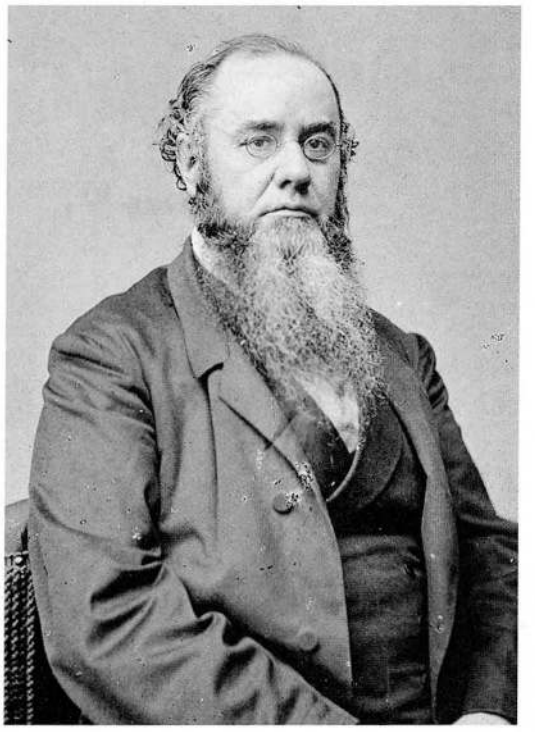
crisis of the first order. The surge of casualties required the transportation of thousands of wounded soldiers to Washington hospitals each week. When the wounded died, the army buried them in the Soldiers' Home cemetery. By early 1864, so many hospitalized soldiers had died that the Soldiers' Home cemetery was completely filled. The army needed a new burial site in the Washington area.[5]

On June 15, 1864, Quartermaster General Montgomery Meigs recommended to Secretary of War Edwin Stanton that the army begin interments at Arlington. "The grounds about the mansion," Meigs noted, "are admirably adapted to such a use." Stanton agreed. Later that same day he issued an order declaring that "[t]he Arlington Mansion and the grounds immediately surrounding it are appropriated for a Military Cemetery."[6]

The swiftness with which Stanton acted suggests that the secretary and Meigs discussed the idea beforehand. It appears that Meigs first proposed the idea of converting Arlington into a cemetery while touring the grounds with President Lincoln in early May. The idea of building a magnificent military cemetery on the heights above Washington captured the quartermaster general's imagination. According to Meigs family tradition, Montgomery Meigs pointed out to the President that the "ancients filled their enemies fields with salt and made them useless forever, but we are a Christian nation, why not make it a field of honor?" Stanton later revealed that one of his motivations in converting Arlington into a cemetery was "to prevent the Lee family from ever returning to the place."[7]

Arlington was not the first national military cemetery established during the war. In July 1862, two years before the creation of Arlington cemetery, Congress authorized the president "to purchase cemetery grounds . . . to be used as a National Cemetery for soldiers who shall have died in the service of the country." In response, the Lincoln administration established five national battlefield



On June 15, 1864, Quartermaster General Montgomery Meigs (left) recommended to Secretary of War Edwin Stanton (right) that they begin interments on the Arlington House grounds and convert it to a cemetery. Stanton acted quickly on this idea, later revealing that one of his motivations in converting Arlington into a cemetery was "to prevent the Lee family from ever returning to the place."

cemeteries: Antietam, Chattanooga, Gettysburg, Knoxville, and Stone's River. The creation of the national cemetery system marked a turning point in the government's relationship to its dead soldiers. As the historian Drew Gilpin Faust has observed, the federal government's role in creating the cemetery system "acknowledged a new public importance for the dead. No longer simply the responsibility of their families, they, and their loss, now belonged to the nation."[8]

Unlike the other cemeteries in the new national system, Arlington did not enter under the National Cemetery Act. Compensation was the sticking point. The act directed the "purchase" of privately owned land for use as national cemeteries and it authorized the administration to pay southerner landowners, as well as northern, for their property. In fact, three of the first five cemeteries established under the act were located on property purchased by the government from Tennessee landowners. But buying land from an obscure southern property owner was one thing; buying land from the wife of the most famous Confederate general was quite another. The Lincoln

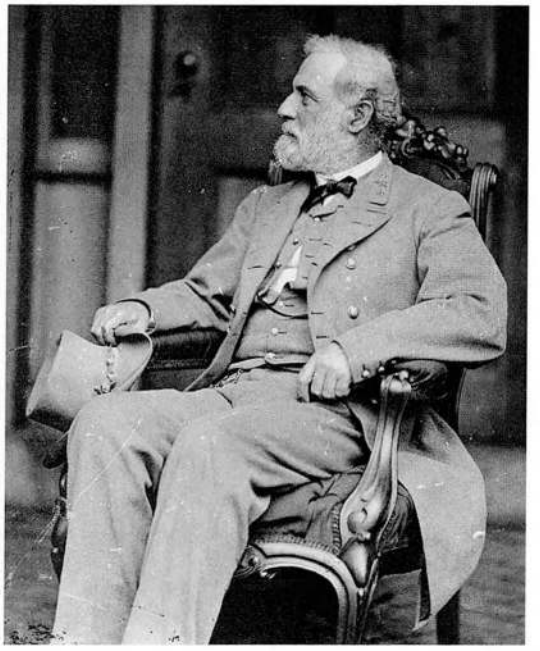
administration did not view the idea of paying Mary Lee for her estate's conversion into a cemetery for soldiers killed fighting her husband's army as a politically viable option. Consequently, Arlington entered the national cemetery system as a separate and unique property of the War Department.[9]

Following the Confederacy's defeat in 1865, the Lee family moved to Lexington, Virginia, where Robert E. Lee served as president of Washington College. He died in October 1870. Even after Lee's death, the prospect of compensating his family for Arlington raised northern ire. In December 1870, a Kentucky senator proposed that the government pay financial compensation to Mary Lee for the loss of Arlington. The proposal set off a storm of protest. Senator Oliver Morton of Indiana spoke for most of his northern peers when he declared it beneath the dignity of the Senate to devote any time to "the rights of the widow of the arch-rebel of the most wicked rebellion in history." The Senate defeated the proposal to compensate Mary Lee by a vote of 54 to 4.[10]

Mary Lee never brought suit to assert her claim to Arlington. She died in 1873. Upon Mary's death, the Lees' eldest son, George Washington Custis Lee, inherited title to the estate. The timing was propitious for Custis Lee. In the years following Appomattox, the Supreme Court handed down two decisions that would prove highly favorable to Lee's case. In 1869, the Supreme Court heard the case of *Bennett v. Hunter*, a controversy that originated under circumstances exactly like those of the Arlington case. A Confederate officer named B. W. Hunter owned a tract of land in Alexandria County, Virginia, not far from Arlington House. During the war, the Union Army seized Hunter's property and assessed a tax on it pursuant to the Doolittle Act. Before the government auctioned the property, one of Hunter's tenants attempted to pay the tax on Hunter's behalf. The commissioners refused to accept the tenant's money on the grounds that the law required the owner to pay the tax in person. The commissioners subsequently auctioned Hunter's land to a man named Bennett. After Hunter's death, his son brought an ejectment action in Virginia state court in an effort to win back the family's land. Both the trial court and the Virginia Supreme Court of Appeals ruled in favor of Hunter's son. Bennett appealed to the Supreme Court of the United States.[11]

The government recognized the importance of the *Hunter* case. If the Supreme Court were to rule that the commissioners had acted unlawfully in *Hunter*, then all tax sales under Doolittle's act—including the sale of the Lee property—were in legal jeopardy. In a sign of how seriously the government took the matter, the Attorney General of the United States submitted an amicus brief on behalf of Bennett, and sent a well-respected government attorney named Westel Willoughby to argue the case.[12]

The central issue of *Bennett v. Hunter* was simple: Under Doolittle's act, could the commissioners lawfully auction a tax defaulter's land even though a third party had attempted to pay on the owner's behalf? Despite Willoughby's impassioned efforts, the Justices rejected the government's arguments. The Supreme Court unanimously ruled that the commissioners could not lawfully auction land if a third party had attempted to pay on the owner's behalf. As the Justices explained in their ruling, the commissioners were legally obligated to accept payment when tendered, regardless of the identity of the person attempting to pay the tax. Writing for the majority, Chief Justice Salmon P. Chase observed that "it seems unreasonable to give to the act, considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed and relieve his hands from the lien." Most important of all, Chase stressed that nowhere in the act did it expressly state that the owner must pay in person. "[T]o whom did the right to make this payment belong?" the Chief Justice asked. "The obvious answer is, to the owner, either acting in person or through some friend or agent, compensated



Custis Lee (left), eldest son of General Lee (right), sued the United States government, claiming that its title to Arlington National Cemetery rested on an invalid tax sale.

or uncompensated. The terms of the act are that the owner or owners may pay; and it is familiar law that acts done by one in behalf of another are valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice."[13]

Indeed, Doolittle's act said not a word about the owner being required to pay in person. Never before had taxpayers been required to pay in person, and nothing in the Doolittle Act suggested a change in that long-standing custom and practice. Consequently, the Supreme Court concluded that the tax commissioners had unlawfully exceeded their authority. The Supreme Court's unanimous ruling in *Hunter* invalidated all tax sales that occurred after payment was attempted by a friend, relative, or agent of the landowner.[14]

Four years later in the case of *Tacey v. Irwin*, the Supreme Court not only reaffirmed its ruling in *Hunter*, it eliminated the requirement to offer to pay the tax. Like *Hunter*, the *Irwin* case originated in Alexandria, Virginia, a short distance from the Lee estate. The facts of *Irwin* were identical to *Hunter* with one crucial exception. When the government seized the plaintiff Irwin's property, a relative of Irwin's went to the tax commissioners' office in Alexandria to pay the tax. There the commissioners informed the relative that they would accept no payment except from the owner himself. After learning of the commissioners' policy, Irwin's relative left without ever having offered to pay the tax. This was precisely what the government claimed happened when Philip Fendall met with the Alexandria commissioners on behalf of Mary Lee.[15]

The central issue in *Irwin* was whether an agent's formal offer to pay the tax was necessary to render the subsequent tax sale invalid. The defendants—and the Justice Department's lawyers, acting as an amicus party—argued that, unless the owner or a third party actually presented money for payment of the tax, the commissioners had legal authority to declare the property in default and auction it to the highest bidder.

The Supreme Court, however, disagreed. In what amounted to a fatal blow to the

Doolittle Act, the Justices unanimously ruled that a formal offer to pay was unnecessary. Noting that this "case is not distinguishable in principle from that of *Bennett* v. *Hunter*," Justice David Davis observed, "It is difficult to see how, upon the case as found here, the sale can be sustained." Writing for the majority, Davis declared, "The law does not require the doing of a nugatory act, as would have been a formal tender of payment, after the action of the commissioners, declining to receive the taxes from any person in behalf of the owner." According to the Supreme Court, when the commissioners announced the fact that it was pointless for the owners' agents to attempt payment, the commissioners rendered the Doolittle Act void and unenforceable. "The friends and agents of absent owners," Justice Davis noted, "were informed that it was useless to interpose in their behalf, and that unless the owner appeared in person and discharged the tax, the property would be sold."[16] The tax commissioners, however, had no legal authority for discriminating against agents of the owners. "While the law gave the owner the privilege of paying by the hands of another, the commissioners confined the privilege to a payment by the owner himself," the justice explained. "This was wrong, and was a denial of the opportunity to pay accorded to the owner by the act, and the lands were, therefore, not delinquent when they were sold."[17]

Justice Davis ruled that the logic used by the court in *Hunter* was equally applicable to *Irwin*. "If an offer [by an agent of the owner] in a particular case to pay the tax before sale . . . renders a subsequent sale by the commissioners void, surely a general rule announced by the commissioners, that in all cases such an offer would be refused, must produce the same effect," he reasoned. "Such a rule of necessity dispenses with a regular tender in any case."[18] Davis concluded that the overwhelming weight of legal precedent demanded the invalidation of all tax sales made under Doolittle's act. "In the absence of any proof to the contrary, it is a legal presumption that the tax in this case, though not actually offered, would have been offered and paid before sale but for the known refusal of the commissioners to accept any offer when not made by the owner in person."[19]

The one-two punch of the *Hunter* and *Irwin* rulings effectively struck down the Doolittle Act. The Court issued its ruling in *Hunter* in 1869 and in *Irwin* in 1873, several years before the Arlington case began. The decisions represented a daunting obstacle to the government's lawyers in *United States v. Lee*.

The most pertinent fact for Custis Lee was that the *Hunter* and *Irwin* cases exactly paralleled the Arlington case. If those tax sales did not pass legal muster, the same was certainly true of the tax sale in the Arlington case. Custis's lawyers made clear to him the tremendous significance of the *Hunter* and *Irwin* rulings. As Senator John W. Johnston of Virginia advised his fellow senators, "Mr. Lee has been advised that his claim could be enforced in the courts."[20]

The *Hunter* and *Irwin* rulings combined to create seemingly irresistible momentum behind Custis Lee's case. The overwhelming weight of case law indicated that the government had never taken lawful ownership of the estate. On the merits, therefore, Custis Lee seemed certain to prevail.

In 1877, Custis Lee finally brought suit to vindicate the family's claim to the estate. His lawsuit alleged that the government's officers had violated the Fifth Amendment's due process clause by claiming title to Arlington on the basis of an invalid tax sale. In addition, Custis Lee contended that the government's officers had violated the amendment's takings clause by failing to compensate Mary Lee for the estate. At no point did Lee ever seek physical possession of Arlington. The presence of the national cemetery made the estate's return to the Lees impossible. What Custis Lee sought instead was formal legal recognition of his ownership of Arlington. He hoped that a victory in the courts would persuade Congress to finally pay compensation to him in

accordance with the government's constitutional obligations.[21]

Although Lee filed his lawsuit in Virginia state court, the Justice Department removed the case to federal court. The government contested Lee's suit on two principal grounds. First, the Justice Department's lawyers contended that Arlington's tax sale complied with the law, and thus divested the Lees of ownership of the estate. In the alternative, the government's attorneys declared that, even if the tax sale were invalid, the doctrine of sovereign immunity barred Custis Lee from seeking a judicial remedy for his claim. Never before had the Justice Department argued for such a sweeping expansion of the government's immunity from suit. When the government's jurisdictional motion failed, a jury heard the case on the merits and ruled in Custis Lee's favor on both the title and just compensation issues.[22]

Undaunted by its defeat in the trial court, the Justice Department appealed to the Supreme Court. The case of *United States v. Lee* reached the Supreme Court in the spring of 1882. When the government's lawyers appealed the *Lee* case to the Supreme Court, they knew they had virtually no chance of prevailing on the title issue. The evidence introduced at trial demonstrated that Phillip Fendall had attempted to pay Arlington's property tax, but had been turned away by the tax commissioners. The government produced no evidence to the contrary. Most important of all, through its rulings in the *Hunter* and *Irwin* cases, the Supreme Court had already declared illegal all tax sales that resulted from the payment-in-person policy.[23]

But the fundamental issue posed by *United States v. Lee* was not who owned Arlington in a legal sense. For all practical purposes, that issue was already resolved in Custis Lee's favor long before the case reached the Supreme Court. Rather, the issue at stake in *Lee* was whether Custis Lee could bring his suit in the first place. The Justice Department contended that the doctrine of sovereign immunity prohibited private citizens from suing government officers without congressional consent. In the government's view, it was irrelevant whether Lee owned Arlington. The only issue that mattered was whether, absent congressional consent, the courts could exercise jurisdiction over the government's officers.[24]

The Justice Department's argument was novel. The basic idea of sovereign immunity is that private citizens cannot sue the government without the government's consent. The doctrine emerged in medieval England and arose from the concept that the king—as creator of the courts—is above the law. After the American Revolution, the federal and state governments in the United States gradually developed their own versions of sovereign immunity. However, American courts routinely allowed private plaintiffs in Fifth Amendment takings cases to get around sovereign immunity by naming as defendants the government officers in possession of wrongfully seized property, even if Congress did not consent to the suit. This was known as the "officer suit" exception to sovereign immunity. Custis Lee's lawyers took full advantage of it by naming as defendants the army officers occupying Arlington, rather than the United States government itself. Accordingly, the Arlington case was originally the case of *Lee v. Kaufman and Strong*; Kaufman and Strong were the army officers in charge of the cemetery and estate at Arlington. Custis Lee did not name the United States government as a defendant in the case because he knew sovereign immunity barred a direct legal attack on the government without its consent, which Congress was not about to give to the son of Robert E. Lee. The Arlington case only became the case of *United States v. Lee* when the Justice Department intervened in the case in order to raise the sovereign immunity issue.[25]

The Justice Department had an audacious goal in the *Lee* case. It sought to deny the courts' jurisdiction over Fifth Amendment takings cases that lacked congressional consent. The government's lawyers insisted that the task of providing a remedy for aggrieved parties

under the Fifth Amendment should be left "to the discretion of congress and not to the courts." With no American case law available to support their provocative position, the government's lawyers relied on precedents from English courts. They noted that in England "the moment the court becomes informed that its action may operate adversely to the interests of the crown without its consent, [the court] invariably suspends all further proceedings." The Justice Department's lawyers contended that, like English judges, American judges should recognize that "the domain of sovereign power is forbidden ground" to the courts and that "judicial authority" must never "trespass upon the prerogatives, property, instrumentalities, or operations of this sovereign power."[26]

Lingering animosity from the Civil War years undoubtedly contributed to the Justice Department's aggressive approach to the case. The government and the Lee family had a singular relationship. At the war's outset, the Lincoln Administration had offered command of the Union Army to Robert E. Lee but he declined. Most northerners believed that, if Lee had accepted Lincoln's offer of command, the war would have ended much sooner and with far fewer lives lost. The national bitterness engendered by the war's devastation made the government loath to reconcile with the Lees or take any step that could be interpreted as forgiveness. Robert E. Lee himself anticipated that his decision to side with the Confederacy would provoke retribution. In a letter to his wife in July 1861, Lee warned, "In reference to the action of the U.S. Govt, you had better make up your mind to expect all the injury they can do us. They look upon us as their most bitter enemies & will treat us as such to the extent of their power."[27]

But other considerations also informed the government's aggressive approach to the case. By challenging the government's title to Arlington, Custis Lee's suit raised issues that were fundamental to the Civil War's legal and constitutional legacy. Sovereign immunity constitutes more than a procedural and jurisdictional doctrine. It concerns the scope and nature of the government's power and authority. In a political and legal sense, the term "sovereignty" means the "supreme dominion" and the "supreme political authority of an independent state."[28] The Civil War posed a question fundamental to American sovereignty: did the states have a sovereign right to secede from the Union? As the legal scholar Daniel Farber has observed, "When Americans debated sovereignty before the Civil War, they were debating the ultimate locus of political authority."[29]

The Civil War represented the preeminent test of sovereign power in the United States. On battlefields stretching from Gettysburg, Pennsylvania to Port Hudson, Louisiana, the issue was resolved decisively in favor of the federal government. The war's outcome made clear that the doctrine of secession was dead. Yet, in the years immediately following Appomattox, the long-term resilience of the Union appeared uncertain. During Reconstruction, many northerners feared that the ex-Confederate South sought to achieve through political and legal ends what it had failed to achieve on the battlefield. In the view of Attorney General Charles Devens, Custis Lee's suit represented a direct attack on the authority of the federal government. In its briefs and at oral argument, the Justice Department warned that the argument espoused by Custis Lee's attorneys "dwarfs the spirit of patriotism" by seeking to "limit the capacity of our government" to carry out its duties. The government's lawyers reminded the court that, in the 1860s, southerners had "regarded it as an invasion for the United States to place her soldiers within the borders of our sacred soil." What Confederates failed to understand, the Justice Department contended, was that "Virginia is not a sovereign state in the full sense of a sovereign power." The Justice Department's lawyers asked the court to make clear that the "United States exists as a nation, supreme within its sphere," by extending the doctrine of sovereign immunity to government officials.[30]

A political crisis informed the Hayes administration's approach to the case. Rutherford B. Hayes, an Ohio Republican, entered the White House in March 1877 promising to advance the cause of sectional reconciliation. But shortly after his inauguration, the Republican Reconstruction governments in South Carolina and Louisiana collapsed amidst a ferocious onslaught by southern Democrats. It soon became clear that the President's policy of sectional reconciliation offered no benefits for the Republican Party or for its African-American supporters in the South. As they had for more than a decade, southern Democrats continued to wage a campaign of terrorism and violence against southern Republicans. Appalled by the abandonment of the southern wing of the party, a Republican revolt against Hayes took shape shortly after he took office. Republican senators as diverse as James Blaine from Maine and Benjamin Wade of Ohio lambasted the administration for abandoning southern Republicans. Just weeks into Hayes's term, as the historian Stanley Hirshson has observed, the "administration's supporters were few."[31]

Custis Lee filed his lawsuit in April 1877. Following so soon on the heels of Reconstruction's ignominious end, Custis Lee's lawsuit struck the Justice Department as an effort to further embarrass and harass the government. The prospect of an ex-Confederate officer seeking refuge in the same constitutional protections that white supremacist state governments in the South systematically denied to African Americans appalled the Hayes administration. The Justice Department likely hoped that, by expanding the doctrine of sovereign immunity, it would acquire a new tool for blocking southern encroachments on federal authority.

The Justice Department's intervention in the Arlington case thus forced a high stakes showdown in the Supreme Court. When the Court first heard the case in the spring of 1882, the Justices split down the middle: four ruled in favor of Custis Lee, and four in favor of the government. Normally, that would have meant victory for Custis Lee because he had prevailed in the lower court proceeding. However, Chief Justice Morrison Waite ordered the matter held over for re-argument during the fall Term, when President Arthur's appointment to fill the court vacancy, Samuel Blatchford of New York, would break the tie.[32]

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After oral argument in the fall of 1882, the Supreme Court ruled in favor of Custis Lee on both the jurisdictional and title issues. It was a complete victory for Lee. Writing for the majority, Justice Samuel F. Miller identified the two questions addressed by the Court's ruling: Did sovereign immunity bar Custis Lee's suit? Was the commissioners' sale of Arlington lawful? The Justices agreed that Arlington's sale was illegal. "[N]o division of opinion exists among the members of this court," Miller

declared, "on the proposition that the rulings of law under which the latter question [the title issue] was submitted by the court to the jury was sound," and that the "jury was authorized to find" that "the tax certificate and the sale . . . did not divest the plaintiff of his title to the property." The evidence, the Court decided, was "uncontradicted" that "Mr. Fendall appeared before the commissioners in due time and offered on the part of Mrs. Lee, in whom the title then was, to pay the taxes, interest, and costs, and was told that the commissioners could receive the money from no one but the owner of the land in person." The commissioners' payment-in-person policy, the Justice observed, had no foundation in the law, and "deprived the owner of the land of an important right," the right to pay by agent, a "right which has in no instance known to us, or cited by counsel, been refused to a tax-payer."[33]

The two key Supreme Court rulings on the payment-in-person rule—*Bennett v. Hunter* and *Tacey v. Irwin*—factored prominently in the majority's decision. "This court," Miller emphasized, "has in a series of cases established the proposition that where the commissioners refused to receive" payment by the owner's agent, "their action in thus preventing payment was the equivalent of payment in its effect upon the certificate of sale." If the government denied a citizen the opportunity to pay the tax, it could not later use that rejection of payment against the citizen. The Justices concluded that a tax "sale made under such circumstances is invalid, as much so as if the tax had been actually paid or tendered."[34]

But on the critical question of whether Lee could bring suit in the first place, the Justices sharply disagreed. Only a narrow 5–4 majority held in favor of Lee on the jurisdictional issue. Writing for the majority, Justice Miller observed that, although the Supreme Court agreed with the Justice Department that a plaintiff could not sue the United States directly, the Court rejected the contention that a plaintiff could not sue government officials.[35]

The outcome of the case, Miller explained, depended "on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption." In anticipation of Horace Gray's dissenting opinion, which relied heavily on English case law, Miller began by distinguishing the English tradition of sovereign immunity from the legal and political traditions of the United States. Although both the American and the English doctrine of sovereign immunity were "derived from the laws and practices of our English ancestors," he emphasized that English subjects could avail themselves of the petition of right, which provided an indirect means of resolving grievances against the crown. American citizens, he wrote, did not have a comparable avenue of adjudication. "There is in this country, however, no such thing as the petition of right," he observed, "as there is no such thing as a kingly head to the nation, or to any of the states which compose it."[36]

The lack of a monarch was fatal to efforts to analogize the English judicial system with the American. "As we have no person in this government who exercises supreme executive power or performs the public duties of a sovereign," Miller explained, "it is difficult to see on what solid foundation of principle the exemption from liability to suit rests." He concluded that the "vast difference in the essential character of the two governments as regards the source and the depositaries of power" was simply too great for the English version of sovereign immunity to act as a guide for American courts. In England "the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure garden by a writ of ejectment against the gardener." The American President, in contrast, lacked monarchical pretensions, and the executive branch routinely appeared in the federal courts through the offices of the Attorney General and the Solicitor

General. In the United States, Miller stressed, it cannot "be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizens to their judgment."[37]

The source of American sovereignty also differed. "Under our system the people, who are there called subjects, are the sovereign," Miller observed. "Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch." When an American citizen "has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." The actions of every government officer, including the President, are subject to judicial review. The "citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered."[38]

Having rejected the Justice Department's efforts to invoke English law, Miller turned to the question of how American courts viewed sovereign immunity. He noted that "the doctrine met with a doubtful reception in the early history of this court." In the 1793 case of *Chisholm v. State of Georgia*, the Supreme Court rejected efforts to introduce a broad version of sovereign immunity to the United States. Although in the 1821 case of *Cohens v. Virginia* the Court accepted the principle that the government cannot be sued without its consent, Miller maintained that never in the history of the Supreme Court was the doctrine "permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to a suit."[39]

The 1809 case of *United States v. Judge Peters* was the first case in which the Supreme Court discussed at length the doctrine of sovereign immunity. *Peters* involved a British ship that was seized on the high seas during the Revolutionary War. Two American naval vessels participated in the capture, one owned by the state of Pennsylvania and one by a privateer. A dispute arose over how the proceeds should be distributed. The prolonged and complicated controversy took thirty years to reach the Supreme Court. In its ruling in *Peters*, the Supreme Court upheld the principle that the government could not be sued directly without its consent. At the same time, however, Chief Justice John Marshall observed that "it certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title." The Supreme Court in *Peters* thus held that sovereign immunity did not deny the courts' jurisdiction to investigate the validity of the government's claim of title to property.[40]

Miller applied the *Peters* rule to the Arlington case. The Justice Department had no basis for contending that the mere "suggestion" that it owned Arlington was enough to "forbid the court below to proceed further, and to reverse and set aside what it has done." He viewed the Justice Department's demand as an assault on judicial independence. To accept the government's argument, Miller warned, was tantamount to refusing "to perform the duty of deciding suits properly brought before us by citizens of the United States."[41]

The majority placed special weight on the fact that in four previous Supreme Court cases—*Meigs v. M'Clung's Lessee*, *Osborn v. Bank of the United States*, *Wilcox v. Jackson*, and *Grisar v. McDowell*—the Court heard and decided claims brought against government officers. In none of those cases did any of the Justices challenge the jurisdictional basis of the plaintiff's claim. Miller concluded that those cases stood for the proposition that the officer suit exception clearly permitted plaintiffs to challenge government land titles.[42]

A central theme of the Justice Department's case was the notion that private suits against government officers undermined the sovereign authority of the federal government. Miller found such arguments completely unpersuasive. "Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the government," he noted. Yet, "if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail."[43]

The real danger according to Miller lay in the Justice Department's argument, not Custis Lee's. Referring to the government's position, Miller warned, "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." The Justice Department's blithe disregard for the takings and due process clauses disturbed Miller. If government officers could invoke sovereign immunity as a blanket defense, the Fifth Amendment would become unenforceable. Every American citizen, he stressed, has a fundamental "right to recover that which has been taken from him by force and violence, and detained by the strong hand" of the government. After all, if citizens cannot turn to the courts to protect their constitutional rights, where could they turn? "In such cases there is no safety for the citizen," the Justice concluded, "except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name."[44]

Justice Miller placed a portion of blame on President Lincoln himself: "It is not pretended, as the case now stands, that the president had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation." The government's case, therefore, boiled down to a single argument: "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government." Yet, he warned, "the executive possessed no such power." In asking the Court for absolute sovereign immunity, the government claimed a power it did not have under the Constitution, and it sought that power to protect itself against the legal implications of its unconstitutional actions. This was an absurd argument in Miller's view, one he and a majority of the Justices would not permit to stand. In seizing Arlington, the government took an action that "is absolutely prohibited," the majority declared, "both to the executive and the legislative," and that is "to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation."[45]

One last question remained. Did the officer-suit exception pose a long-term threat to the orderly conduct of the government's operations? Miller insisted that it did not. The United States, he pointed out, endured "a great civil war, such as the world has seldom known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens in order to cripple the exercise of the authority necessary to put down the rebellion, yet no improper interference with the exercise of that authority was permitted or attempted by the courts." Indeed, officers occupying land of disputed title could avail themselves of the federal courts, which by their very nature would be sympathetic to the government's interests. "From such a tribunal," Miller concluded, "no well-founded fear can be entertained of injustice to the government or purpose to obstruct or diminish its just authority."[46]

Miller ended on an eloquent note:

> No man in this country is so high that he is above the law.... No officer of the law may set that law at defiance with impunity. All the officers

> of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[47]

Nevertheless, the majority's reasoning failed to persuade Chief Justice Morrison Waite, Horace Gray, Joseph Bradley, and William Woods. The four dissenting Justices endorsed the broad scope of sovereign immunity asked for by the government. Writing on behalf of his fellow dissenters, Horace Gray proclaimed that the Arlington "case so deeply affects the sovereignty of the United States, and its relations to the citizen, that it is fit to announce the grounds of our dissent."[48]

The dissenters believed it was a mistake to apply the officer suit exception to challenges to facially valid government titles. Gray conceded that if the army had "violently and suddenly wrested" Arlington from Mary Lee, and if the army had acted without executive orders and without "color of title" in the property, then the officer suit exception might apply. But he maintained that, in the Arlington case, where the army seized property on the President's orders, the courts had jurisdiction to investigate only whether the government possessed a facially valid title to the land and whether it devoted the property to public uses.[49]

In the Arlington case, Gray pointed out that the Justice Department had established that the army possessed the estate, devoted it to public uses, and held it under a facially valid title. In Gray's view, that was sufficient to bring the government's officers under the umbrella of sovereign immunity. However, with little support for their position in American case law, the dissenters found themselves forced to rely on general endorsements of sovereign immunity, such as Chief Justice John Marshall's assertion in *Cohens v. Virginia* that the "universally-received opinion is that no suit can be commenced or prosecuted against the United States." The dissent also approved of Justice David Davis's holding in *Nichols v. United States*, in which he declared that every "government has an inherent right to protect itself against suits." For more specific support, the dissenters—like the Justice Department before them—turned to English precedent. The list of authorities cited in the dissenting opinion included the Magna Carta, the medieval legal scholar Bracton, Staunford's Exposition of the King's Prerogative, and the works of English judges such as Lord Coke and Lord Hale. "The English authorities from the earliest to the latest times show that no action can be maintained to recover the title or possession of land held by the crown by its officers or servants," Gray asserted, "and leave no doubt that in a case like the one before us the proceedings would be stayed at the suggestion of the attorney general in behalf of the crown."[50]

Although Gray conceded the inherent difference between republican and monarchical forms of government, he insisted that both forms of government had a common interest in sovereign immunity. The need for sovereign immunity "is not limited to a monarchy, but is of equal force in a republic," he announced. Both in a republic and a monarchy "it is essential to the common defense and general welfare, that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war necessary to guard the national existence against insurrection and invasion."[51]

Lee's suit, of course, posed no threat to the government's possession of Arlington. The Justices disagreed, however, on the implications of that fact. The majority saw it as evidence that suits like Lee's should be allowed to go forward since they would not disrupt the government's operations. But the

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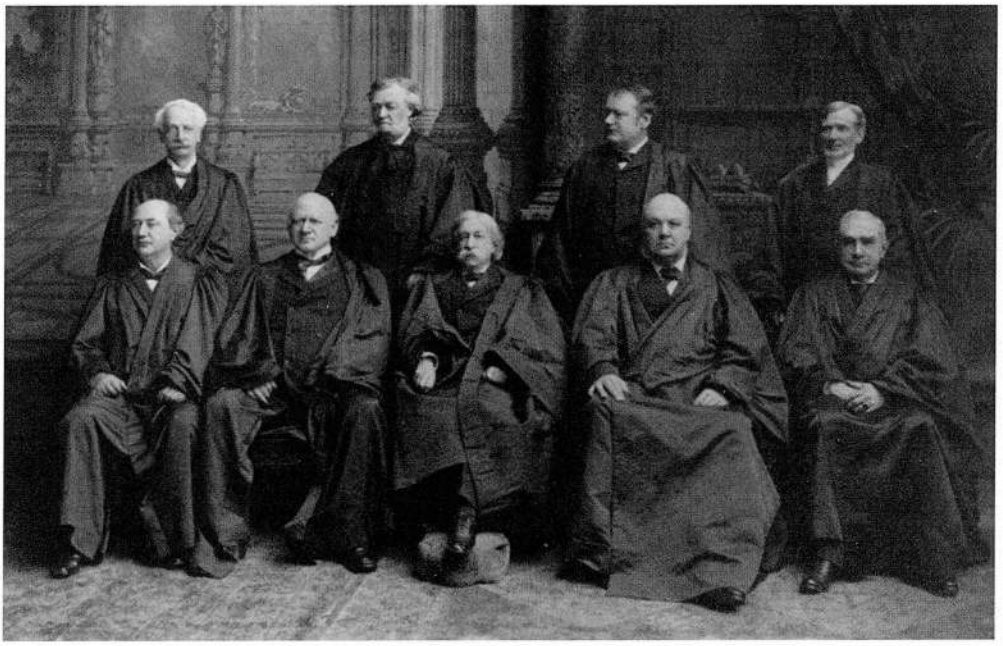
minority viewed it as evidence of the futility of letting Lee's suit be heard. Gray contended that "in ejectment [actions], as in other actions at law, a court has no authority to render a judgment on which it has no power to issue execution." If the Supreme Court could not order the United States government to return Arlington to Custis Lee, then why was it hearing the case in the first place? On the other hand, if the court had the authority to evict the army from Arlington, then Lee's suit represented a threat to the government's interests. Either way, Gray concluded, the courts had no business intervening in the case.[52]

The dissenters insisted, therefore, that a petition to Congress represented the only legally authorized recourse available to Lee. "If it is proper that the United States should allow themselves to be sued in such a case as this," Gray reasoned, "public policy requires that it should rest with congress to define the mode of proceeding, the conditions on which it may be maintained, and the manner in which the decision shall be enforced—none of which can be done if the citizen has an absolute right to maintain the action." He emphasized the fact that Congress had never endorsed the officer suit exception. "No act of Congress," he observed, "has conferred upon" the courts of the United States "general jurisdiction of suits against the United States to recover possession of real property, or to redress a tort."[53]

In closing, Gray and his fellow dissenters declined to address the title issue. Since "the question of the validity of the title, under which the United States, through their offices and agents, hold the land, cannot be tried and determined in this action," the dissenters explained, "we of course express no opinion upon that branch of the case." Thus, even in defeat, the minority used sovereign immunity as justification for avoiding a public admission that the government unlawfully held Arlington. But, as Miller had stressed in the majority opinion, "no division of opinion exists among the members of this court" that the jury was justified in ruling that the tax auction "did not divest the plaintiff of his title to the property." Indeed, the Supreme Court in *Hunter* and *Irwin* had long since concluded that the commissioners' payment-in-person policy was illegal.[54]

Justices Blatchford, Miller, Field, Harlan, and Matthews refused to agree to the enormous expansion of sovereign immunity that the dissenters advocated. By a narrow majority, therefore, the Supreme Court in *Lee* affirmed the principle that no officer was above the law or beyond the reach of justice.

The Court's ruling closed an important chapter in Civil War history. When the government seized Arlington in May 1861, it acted to protect the capital during a grave wartime crisis. Yet, as the historian James G. Randall once observed, actions taken in the name of military necessity "are a matter of degree, of discretion, and of means chosen. Penalties and severity should be part and parcel of the



Justices Samuel Blatchford, Samuel F. Miller, Stephen J. Field, John Marshall Harlan, and Stanley Matthews refused to agree to the enormous expansion of sovereign immunity that the dissenters advocated. The Court affirmed by a narrow majority the principle that no officer was above the law or beyond the reach of justice.

emergency. They should not pass beyond what the situation actually demands." By refusing to pay compensation to the Lees, and by adopting disingenuous tax rules to dispossess them and other southerners of their property, the government went far beyond what the crisis demanded.[55]

In rejecting the Justice Department's argument, the Supreme Court reaffirmed the nation's commitment to the rule of law. During the war, President Lincoln himself advised that disloyal citizens should not "be punished without regular trials in our duly constituted courts under the forms and all the substantial provisions of law and of the Constitution." The fundamental lesson of *United States v. Lee* was that, in the American legal system, the rule of law constrains the actions of every government officer, including the President. As Justice Miller explained, "All the officers of the government are creatures of the law and are bound to obey it." The case also stood for a simple but critical principle espoused by Judge Robert Hughes, who presided over the Arlington trial: "The courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors against him."[56]

The Court's ruling was a major public embarrassment for the federal government. The day after the Supreme Court announced its decision in *United States v. Lee*, Senator George Edmunds of Vermont introduced a resolution in the Senate directing the Judiciary Committee to investigate "whether any further legislation is necessary to secure the title of the United States to the national soldiers' cemetery at Arlington." The Vermont senator explained that the investigation was "made necessary by the recent decision of the Supreme Court in relation to the rights of General Lee." The Senate unanimously approved the resolution. On February 7, 1883, Custis Lee agreed to the committee's proposal to purchase Arlington for $150,000.[57]

One week later, Senator Edmunds released the Judiciary Committee's report. The

committee emphasized Arlington's "sacred public use," and it noted that Custis Lee had approached the settlement in an "entirely proper spirit." The Senate and House agreed, and the Appropriations Committee added the $150,000 settlement with Custis to its annual appropriations bill. The provision passed without debate. On May 15, 1883, the Secretary of the Treasury issued a check for $125,000 to Custis Lee, with $25,000 to follow after Custis paid the interest that had accrued on the unpaid tax. Arlington was finally and unquestionably the legal property of the United States government.[58]

The ramifications of the *Lee* decision extended beyond the courtroom. When Custis Lee first filed suit in 1877, the case appeared certain to antagonize sectional resentments. By pitting the United States government against the family of the leading Confederate general, many observers expected the Arlington case to stir bitter memories of the Civil War. The case's ultimate legacy, however, was quite different. The *Lee* ruling contributed to a spirit of sectional reconciliation that was already blossoming in the early 1880s. The symbolism of the nation's highest court ruling in favor of the most prominent Confederate family in a lawsuit vigorously contested by the Attorney General of the United States was unmistakable. The *Atlanta Constitution* spoke for many when it described the Court's ruling in the Arlington case as a "triumph of justice over war prejudices." The notion that the rule of law had prevailed over sectional prejudices resonated widely. As the *Washington Post* declared, the Court's ruling offered a powerful testament to "the rights [of] the citizens of a country where the law alone is supreme."[59]

But the rule of law had distinct limits in a society marked by deep racial inequities. The spirit of sectional reconciliation that informed the public's response to the Arlington case did not extend to racial reconciliation. If anything, the two had an inverse relationship. As the historian David Blight has asserted, "In the half century after the war, as the sections reconciled, by and large, the races divided." No institution in American life illustrated that fact more bluntly than the Supreme Court. One year after the *Lee* decision, the Supreme Court in the *Civil Rights Cases* held that the Fourteenth Amendment did not prohibit private parties from racially segregating public accommodations, such as restaurants, trains, and theaters. The court's ruling in the *Civil Rights Cases* cleared the way for the imposition of Jim Crow segregation across the South.[60]

The contrasting outcomes of *Lee* and the *Civil Rights Cases* demonstrated the stark reality that white men alone reaped the full benefits of the "rule of law" in late nineteenth century America. The son of the most important Confederate general found a more sympathetic hearing before the nation's high court than did millions of African Americans in the South, virtually none of whom had ever taken up arms against the United States government. Not until the 1950s would the federal courts begin to defend vigorously the constitutional rights of African Americans. But the principle of judicial review that Lee benefited from in the Arlington case would eventually facilitate the success of the Civil Rights Movement in the twentieth century.[61]

The Arlington case's most significant legal legacy lies in its eloquent defense of the rule of law. The majority ruling in *United States v. Lee* endorsed the principle that the rule of law applies equally to ordinary citizens and high government officials. To that end, *Lee* forcefully affirmed the doctrine of judicial review. In the American system of government, which rests upon a separation of powers, the judiciary has emerged as the ultimate safeguard of the people's liberty. The legislature enacts laws and the executive branch enforces them, but, in modern America, only the courts have the critical task of interpreting the law. As Chief Justice John Marshall observed in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[62]

On May 15, 1883, the Secretary of the Treasury issued a check for $125,000 to Custis Lee, with $25,000 to follow after Custis paid the interest that had accrued on the unpaid tax. Arlington House was finally and unquestionably the legal property of the United States government.

In the Arlington case, the Supreme Court did exactly that. The outcome of *United States v. Lee* made clear that the Constitution is not suspended in wartime. At all times, legal and constitutional limits govern the exercise of official power. As Justice Miller explained in *Lee*, "All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." The law, Miller emphasized, "is the only supreme power in our system of government."[63]

The Civil War posed the most severe test the American system of law and government has ever faced. The vast conflict transformed the country and gave rise to a modern nation. But, as the outcome of *United States v. Lee* demonstrated, the cornerstone idea that the government is accountable to the people survived the war intact. In the end, therefore, the Arlington case stands for the principle that we have a "government of laws and not of men."[64]

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ENDNOTES

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[3] *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851).

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[10]William Gillette, **Retreat from Reconstruction, 1869–1879** (Baton Rouge, 1979), p. 3; *Congressional Globe*, 41st Cong., 3d Sess. (December 13, 1870), pp. 74, 75–76, 77.

[11]*Bennett v. Hunter*, 76 U.S. 326, 327–330 (1869).

[12]*Hunter*, 76 U.S. at 330.

[13]*Ibid.* at 331–332, 333, 335, 337, 338.

[14]*Ibid.* at 338.

[15]*Tacey v. Irwin*, 85 U.S. 549, 550 (1873).

[16]*Irwin*, 85 U.S. at 551.

[17]*Ibid.* at 550.

[18]*Ibid.* at 551.

[19]*Ibid.* at 550.

[20]*Congressional Record*, 43rd Cong., 2nd Sess. (March 2, 1875), pp. 2054, 2056.

[21]*Lee v. Kaufman and Strong et al*, 15 F. Cas. 162 (D. Va. 1878) ("*Kaufman I*").

[22]*Kaufman I*, 15 F. Cas. 162; *Lee v. Kaufman and Strong et al*, 15 F. Cas. 204 (D. Va. 1879) ("*Kaufman II*").

[23]*United States v. Lee*, 106 U.S. 196, 199, 204 (1882); *Kaufman II*, 15 F. Cas. 204; *Hunter*, 76 U.S. 326; *Irwin*, 85 U.S. 549.

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[29]Christian G. Fritz, **American Sovereigns: The People and America's Constitutional Tradition before the Civil War** (New York, 2008), pp. 223–225; Daniel Farber, **Lincoln's Constitution** (Chicago, 2003)(quotation on p. 27).

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[34]*Ibid.* at 200–202.

[35]*Ibid.* at 204.

[36]*Ibid.* at 205.

[37]*Ibid.* at 206.

[38]*Ibid.* at 208–209. On the pre–Civil War conception of the people as sovereign, *see* Fritz, **American Sovereignty**, esp. 117–234.

[39]*Lee*, 106 U.S. at 207–208; *Chisholm v. Georgia*, 2 U.S. 419, 449–450 (1793); *Cohens v. Virginia*, 19 U.S. 264 (1821).

[40]*United States v. Judge Peters*, 9 U.S. 115, 139–140 (1809).

[41]*Lee*, 106 U.S. at 210.

[42]*Meigs v. M'Clung's Lessee*, 13 U.S. 11 (1815); *Osborn v. Bank of the United States*, 22 U.S. 738 (1824); *Wilcox v.*

Jackson, 38 U.S. 498 (1839); *Grisar v. McDowell*, 73 U.S. 363 (1867).

[43]*Lee*, 106 U.S. at 217.

[44]*Ibid.* at 218, 219, 221.

[45]*Ibid.* at 219–220.

[46]*Ibid.* at 221–222, 223.

[47]*Ibid.* at 220.

[48]*Ibid.* at 223. Gray's dissenting opinion in *Lee* drew heavily upon his own majority opinion in *Briggs v. The Light Boats*, 93 Mass. 157 (1865).

[49]*Lee*, 106 U.S. at 224, 225–226.

[50]*Lee*, 106 U.S. at 224, 226, 227, 228–232; *Cohens v. Virginia*, 19 U.S. 264, 411–412 (1821); *Beers v. Arkansas*, 61 U.S. 527, 529 (1857); *Nichols v. United States*, 74 U.S. 122, 126 (1868).

[51]*Lee*, 106 U.S. at 226.

[52]*Ibid.* at 250.

[53]*Ibid.* at 240, 241.

[54]*Ibid.* at 199, 251.

[55]James G. Randall, **Constitutional Problems under Lincoln** (Urbana, Ill., 1964), p. xviii.

[56]*Lee*, 160 U.S. at 220; *Kaufman I*, 15 F. Cas. at 189–190; Randall, **Constitutional Problems under Lincoln**, p. xxvii.

[57]*Congressional Record*, 47th Cong., 2d Sess. (December 6, 1882), p. 35; Washington *Evening Star*, December 6, 1882, p. 1; Legh R. Page to Sen. George F. Edmunds, February 7, 1883, in U.S. Doc. 2088, Senate Reports 2, 47th Cong., 2d Sess., Report No. 993 (February 15, 1883).

[58]U.S. Doc. 2088, Senate Reports 2, 47th Cong., 2d Sess., Report No. 993 (February 15, 1883); *New York Times*, February 16, 1883, p. 1, and May 15, 1883, p. 2; *Congressional Record*, 47th Cong., 2d Sess. (February 15, 1883), pp. 2680–2681, and *ibid.* (March 1, 1883), pp. 3535–3538, 3736; U.S. Doc. 2088, Senate Reports 2, 47th Cong., 2d Sess., Report No. 993 (February 15, 1883); Act of March 3, 1883, ch. 141, 22 Stat. 584.

[59]*Atlanta Constitution*, December 7, 1882, p. 4; *Washington Post*, December 8, 1882, p. 2.

[60]David W. Blight, **Race and Reunion: The Civil War in American Memory** (Cambridge, Mass., 2001), p. 4; Harold Hyman and William Wiecek, **Equal Justice under Law: Constitutional Development, 1835–1875** (New York, 1982), pp. 499–500.

[61]On the legal battle for civil rights, *see* Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York, 2006); Juan Williams, **Thurgood Marshall: American Revolutionary** (New York, 1998).

[62]*Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[63]*Lee*, 106 U.S. at 220.

[64]*Marbury*, 5 U.S. at 163. *See also* David McCullough, **John Adams** (New York, 2001), p. 222.

Rufus W. Peckham and the Pursuit of Economic Freedom

JAMES W. ELY, JR.*

It is striking that Rufus W. Peckham has received so little scholarly attention and remains without a biography. He was, of course, the author of *Lochner v. New York* (1905),[1] one of the most famous and contested decisions in the history of the Supreme Court. Moreover, Peckham wrote important opinions dealing with contractual freedom, anti-trust law, eminent domain, dormant commerce power, and the Eleventh Amendment. Indeed, Owen M. Fiss maintains that Peckham and David J. Brewer were intellectual leaders of the Fuller Court, "influential within the dominant coalition and the source of the ideas that gave the Court its sweep and direction." Even when they did not prevail, Fiss observed, Peckham and Brewer "set the terms for the debate."[2]

Why has such an influential jurist been so conspicuously overlooked in the historical literature? One might be tempted to explain this neglect in terms of the disdain that many scholars feel toward the jurisprudence of the Gilded Age, with its emphasis on economic liberty and limited government. It is an old adage that winners write history. Scholars who view the work of the Supreme Court through the lens of the Progressive and New Deal mind-set would likely have little sympathy for Peckham.[3] After all, he was skeptical about much of the legislation associated with the Progressive movement and strenuously rejected the emerging statist liberalism.

While, no doubt, this is a partial explanation, it is not ultimately persuasive. Other leading jurists of the late nineteenth century—Stephen J. Field,[4] Melville W. Fuller,[5] Brewer,[6] Thomas M. Cooley[7]—have received considerable scholarly attention. Even the controversial *Lochner* decision has been the subject of revisionist and more sympathetic accounts in recent years.[8] So we are left with an unresolved question as to why Justice Peckham lingers in relative obscurity. I propose in this article to take a fresh look at Peckham's career and assess his signature issue, a commitment to liberty of contract.

Background

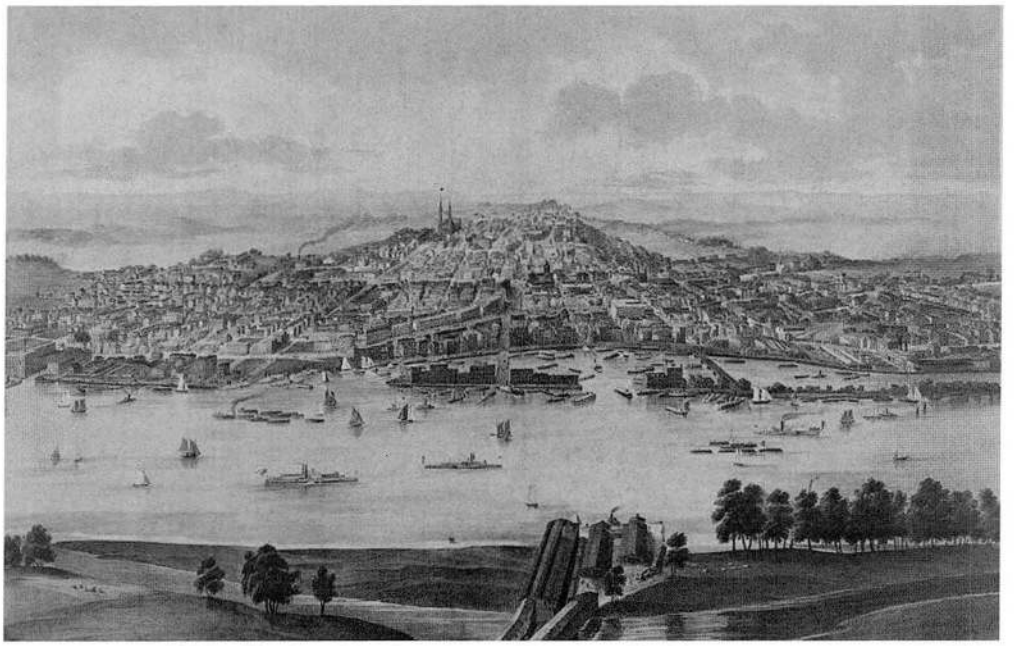
Born in 1838 in Albany, New York, Peckham was part of a family of prominent lawyers and judges. Indeed, in many respects Peckham's

early career followed in the footsteps of his father. The elder Peckham was a district attorney, a member of Congress, and served on both the New York Supreme Court and the Court of Appeals. Rufus Peckham was educated locally and studied law in his father's office. He was admitted to the New York bar in 1859. Joining the family firm, Peckham built a successful practice representing the Albany and Susquehanna Railroad, a local bank, and real estate interests.

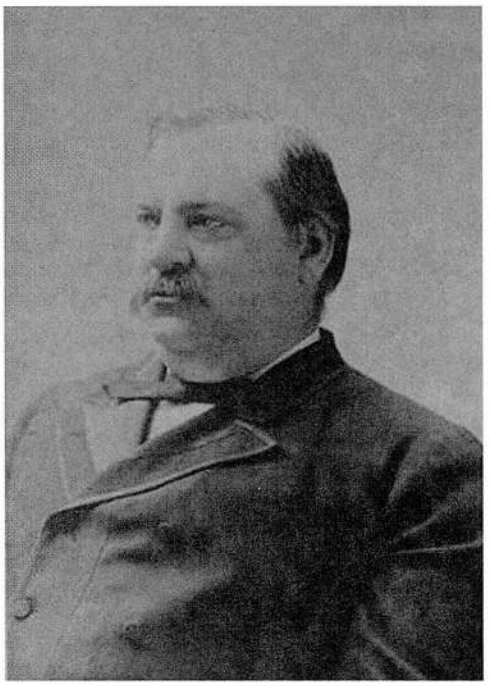
Peckham was very active in Democratic party affairs and in 1868 he was elected district attorney for Albany County, a post that he held for three years. From 1881 to 1883 he was corporation counsel for the City of Albany. Participating regularly in Democratic party conventions at both the national and state level, Peckham emerged as a leading spokesman for upstate Democrats in their struggle to prevent domination of the party by Tammany Hall, a New York City-based political group. He formed a close friendship with Grover Cleveland, and actively supported Cleveland's rise in New York political life. In 1883 Peckham was elected to the New York Supreme Court. Three years later, then-President Cleveland helped to engineer Peckham's election to the New York Court of Appeals.

Court of Appeals

During his nearly ten years on the appellate bench, Peckham proved to be an able judge who avoided partisanship. He authored more than 300 opinions for the Court on a wide variety of private law topics, including property, torts, contracts, and wills. Peckham wrote only eight dissenting opinions, but dissented more than 80 times without opinion. For our purposes, however, Peckham's opinions raising constitutional issues are of special interest. He demonstrated skepticism about governmental regulation of the economy, an aversion to class legislation, and a disposition to define liberty as encompassing economic freedom. Since Peckham carried these views with him to the



Born in Albany in 1838, Rufus Peckham studied law at his father's firm for two years before passing the bar in 1859. He became a leading citizen of the Albany community and attracted such notable clients as the Albany and Susquehanna Railroad.



Peckham was involved in politics in the upstate wing of the Democratic party of New York. He became friends with Grover Cleveland (above), the former mayor of Buffalo, who would become President in 1885 after a stint as governor of the state. Cleveland engineered Peckham's election to the New York Court of Appeals in 1886.

U.S. Supreme Court, his work on the Court of Appeals warrants careful consideration.

Peckham's opinion in *People v. Gillson* (1888) is especially revealing.[9] At issue was the act of the defendant in giving away a teacup and saucer to the purchaser of two pounds of coffee as part of a promotional scheme. The state alleged that this transaction violated a section of the penal code that banned the distribution of a gift or prize with the sale of food. It argued that the measure was a valid exercise of the police power to prohibit lotteries and prevent the sale of unwholesome food. Speaking for a unanimous bench, Peckham found that the statute amounted to a deprivation of both liberty and property without due process of law as guaranteed by the New York Constitution. Emphasizing that liberty encompassed the right "to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation," he pictured the statute as an anti-competitive regulation. It was, Peckham complained, "of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class..."[10] He insisted that the statute infringed upon the liberty of the owner to pursue a lawful calling and deprived the owner of property by curtailing the power of sale. After considering at length the state's police power argument, Peckham concluded that there was no element of chance here and hence no lottery. Conceding that the legislature could ban lotteries and prevent sale of adultered food, he declared that the statute did not accomplish either purpose.

Peckham's *Gillson* opinion anticipates much of his reasoning in *Lochner*. He broadly defined liberty to include economic activities and required the state to demonstrate that its exercise of regulatory authority was "reasonably necessary for the common welfare." Peckham did not accept the state's ostensible purpose at face value. Instead, he undertook an extensive economic analysis of the regulation and independently weighed the evidence, finding that the measure had no relationship to its alleged purpose. Thus, Peckham persuasively ruled that, on the facts presented, the state failed to justify its interference with liberty and property. Moreover, the *Gillson* opinion underscores Peckham's intellectual debt to Jacksonian Democracy, with its stress on equal rights and distrust of class legislation. The Jacksonian distaste for granting special economic privilege and preference for competition had a significant impact on constitutional thought in the Gilded Age.[11]

It bears emphasis that Peckham's solicitude for economic liberty was not confined to business enterprise. He championed the right to pursue ordinary trades, a right seemingly threatened by the rise of occupational licensing in the late nineteenth century. Accordingly, Peckham viewed occupational licensing with deep skepticism. In *Nechameus v.*

Warden of the City Prison (1895) the court majority upheld a state law that required master plumbers—those who employed other plumbers to work for them—to pass an examination and obtain a license from a board of plumbers.[12] The act did not apply to persons just working as plumbers. The majority reasoned that the statute, although coming "pretty close" to the borderline of legitimate police power, related to public health and welfare. In a vigorous dissent, however, Peckham blasted the licensure scheme as a deprivation of the liberty to follow an ordinary trade. Finding no health or safety rationale for the act, he declared:

> . . . it would seem quite apparent that its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter excepting as he may pass an examination, the requisites are not stated . . .

Peckham added that the license requirement was "vicious in its purpose and that it tends directly to the creation and fostering of a monopoly."[13]

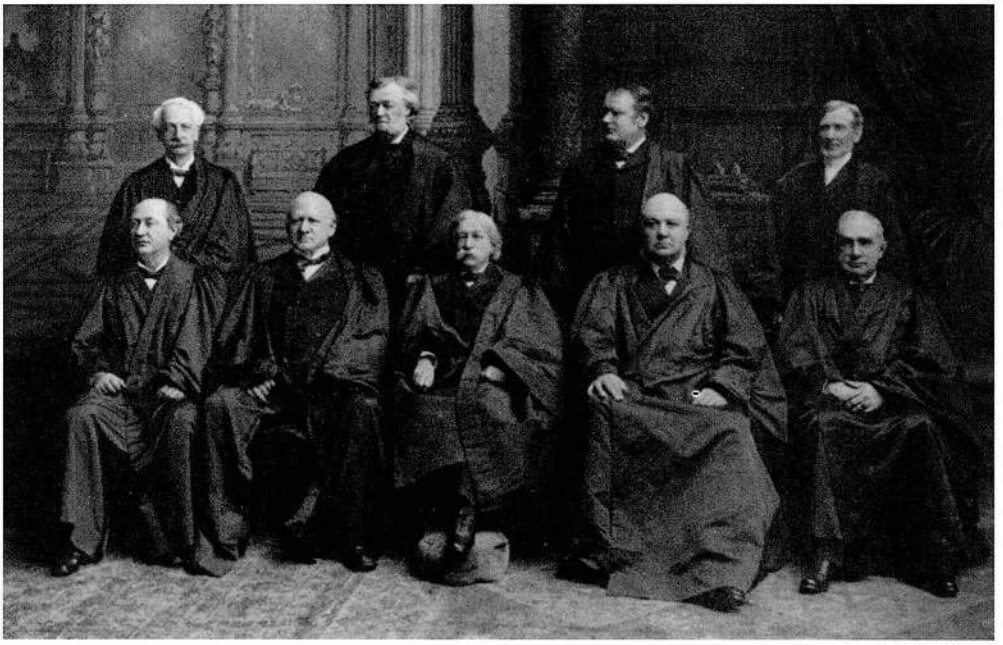
Supreme Court Appointment

Peckham's path to the Supreme Court provides a glimpse into Gilded Age patronage politics. President Cleveland and Senator David B. Hill were locked in a struggle over control of the New York Democratic party. In 1894, Cleveland nominated William B. Hornblower, a leading New York City attorney, to fill a vacancy on the Supreme Court. Hornblower had conducted an investigation into judicial election irregularities, and, in so doing, antagonized then Governor Hill. In retaliation, Hill successfully urged the Senate to reject Hornblower's nomination. Cleveland then turned to Wheeler H. Peckham, the brother of Rufus. A prominent advocate of legal reform, Wheeler Peckham practiced in New York City and was not politically active. Nonetheless, Senator Hill perceived a threat, and again invoked senatorial courtesy in persuading the Senate to vote against confirmation.[14] At this time, however, Hill praised Rufus Peckham as one who "would make a magnificent member of the Supreme Court."[15] Frustrated by his failure to find an acceptable New York nominee, President Cleveland named Edward Douglass White, a senator from Louisiana, who was readily confirmed. A year later there was another vacancy on the Supreme Court. Having at last mended relations with Senator Hill, Cleveland named his close friend Rufus Peckham as his final appointee to the Supreme Court in December of 1895. The nomination was enthusiastically received. *The New York Times* declared that Peckham "is admirably qualified for the place by integrity, by learning, by judicial temperament, and by judicial experience."[16] Hill endorsed the nomination, and Peckham was confirmed only a few days later with no recorded opposition. Peckham took his seat on the Court on January 6, 1896, and served for fourteen years.

The Fuller Court

The Framers of the Constitution and Bill of Rights believed that respect for private property was closely linked to political liberty. Echoing this view, the federal courts had long been concerned with safeguarding property and contractual rights against legislative abridgement.[17] In the late nineteenth century, the Supreme Court, under the leadership of Chief Justice Melville W. Fuller (1888–1910), afforded heightened scrutiny to the rights of property owners in the face of the nascent regulatory state.[18]

Thus, before Peckham's appointment, the Fuller Court had invoked a substantive reading of due process to establish judicial review of state rate regulations,[19] strengthened the position of property owners under the takings clause of the Fifth Amendment,[20] struck down state laws that interfered with trade among the states,[21] invalidated the 1894 income tax as an



Under the leadership of Chief Justice Melville W. Fuller (1888–1910), the Supreme Court afforded heightened scrutiny to the rights of property owners in the face of the nascent regulatory state. On the Court, Peckham (standing at left) paid considerable attention to the right to contract.

unconstitutional "direct tax,"[22] and limited the reach of the Sherman Act of 1890.[23]

In many respects, therefore, Peckham joined a Supreme Court on which the dominant outlook was congenial to his own convictions. He helped to cement trends already evident on the Fuller Court, and, at the same time, he moved the Court in some new directions. Peckham wrote more than 300 majority opinions, but only seven dissents. However, he dissented without opinion in 139 cases, and compiled a dissent rate of 4.9 percent.[24] Although Peckham was one of the more prolific dissenters on the Fuller Court, his dissent rate is quite low when compared to current dissent behavior.

Liberty of Contract

Peckham is closely associated with the emerging liberty-of-contract doctrine, and indeed he played a key role in the Court's somewhat cautious endorsement of this principle. Americans of the nineteenth century assigned a high value to contractual rights. The law generally left parties free to promote their own interests through contractual arrangements. The origin of the liberty-of-contract doctrine, which can be traced to several sources, is beyond the scope of this paper.[25] Suffice it to say that, by the late nineteenth century, state courts began to strike down some workplace regulations as an infringement of the constitutional right to enter agreements.[26] In fact, the Supreme Court was relatively slow to adopt the liberty-of-contract norm. That started to change with Peckham's landmark opinion in *Allgeyer v. Louisiana* (1897).[27]

In *Allgeyer*, Peckham, speaking for a unanimous Court, gave a broad reading to the scope of "liberty" protected by the Due Process Clause of the Fourteenth Amendment and, for the first time, embraced freedom of contract as a constitutional principle. At issue in *Allgeyer* was a state law that prohibited an individual within Louisiana from

Peckham's landmark opinion in *Allgeyer* concerned a state law that prohibited an individual within Louisiana from entering into an insurance contract with an out-of-state company not qualified to do business in Louisiana. Allgeyer, a Louisiana resident, had been convicted of notifying a New York insurance company of a shipment of cotton covered by a marine insurance policy obtained in New York. Above is the Cotton Exchange building in New Orleans.

entering into an insurance contract with an out-of-state company not qualified to do business in Louisiana. Allgeyer, a Louisiana resident, was convicted of notifying a New York insurance company of a shipment of cotton covered by a marine insurance policy obtained in New York. Peckham reversed the conviction and vigorously declared:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere

> physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

He then linked the freedom of contract to "the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property."[28]

Several comments are in order with respect to the outcome of *Allgeyer.* Peckham certainly did not bar any role for the states in governing contractual freedom. He remarked that, pursuant to state police power, contracts could be "regulated and sometimes prohibited" when they conflicted with state policy articulated in a statute.[29] The *Allgeyer* holding was also complicated by the fact that the challenged statute had direct implications for business activity across state lines.[30] Peckham pointedly noted that state power did not extend to prohibiting contracts made outside the jurisdiction.[31] The Supreme Court had long sought to guard the national market from state interference, and *Allgeyer* must be partially seen in this light. Finally, the *Allgeyer* case contradicts the misleading hypothesis fashioned by the Progressives that the Supreme Court adopted the freedom-of-contract principle to aid the propertied and business interests. "The distributional effect of the decision," as Kermit L. Hall and Peter Karsten have pointed out, "was hardly to protect the rich from the poor, because the measure opened to citizens of the state the opportunity to engage an effective competitor to insurance companies within the state."[32]

In any event, most of Peckham's colleagues did not share his devotion to liberty of contract. Despite the potentially sweeping reach of the freedom-of-contract doctrine, the Supreme Court did not apply this principle again for a number of years. In a series of cases, the justices rejected the contention that state laws regulating the terms and conditions of employment abridged contractual liberty. Thus, the Court upheld a state law limiting employment in mines to eight hours a day;[33] sustained a state law requiring employers to pay workers in money, not script;[34] and validated a statute limiting hours of work on state and municipal projects.[35] So intense was Peckham's commitment to liberty of contract that he dissented, albeit without opinion, in each of these cases. The Court was similarly reluctant to apply the liberty-of-contract doctrine in cases involving regulation of business enterprise. For example, it brushed aside a liberty-of-contract argument and sustained a state mechanics' lien law.[36] The Justices also held that states could require grain elevators and warehouses on railroad lines to obtain a license to do business.[37] Peckham evidently had no quarrel with these outcomes and did not dissent.

By 1905, it appeared at first blush that Peckham's dogged efforts to fashion constitutional protection for contractual freedom under due process had produced a meager result. The idea of a constitutional right to make contracts free of state oversight seemingly received little more than lip service from the Fuller Court. Still, the Justices increasingly treated liberty of contract as a constitutional baseline, and expected the states to justify legislative restrictions on this right. The freedom to make agreements could only be curtailed to advance the health, safety, and morals of the community.

Peckham's dedication to the liberty of contract eventually bore fruit with his famous and much-maligned decision in *Lochner v. New York* (1905).[38] The case has been treated extensively elsewhere and will receive just brief attention here. It involved a challenge

to a state law that limited work in bakeries to ten hours a day or sixty hours a week. Writing for a 5–4 majority of the Court, Peckham struck down the measure as an infringement of contractual freedom. He maintained: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[39] Peckham conceded that a state could impose "reasonable conditions" on the enjoyment of both liberty and property. He further agreed that the state could inspect bakeries and enact measures to improve workplace conditions. Peckham drew the line, however, at regulations governing working hours. He was not persuaded that baking was an unhealthy trade, and he could see no relationship between hours of work and the health of bakers. Consequently, Peckham asserted that the "real object and purpose" of the law was to regulate labor relations, not to achieve the purported goal of safeguarding either public or employee health. In other words, he viewed the hours limitation as promoting a class interest rather than a traditional police power concern with health and safety. "It is impossible for us to shut our eyes," Peckham lectured, "to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[40] Declaring that bakers were capable of looking out for their own interests, he characterized maximum-hours statutes as "mere meddlesome interferences with the rights of the individual."[41]

At first, the *Lochner* decision aroused little public interest.[42] Prominent figures in the Progressive Movement of the early twentieth century, however, came to see the ruling as a barrier to their agenda of legislative reform of working and social conditions. So notorious did the decision eventually become that scholars have coined the misleading phrase "*Lochner* era" to characterize an entire period of Supreme Court history.

Among other problems, the notion of a *Lochner* era conveys an erroneous impression of the Supreme Court's adherence to the liberty-of-contract doctrine.[43] Judges of the supposed *Lochner* era, we are still frequently told, sought to impose their laissez-faire ideology on the polity. Revisionist scholarship has destroyed much of this once conventional story. Many of the stock criticisms of *Lochner* are quite wide of the mark.[44] It bears emphasis, moreover, that the *Lochner* decision was atypical and was never steadily followed by the Supreme Court.[45] Instead, the Court infrequently invoked the freedom-of-contract principle and found that most regulatory legislation passed constitutional muster. Gregory S. Alexander has cogently pointed out that "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty-of-contract principle."[46]

In fact, the Fuller Court only invoked the liberty of contract doctrine in one other case while Peckham was on the Bench. In *Adair v. United States* (1908), Justice John Marshall Harlan, writing for the majority, invalidated a congressional statute that banned so-called yellow dog contracts on railroads.[47] Such contracts made it a condition of employment that workers not join a labor union. Invoking *Lochner,* Harlan affirmed "the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation."

In other respects, however, the Justices began almost immediately to move away from *Lochner*. In *Muller v. Oregon* (1908), for instance, they upheld a state law restricting the number of working hours for women in factories and laundries in an opinion that reflected paternalist assumptions about the place of women in society.[48] Peckham must have found this analysis persuasive, for he joined in the *Muller* opinion. A year later, the Court in *McLean v. Arkansas* (1909) brushed aside a freedom-of-contract objection and upheld

a coal-weighing statute requiring that miners' wages be calculated by the weight of coal mined before screening.[49] Analogizing the measure to laws preventing fraud, the Court noted that statutes mandating honest weights "have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract." This case, the last that raised issues of contractual freedom during Peckham's tenure, found him once again dissenting without opinion.

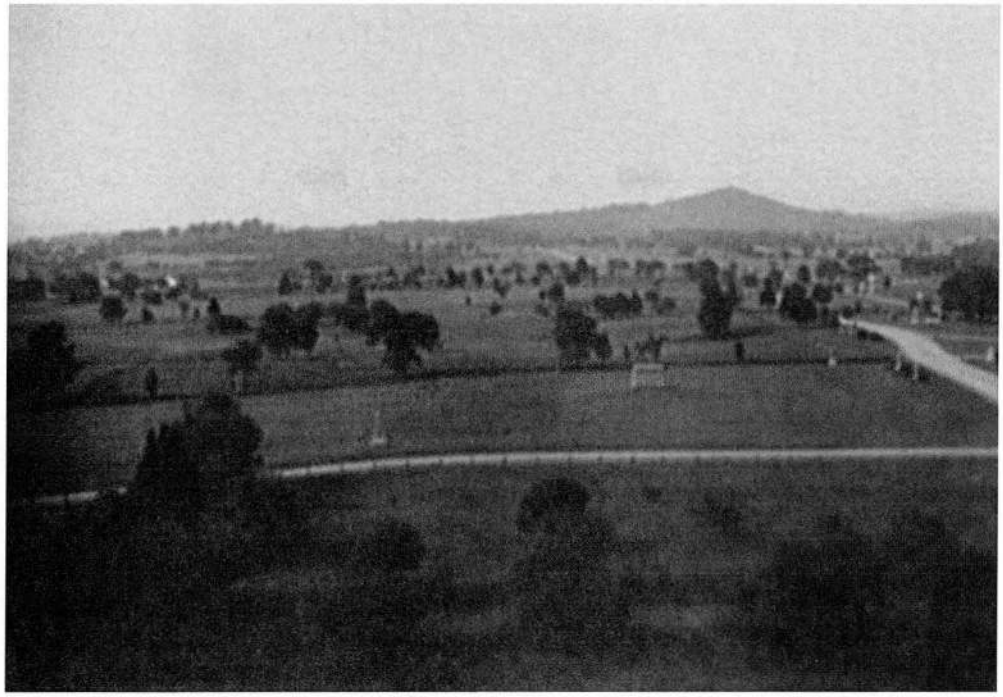
It is evident that Peckham was more committed to liberty of contract than most of his colleagues even on the property-conscious Fuller Court. Not only did Peckham stand out in his dedication to contractual freedom, but the Supreme Court, both during his life and subsequently, wielded the doctrine sparingly. Eventually, of course, the Court rejected liberty of contract as a constitutional norm.[50] This repudiation has done much to cloud Peckham's historical reputation.

Yet Peckham and *Lochner* cannot be banished so easily from our constitutional history. *Lochner,* to be sure, is regularly cast as a bogey by scholars from a wide range of ideological perspectives, although for different reasons. But its enduring significance lies elsewhere. Peckham's decision in *Lochner* remains at the heart of a continuing dialogue about the role of the judiciary in American life. To what extent are courts free to review legislative determinations? To what extent are they bound to defer to the political branches of government? In short, *Lochner* is at the center of the endless discussion over judicial activism. No matter how much some scholars may revile *Lochner*—and much of this criticism is exaggerated in my view—they cannot escape dealing with its contested legacy. Indeed, an ocean of ink has been spilt by scholars attempting to differentiate judicial activism in support of civil rights and civil liberties following World War II with earlier judicial solicitude for economic rights.[51] One may well question whether there is a principled distinction, but that is a topic for another day.

Takings Jurisprudence

During the tenure of Chief Justice Fuller, the Supreme Court, for the first time, came to grips in a sustained way with the takings issue. In this area, Peckham invariably voted with the majority and authored several important opinions. It should be noted that, in this era, the Court sometimes conflated taking of property with deprivation of property without due process of law under the Fourteenth Amendment. With the notable exception of the just compensation norm,[52] the Fuller Court declined to extend the guarantees of the Bill of Rights to the states. As a result, Peckham and his colleagues analyzed some cases under the due process framework that today would likely be treated as a takings issue.

Peckham wrote three opinions that bear on the contested meaning of "public use" for the exercise of eminent domain power. Since these decisions have figured prominently in the current debate over the "public use" requirement, they deserve careful attention.[53] At issue in *United States v. Gettysburg Electric Railway Company* (1896) was the authority of the federal government to acquire by eminent domain parcels of land in order to preserve the Gettysburg battlefield as a park.[54] Opposing counsel primarily argued that the powers of the national government did not encompass the preservation of historic sites. Peckham, speaking for a unanimous Court, had no difficulty in concluding that the proposed use of land was of national importance and therefore within the powers of Congress. Of course, the historic park would be open to the public and would satisfy the most stringent definition of "public use." Nonetheless, Peckham offered some brief comments about the exercise of eminent domain. Pointing out that "the full



Peckham wrote three opinions about the meaning of "public use" for the exercise of eminent domain power. At issue in *United States v. Gettysburg Electric Railway Company* (1896) was the authority of the federal government to acquire by eminent domain parcels of land in order to preserve the Gettysburg battlefield (pictured) as a park. Peckham, speaking for a unanimous Court, had no difficulty in concluding that the proposed use of land was of national importance and therefore within the powers of Congress.

value of the property taken" must be paid by the public through taxation, he optimistically asserted that there was little danger of governmental abuse of this power. Peckham, however, adopted a more cautious approach when eminent domain was delegated to a private enterprise. "In that case," he observed, "the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself."[55]

A few months later, in *Fallbrook Irrigation District v. Bradley* (1896), Peckham had an opportunity to amplify his understanding of the "public use" norm.[56] In fact, *Fallbrook* was really not an eminent domain case.[57] Rather, it involved a lawsuit by a landowner in California contesting an assessment imposed on her land by an irrigation district for the purpose of providing water for arid lands. The federal circuit court enjoined the collector of the irrigation district from selling the plaintiff's land for nonpayment of the assessment. Her objection was premised on the notion that irrigation was not a public purpose, and hence the assessment constituted a deprivation of property without due process of law under *Loan Association v. Topeka* (1874).[58] Rejecting this contention, Peckham deferred to decisions of the California courts that irrigation was a public use under the state constitution and laws. It followed that the assessment did not unconstitutionally deprive the plaintiff of property in violation of due process.

Since the challenge in *Fallbrook* was to governmental taxing authority, Peckham correctly spoke largely in terms of "public purpose." Indeed, he formulated the crucial inquiry as follows: "Is this assessment, for the non-payment of which the land of the plaintiff

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was to be sold, levied for a public purpose?"[59] Nonetheless, Peckham did discuss the issue of "public use" in his somewhat rambling opinion. With no condemnation of property before the Court, however, his remarks have the character of dictum. Peckham was prepared to allow states some latitude concerning the exercise of eminent domain. "It is obvious," he observed, "that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Still, he insisted that "[t]he use for which private property is to be taken must be a public use." Importantly, Peckham was persuaded that the irrigation of arid and "otherwise worthless" land was a "public use," a term that he used interchangeably with "public purpose."[60] In his mind it was not necessary that the entire community should be able to enjoy an improvement in order to render it a "public use." But Peckham emphasized that "[a]ll landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to use the water." He concluded that providing water to arid land was a "public purpose," the cost of which could be legitimately paid by general taxes or assessments.[61] All in all, *Fallbrook,* which focused primarily on taxation issues, is a curious case to be treated as a seminal authority in defining "public use" in the context of eminent domain.

That Peckham did not give a carte blanche endorsement to the taking of private property was demonstrated by *Missouri Pacific Railway Company v. Nebraska* (1896), a case in which he joined the Court's opinion.[62] At issue was a Nebraska statute that authorized a state agency to compel a railroad to grant part of its land to private individuals for the purpose of erecting a grain elevator. The law was a response to agitation by farm organizations seeking to control the price of grain storage by establishing competing facilities. The Court described the proceedings as "in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners."[63] It invalidated the statute on grounds that the taking of the private property of one person by the state for the private use of another violated the due process clause of the Fourteenth Amendment. The ruling seemed to bar the exercise of eminent domain for the benefit of private parties.

Justice Peckham's third opinion dealing with the "public use" issue, *Clark v. Nash* (1905), also involved the irrigation of arid land.[64] A Utah statute empowered individuals to condemn land for the purpose of obtaining water for mining or irrigation. In *Clark*, the plaintiff, who was entitled to use water from a nearby creek, sought to widen by one foot an already existing ditch on the defendant's contiguous land. The evidence indicated that water would reach the plaintiff's property through such an enlarged ditch. The Supreme Court of Utah, broadly defining "public use" as a taking that promoted public interest, affirmed a condemnation order conditioned upon payment of $40 in compensation to the defendant. The defendant argued before the Supreme Court that this action amounted to a taking for private,

not public, use, and consequently deprived the defendant of property without due process of law in violation of the Fourteenth Amendment.

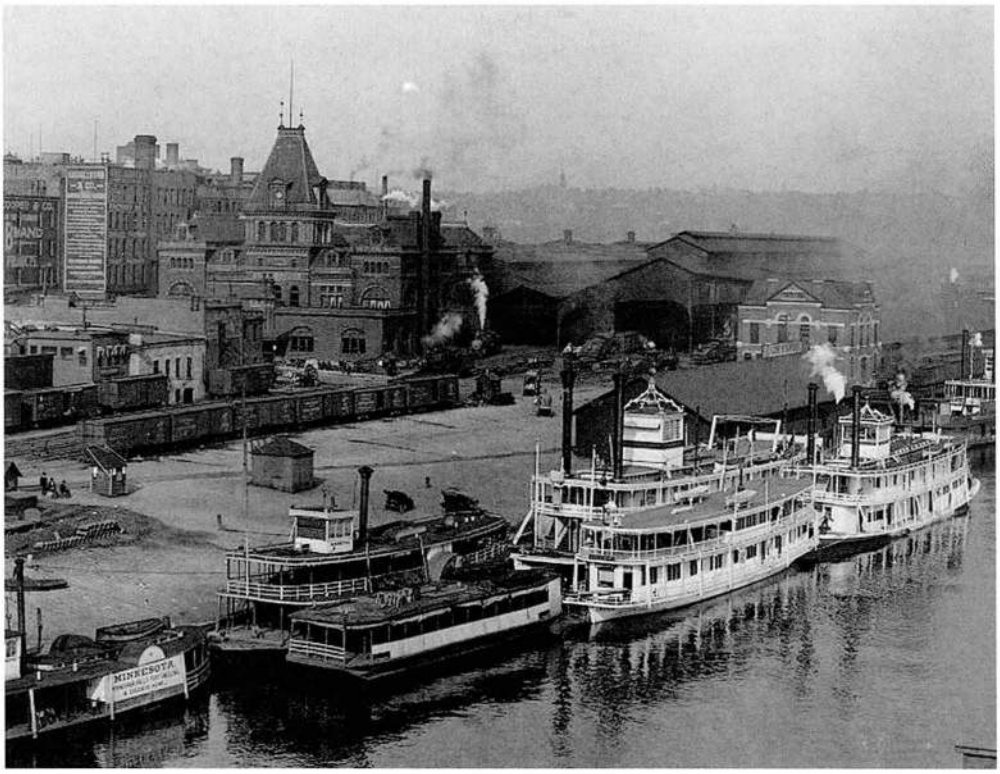
Peckham began his opinion by asserting that in many states the defendant's contention would be sound, but stressed that a determination of "public use" might be contingent upon unique local circumstances. Whether obtaining water was for a "public use," he observed, "may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries." When the exercise of eminent domain was based "upon some peculiar condition of the soil or climate, or other peculiarity of the State," Peckham added, the Supreme Court was inclined to defer to the judgment of state lawmakers.[65] Having stressed the fact-dependent nature of the determination of "public use," Peckham then misleadingly stated that the earlier *Fallbrook* case turned upon the condemnation of land by a corporation to obtain a water supply. As we have seen, that case, in fact, involved the validity of a special tax assessment. Not surprisingly, Peckham found that allowing the plaintiff to enlarge the ditch to irrigate land "which otherwise would remain absolutely valueless" satisfied the "public use" norm.[66] Under these particular circumstances, he was evidently persuaded that the modest incursion on private property by the irrigation scheme could be justified by the overall resource benefit for the public.

It bears emphasis, however, that Peckham expressly confined the reach of *Clark* to its facts. In language often unaccountably omitted from subsequent treatment of *Clark,* he declared: "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."[67] While Peckham might be faulted for employing some imprecise language in his three eminent domain opinions, he never held that legislative determinations of "public use" were virtually conclusive or that private property could be taken for any supposed public purpose. Moreover, the factual context of *Fallbrook* and *Clark* is important. It is not difficult to distinguish taking a narrow strip of arid land, which involved no displacement of residences or business enterprises, from more recent economic development projects.[68]

Rate Regulation

One of the most protracted and vexing issues before the Supreme Court during Peckham's tenure was the extent to which state or federal governments could control the rates charged by railroads. As the principal arteries of commerce and travel among the states, railroads occupied a vital place in American life at the turn of the twentieth century. Shippers and farmers saw the carriers as wielding monopoly power and charging excessive rates. Railroads, on the other hand, asserted that rates imposed by state legislatures or governmental agencies were often unreasonably low. They argued that such regulations indirectly deprived the carriers of the value of their property, and amounted to a de facto confiscation of property.[69]

In a line of decisions rendered before Peckham took his place on the Bench, the Fuller Court had circumscribed state regulatory authority. It established federal judicial supervision of state-imposed rates under the due process clause of the Fourteenth Amendment, and insisted that railroads were constitutionally entitled to charge reasonable rates for the use of their property.[70] Peckham was, no doubt, in full agreement with these developments. Shortly after he became a member of the Court, Peckham joined his colleagues in holding that legislative control of tolls on a private turnpike was subject to the same constitutional limitations.[71] More importantly, he signed on to the Court's opinion in *Smyth v. Ames* (1898), in which the Justices sought to distinguish a valid rate regulation from



Peckham's most significant contribution to the controversy over rate regulation was his opinion *Ex Parte Young* (1908), which involved a Minnesota statute that required reductions in passenger and freight charges. Above is a railroad freight terminal and steamship station in Duluth.

confiscation.[72] In *Smyth*, the Court ruled that a steep reduction in intrastate freight rates mandated by the Nebraska legislature constituted a deprivation of property without due process of law. In so doing, the Court articulated a standard for judicial review of rates, ruling that a railroad was entitled to a "fair return" upon the "fair value" of its property. Under the "fair value" rule, courts looked primarily at the current or replacement value of a company's assets as the baseline for calculating the reasonableness of imposed rates. As a consequence of *Smyth,* the federal courts became deeply involved in rate cases and state rate-making authority was sharply restricted. Railroad companies increasingly sought federal court injunctions to restrain enforcement of state-fixed rates.

Some states were so upset at federal judicial review of intrastate rates that they attempted to deter railroads from pursuing relief in the federal courts. This set the stage for Peckham's most significant contribution to the controversy over rate regulation. At issue in the seminal case of *Ex Parte Young* (1908) was a Minnesota statute that required reductions in passenger and freight charges.[73] It also specified huge fines and severe criminal penalties on railroads and their agents for violation of the act. The obvious purpose behind these penalties was to intimidate carriers and their officers from testing the validity of the rate reductions in court. Maintaining that the mandated rates were confiscatory and unconstitutional, railroad stockholders secured a temporary injunction in federal court prohibiting Edward T. Young, the Minnesota attorney general, from enforcing the measure. Young violated the injunction by attempting to force obedience to the new rate schedule in state

court. Found guilty of contempt by the federal court, Young was fined, directed to dismiss the state court proceeding, and jailed until he complied. Young then sought a writ of habeas corpus from the Supreme Court, arguing that the federal court lawsuit was, in reality, against the state in violation of the Eleventh Amendment.

Speaking for the Court, Peckham ruled that the penalty provisions were unconstitutional on their face because they effectively denied access to the federal courts to determine the adequacy of imposed rates. He cogently observed:

> ... when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.[74]

Rejecting the Eleventh Amendment defense, Peckham insisted that when a state official took steps to enforce an unconstitutional law "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[75] Peckham's distinction between suits against states and suits against state officials alleged to be acting unconstitutionally relied on a legal fiction that permitted circumvention of the Eleventh Amendment. *Young* has endured as a foundational decision for Eleventh Amendment jurisprudence because the power to enjoin state officials from violating national laws proved essential for maintaining the federal scheme of government.[76]

Our concern, however, is less with the intricacies of Eleventh Amendment jurisprudence than with what the *Young* opinion reveals about Peckham's thinking. Peckham was surely influenced by his suspicion of state railroad regulations and his desire to protect the property rights of the carriers from confiscatory rates. To this end, he emphasized that railroads should not be required to risk severe penalties in order to obtain federal judicial review of state-imposed rates. Thus, *Young* provides a jurisdictional counterpart for *Smyth*. It was vital to preserve access to a federal forum in order to guarantee that regulated industries received a "fair return" on their investments. Aside from his dedication to the rights of property owners, Peckham was influenced by utilitarian considerations. Protection of investment capital was an important feature of the work of the Fuller era, an attitude that Peckham shared. Security of private property was linked with a continued flow of investment capital and with economic growth. "Over eleven million dollars, it is estimated, are invested in railroad property, owned by many thousands of people who are scattered over the whole country from ocean to ocean," Peckham pointedly commented in *Young,* "and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less."[77]

Peckham's skepticism about rate regulation was also manifest in a series of cases that narrowly construed the authority of the newly created Interstate Commerce Commission.[78] (ICC) He repeatedly joined his colleagues in limiting the agency's power to control railroad charges. The Interstate Commerce Act did not expressly empower the ICC to fix rates, but the commission assumed that its authority to review the reasonableness of rates included by implication such power. The Supreme Court halted this practice in *ICC v. Cincinnati, New Orleans and Texas Pacific Railway Company* (1897), reasoning that a rate-making power could not be implied.[79] The ICC was thus compelled to stop its efforts to set rates for railroads. Even more telling was the Court's interpretation of the long haul–short haul clause of the Interstate Commerce Act. This clause was

Recognizing the dangers of railroad work, Peckham regularly voted to affirm the validity of safety standards on railroad carriers imposed by state and federal government.

aimed at the perceived price discrimination, which occurred when railroads charged more for short haul freight shipments than for long haul. By ruling in *ICC v. Alabama Midland Railway Company* (1897) that the existence of competing rail facilities must be considered in applying this clause, the Court effectively negated the long haul–short haul provision of the act.[80]

Peckham's voting pattern in the rate regulation cases demonstrates his preference for private economic ordering and reluctance to allow broad governmental control over charges. Still, Peckham and his colleagues stopped well short of blocking all governmental supervision of railroad charges or mandating a supposed laissez-faire regime on the industry. They sought a middle ground, seeking to bar the imposition of unrenumerative rates. Rate regulation was particularly suspect because it altered the working of the market economy and implicitly served to redistribute property.

Regulation of Health, Safety, and Morals

Notwithstanding his dedication to economic liberty and his dislike of rate controls, Peckham upheld numerous regulations that fell within the ambit of traditional state police power to protect the health, safety, and morals of the public. He repeatedly sustained health and safety measures against challenges that such laws amounted to a deprivation of property without due process.

For example, Peckham, writing for the Court, validated a Chicago ordinance requiring a license to sell cigarettes.[81] He stressed that states were free to determine what kinds of businesses ought to be licensed to preserve community health and safety. Moreover, Peckham ruled that, pursuant to the police power, states could seize and destroy unwholesome food without providing the owner a prior hearing. Emphasizing "the right and duty of the State to protect and guard . . . the lives and health of its inhabitants," he declared that food unfit for human consumption was "a nuisance of the most dangerous kind."[82]

In an age before comprehensive zoning, Peckham was prepared to sustain legislation requiring owners to incur expenses in order to comply with health and safety regulations. In 1906, he joined the Court in upholding a New York law directing tenement owners to install windows and modern sanitary facilities.[83] Peckham's vote here was not surprising given his opinion as a New York judge in *Rector of Trinity Church* upholding earlier tenement reform legislation. Peckham was also sympathetic to fledgling land use controls. In *Welch v. Swasey* (1909), writing for the Court, he affirmed the validity of statutes limiting the height of buildings.[84] Stressing the importance of local circumstances, Peckham ruled that it was reasonable to distinguish between the height of buildings in residential and commercial districts. He justified this classification by explaining that taller buildings in commercial areas posed less danger in

the event of fire. In this context, Peckham was inclined to defer to the judgment of the state courts that the statute promoted public safety. By implicitly recognizing that the enjoyment of land by private owners could negatively impact third owners, he paved the way for more intensive land use controls.

Railroading was an especially hazardous enterprise, posing dangers to adjacent landowners and employees. As a result, both state and federal governments in the nineteenth century imposed safety standards on the carriers. Peckham regularly voted to affirm the validity of such measures. He agreed, for example, that states could make railroads absolutely liable for damages from fires caused by railroad operations.[85] Likewise, Peckham voted to broadly construe and vigorously enforce the Safety Appliance Act, which required railroads in interstate commerce to use air brakes and automatic couplers.[86] The act also banned the assumption of the risk defense for injuries arising from violations of the statute.

Yet there were limits to how far Peckham was prepared to modify common law tort rules in the context of railroad accidents. He joined the dissenters when the Court held that the statutory abolition of assumption of the risk by the Safety Appliance Act also operated to relieve employees from liability for contributory negligence.[87] The dissenters argued that contributory negligence was a distinct defense from assumption of risk, and that the act did not set aside the ordinary rules of contributory negligence. Moreover, in cases arising under diversity of citizenship jurisdiction, Peckham consistently voted to invoke the fellow servant doctrine to deny recovery to injured or killed railroad employees.[88] Nor was he receptive to congressional attempts to abolish the fellow servant rule with respect to common carriers. In the *Employers' Liability Cases* (1908), the Supreme Court ruled that the Federal Employers' Liability Act was unconstitutional because it covered railroad employees engaged in intrastate as well as interstate commerce.[89] The Court pointed out, however, that Congress could regulate employment relationships within interstate commerce. In a concurring opinion, Peckham, joined by two other Justices, agreed that the act was unconstitutional because it reached injuries occurring in intrastate traffic. But he pointedly refused to accept "all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant."[90] Evidently, Peckham questioned the power of Congress to regulate issues relating to employment at all. It is fair to conclude that Peckham was slow to realize that, in an age of dangerous equipment and a complex workplace, the fellow servant rule was an unsuitable doctrine to address work-related injuries in a modern industrial setting. Instead, he clung to the notion that individuals were free agents who had to accept responsibility for their own carelessness. Fault was the only legitimate basis on which to impose liability for accidents.

By the late nineteenth century, public health authorities sought to check smallpox epidemics by compulsory vaccination.[91] Efforts to protect the community by such programs pitted exercise of the police power to halt spread of the disease against claims of individual liberty. This conflict occurred in a climate in which much of the public remained fearful of vaccination and disliked governmental intrusion in what was seen as private health decisions. In 1902, confronted with a smallpox epidemic in Massachusetts, the Cambridge board of health, pursuant to state law, required all residents not recently vaccinated to submit to the procedure. Rev. Henning Jacobson, an outspoken opponent of vaccination, refused to be vaccinated and was fined $5. Massachusetts courts dismissed Jacobson's challenge to the constitutionality of the compulsory vaccination law, and he petitioned the Supreme Court.[92]

In *Jacobson v. Massachusetts* (1905) the Supreme Court, by a vote of seven to two, broadly upheld state authority to enact "health laws of every description" to safeguard the public.[93] The Court reasoned that the common

good must prevail over claims of individual liberty. It conceded, however, that there could be situations where public health measures were "sufficiently arbitrary and oppressive . . . as to justify the interference of the courts." Peckham, joined by Justice Brewer, dissented without opinion. He apparently felt that requiring a healthy adult to undergo vaccination violated the liberty of individuals and exposed them to the risks of vaccination. This attitude was consistent with his earlier vote on the New York Court of Appeals to limit the power to impose smallpox quarantines. Peckham's dissent exemplified his attachment to individualism, a principle that in *Jacobson* found expression in an area other than economic rights. Moreover, Peckham's libertarian position was not entirely out of step with public opinion. Compulsory vaccination of adults became increasingly rare, and public health programs focused on vaccination as a school entry requirement.[94]

Peckham's Legacy

It remains to assess briefly Peckham's jurisprudence and to consider his legacy. The central tenet of Peckham's constitutionalism was a deep attachment to liberty, a concept that he defined largely in terms of economic freedom and limited government. Conversely, he was hostile to what he perceived as class legislation and schemes to redistribute wealth. As Herbert Hovenkamp explains, conservative jurists such as Peckham "perceived the new interventionist policies of the Progressive Era as the greatest threat to liberty."[95] To Peckham, liberty clearly trumped equality as a constitutional norm. In general terms, he echoed the attitudes of the framers of the Constitution, who closely linked respect for property rights with liberty.

Like most other members of the Fuller Court, Peckham was not shy about invoking judicial review to safeguard economic rights. As a broad proposition, he did not mechanically defer to legislative judgments. On the contrary, as John E.Semonche points out, Peckham was a "believer in the need for an active Court sensitive to the task of guarding property and contractual rights."[96] Peckham's libertarian inclinations led him to reject the nascent doctrine of judicial deference prompted by Progressives of the early twentieth century in order to encourage the emerging regulatory state.

Yet Peckham does not fit the cartoonist image fashioned by the Progressive historians and their progeny of a one-sided champion of large-scale business interests. Although the business community may have benefited incidentally from the course of Peckham's decisions, such a result was not his primary goal. Instead, Peckham's concern was to protect small, self-sufficient entrepreneurs from excessive governmental regulation. He indulged no presumption about the legitimacy of legislation that seemed to abridge marketplace rights. In these situations, Peckham expected lawmakers to show that regulation served traditional police power ends of public health, safety, and morals. In his mind, legislative assertions that regulation was necessary could not be regarded as final because lawmakers could then circumvent constitutional limits and effectively destroy private property and contractual freedom in the guise of asserting the police power.

It bears emphasis that, for all his devotion to economic liberty, Peckham was not a legal theorist or a doctrinaire adherent of laissez-faire principles. He was willing to uphold measures safeguarding public health and safety. He was also receptive to early land use controls and, within bounds, the exercise of eminent domain.

An evaluation of the influence and lasting significance of Peckham's jurisprudence must proceed with caution. He was clearly a stalwart member of the Fuller Court and authored a number of leading opinions. But, as his frequent dissents demonstrate, Peckham did not intellectually dominate his colleagues. Consider his signature issue—the liberty of

contract. Peckham was never able to fashion a consistent majority to strike down statutes infringing on contractual freedom. His record of success in this area was decidedly mixed.

It is unclear how much of Peckham's legal outlook retains any vitality in the modern age. His historical reputation is inevitably tied to the constitutional values of the late nineteenth century. For better or worse, our nation has moved far from a constitutional order grounded on a limited national government, states' rights, and a high regard for the rights of property owners and private market ordering. Scholars associated with the Progressive movement were sharply critical of constitutionalized property and took particular aim at *Lochner* and Peckham. They too often attributed dark motives to him as a defender of economic privilege.

Other avenues of inquiry seem more fruitful. Should Peckham's career be seen as a sincere if ultimately futile rear guard action in defense of a world that was vanishing? Or are other perspectives more compelling? To the extent that private property and economic freedom continue to play a role in the American polity, Peckham cannot be simply erased from constitutional dialogue. Indeed, one might argue that the continuing debate over *Lochner* and the scope of due process protection underscores the lasting significance of Peckham. David Bernstein forcefully argues that discussion over the extent to which due process protects unenumerated rights "is a testament to the ultimate triumph of Peckham's vision of the due process clause as a source of the Court's power to act as defender of last resort of individual liberties against the states, if not of his specific views on the scope of that clause."[97] In short, so long as courts persist in a substantive reading of the due process guarantee, it is impossible to escape the legacy of Rufus W. Peckham.

ENDNOTES

*For a more complete analysis of Justice Peckham's jurisprudence, see my article "Rufus W. Peckham and Economic Liberty," 62 *Vanderbilt Law Review* 591 (2009), from which this essay is derived.

[1]198 U. S. 45 (1905).

[2]Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888–1910** (1993), 33.

[3]Brian Z. Tamanaha, **Beyond the Formalist–Realist Divide: The Role of Politics in Judging** (2010), 88–89, 200–201.

[4]Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (1997).

[5]James W. Ely Jr., **The Chief Justiceship of Melville W. Fuller, 1888–1910** (1995).

[6]Michael J. Brodhead, **David J. Brewer: The Life of a Supreme Court Justice, 1837–1910** (1994); J. Gordon Hylton, "The Perils of Popularity: David Josiah Brewer and the Politics of Judicial Reputation," 62 *Vanderbilt Law Review* 567 (2009).

[7]Alan R. Jones, **The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas** (1987).

[8]*See* David E. Bernstein, **Rehabilitating *Lochner:* Defending Individual Rights against Progressive Reform** (Chicago: University of Chicago Press, 2011); Richard A. Epstein, **Supreme Neglect: How to Revive Constitutional Protection for Private Property** 165–166 (2008); Ellen Frankel Paul, "Freedom of Contract and the 'Political Economy' of *Lochner v. New York*," 1 NYU J. L. & Lib. 515 (2005); Randy E. Barnett, **Restoring the Lost Constitution: The Presumption of Liberty** (2006), 211–214; Bernard H. Siegan,, "Rehabilitating *Lochner*," 22 *San Diego L. Rev.* 453 (1985); Hadley Arkes, "*Lochner v. New York* and the Cast of Our Laws," in Robert P. George, ed., **Great Constitutional Cases** (2000), 94–129.

[9]109 N.Y. 389, 17 N. E. 343 (1888).

[10]109 N.Y. at 399 , 17 N. E. at 345.

[11]Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner Era Jurisprudence** 33–60 (1993) (noting continuing importance of Jacksonian doctrines in shaping judicial support for free markets); Michael Les Benedict,"Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Rev.* 793, 318–320, 327–331 (1985).

[12]144 N. Y. 529, 39 N. E. 688 (1895).

[13]144 N. Y. at 542, 39 N. E. at 690.

[14]*See* Carl A. Pierce," A Vacancy on the Supreme Court: The Politics of Judicial Appointment," 39 *Tenn. L. Rev.* 555, 558–609 (1972).

[15]*The New York Times*, January 23, 1894.

[16]*The New York Times*, December 4, 1895.

[17]*See generally* James W. Ely Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights**, 3rd ed., 42–105 (2008).

[18]Ely, *supra* note 5, at 83–126.

[19]Ely, *supra* note 5, at 83–90.

[20]*See* James W. Ely, Jr., " The Fuller Court and Takings Jurisprudence," *Journal of Supreme Court History*, 1966, vol. 2, 120–135.

[21]Ely, *supra* note 5, at 140–148.

[22]*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895).

[23]*United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

[24]Willard L. King, **Melville Weston Fuller: Chief Justice of the United States 1888–1910**, Appendix 1, 340–341; Sheldon Goldman, **Constitutional Law: Cases and Essays**, 2nd ed., Table 4.7 at 87 (1991).

[25]*See* David N. Mayer, **Liberty of Contract: Rediscovering a Lost Constitutional Right** 11–67 (2011) (discussing the foundations of the liberty of contract doctrine).

[26]*See* Lawrence M. Friedman, **American Law in the Twentieth Century** 25 (2002) (noting that "there were important forerunners of *Lochner* on the state level. It was in the state supreme courts that some important doctrines of constitutional law first saw the light of day—doctrines of due process, or liberty of contract."); James W. Ely, Jr., "'To Pursue Any Lawful Trade or Avocation:' The Evolution of Unenumerated Economic Rights in the Nineteenth Century," 8 *U. Pa. J. Const. L.* 917, 947–949 (2006).

[27]165 U. S. 578 (1897).

[28]165 U. S. at 589, 591.

[29]165 U. S. at 591.

[30]Herbert Hovenkamp, **Enterprise and American Law, 1836–1937**, at 178 (1991) ("The legislature probably enacted the statute in *Allgeyer* to protect in-state insurance companies from out-of-state competitors.").

[31]165 U. S. at 591. *See* Michael G. Collins, "October Term, 1896—Embracing Due Process," 45 *Amer. J. L. Hist.* 70, 82–87 (2001) (suggesting that "the real problem in *Allgeyer* was that the regulation at issue exceeded the permissible powers of the state, not that contractual freedom was somehow generally immune from regulation . . . .").

[32]Kermit L. Hall and Peter Karsten, **The Magic Mirror: Law in American History**, 2nd ed. 257 (2009).

[33]*Holden v. Hardy*, 169 U. S. 366 (1898).

[34]*Knoxville Iron Company v. Harbison*, 183 U. S. 13 (1901).

[35]*Atkin v. Kansas*, 191 U. S. 207 (1903).

[36]*Great Southern Fire Proof Hotel Company v. Jones*, 193 U. S. 532 (1904).

[37]*W. W. Cargill Co. v. Minnesota*, 180 U. S. 452 (1901).

[38]198 U. S. 45 (1905).

[39]198 U. S. at 53.

[40]198 U. S. at 64.

[41]198 U. S. at 61.

[42]Paul Kens, **Judicial Power and Reform Politics: The Anatomy of Lochner v. New York**, 128 (1990) (observing that "initial public reaction to the Court's ruling was very subdued"). In fact, some commentators hailed the ruling. See Bernstein, *supra* note 8, at 38–39.

[43]James W. Ely, Jr., "The Protection of Contractual Rights: A Tale of Two Constitutional Provisions," 1 *NYU J. Law & Liberty* 370, 391–392 (2005) (questioning existence of supposed *Lochner* era).

[44]*See* David A Strauss, "Why Was *Lochner* Wrong?," 70 *U. Chi L. Rev.* 373 (2003) (asserting that standard attacks on *Lochner* for aggressive judicial review and enforcing rights not found in the text of the Constitution are not persuasive in light of more recent decision-making by the Supreme Court).

[45]Hall and Karsten, *supra* note 32, at 264 ("The *Lochner* decision was in many ways an aberration with limited impact.").

[46]Gregory S. Alexander, " The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism," in F. H. Buckley, ed., **The Rise and Fall of Freedom of Contract** 108 (1999).

[47]208 U. S. 161 (1908).

[48]208 U. S. 412 (1908).

[49]211 U. S. 539 (1909).

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

[51]*See*, e.g., Fiss, *supra* note 2, at 9–12; Bernstein, *supra* note 8, at 110–124; Michael J. Phillips, The *Lochner* Court, Myth and Reality: Substantive Due Process from 1890s to the 1930s, 185–191 (2001).

[52]*Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U. S. 226 (1897). Peckham joined the Court's opinion. For a discussion of this case see Collins, *supra* note 31, at 88–91.

[53]*See Kelo v. City of New London*, 545 U. S. 469, 480 (Stevens, J.), 515–516 (Thomas, J., dissenting). *See also* Gideon Kanner, "The Public Use Clause: Constitutional Mandate or 'Hortatory Fluff'?," 33 *Pepperdine L. Rev.* 335, 376–378 (2005).

[54]160 U. S. 668 (1896).

[55]160 U. S. at 680.

[56]164 U. S. 112 (1896).

[57]Kanner, *supra* note 53, at 376 (declaring that *Fallbrook* "was not truly an eminent domain case, and really had nothing to do with the Fifth Amendment's "public use clause").

[58]87 U. S. 665 (1874) (insisting that "there can be no lawful tax which is not laid for a *public purpose*").

[59]164 U. S. at 158.

[60]164 U. S. at 161.

[61]164 U. S. at 162, 164.

[62]164 U. S. 403 (1896).

[63]164 U. S. at 417.

[64]198 U. S. 361 (1905).

[65]198 U. S. at 367, 368.

[66]198 U. S. at 369.

[67]198 U. S. at 369.

[68]The Supreme Court of Ohio correctly noted the limited nature of the holding in *Clark* as dependent upon unique

local conditions. *City of Norwood v. Horney,* 110 Ohio St. 3d 353, 368, 853 N.E. 2d 1115, 1133 (2006).

[69]James W. Ely Jr., **Railroads and American Law** 80–96 (2001).

[70]Ely, *supra* note 5 at 83–87.

[71]*Covington and Lexington Turnpike Road Company v. Sandford,* 164 U. S. 578 (1896).

[72]169 U. S. 466 (1898).

[73]209 U. S. 123 (1908). For extensive examination of *Young* and Peckham's opinion, see Richard C. Cortner, **The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment** 181–208 (1993); William F. Duker, "Mr. Justice Rufus W. Peckham and the Case of *Ex Parte Young*: Lochnerizing *Munn v. Illinois*," 1980 *B. Y. U. L. Rev.* 539.

[74]209 U. S. at 147.

[75]209 U. S. at 160.

[76]John V. Orth, **The Judicial Power of the United States: The Eleventh Amendment in American History** 121–135 (1987).

[77]209 U. S. at 165. As further evidence of his utilitarian thinking, Peckham added: "It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected." 209 U. S. at 166.

[78]Ely, *supra* note 69, at 93–96.

[79]167 U. S. 479 (1897).

[80]168 U. S. 144 (1897).

[81]*Gundling v. Chicago,* 177 U. S. 183 (1900).

[82]*North American Storage Co. v. Chicago,* 211 U. S. 306, 315 (1908).

[83]*Tenement House Department of New York v. Moeschen,* 203 U. S. 583 (1906). For the background of this case, *see* Judith A. Gilbert, "Tenements and Takings: *Tenement House Department of New York v. Moeschen* As a Counterpoint to *Lochner v. New York*," 18 *Ford. Urb.* L. J. 437 (1991).

[84]214 U. S. 91 (1909).

[85]*St. Louis and San Francisco Railway Company v. Mathews,* 165 U. S. 1 (1897).

[86]*See,* e.g., *Johnson v. Southern Pacific Company,* 196 U. S. 1 (1904); *St. Louis, Iron Mountain and Southern Railway Company v. Taylor,* 210 U. S. 281 (1908).

[87]*Schlemmer v. Buffalo, Rochester and Pittsburg Railway Company,* 205 U. S. 1, 14–20 (1906).

[88]*See,* e.g., *New England Railroad Company v. Conroy,* 175 U. S. 323 (1899); *Northern Pacific Railway Company v. Dixon,* 194 U. S. 338 (1904).

[89]207 U. S. 463 (1908).

[90]207 U. S. at 504.

[91]James Colgrove, **State of Immunity: The Politics of Vaccination in Twentieth–Century America,** 33–38 (2006).

[92]*Ibid.,* 38–44.

[93]197 U. S. 11 (1905).

[94]Colgrove, *supra* note 90, 65–74.

[95]Hovenkamp, *supra* note 30, at 77.

[96]John E. Semonche, **Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920,** at 234 (1978).

[97]David E. Bernstein, "*Lochner v. New York*: A Centennial Retrospective," 83 *Wash. U. L. Q.* 1469, 1525 (2005).

Fair Labor: The Remarkable Life and Legal Career of Bessie Margolin (1909–1996)

MARLENE TRESTMAN[1]

On January 28, 1972, more than 200 co-workers, family and friends, as well as dozens of prominent judges and government officials, arrived at the Washington Hilton Hotel for a formal dinner to mark the retirement of Bessie Margolin, Associate Solicitor of Labor. This was no ordinary retirement party for a Washington bureaucrat. Earl Warren, the retired Chief Justice of the United States, was a guest speaker; he would sing the praises of Margolin, who had argued cases in every one of the eleven circuits and twenty-eight cases in the Supreme Court, including fifteen before Warren himself. Warren and other distinguished speakers would reminisce about her thirty-three years at the Department of Labor, where she oversaw the court enforcement of the Fair Labor Standards Act (FLSA), and later the Equal Pay Act.

When it was his turn at the podium, Warren summed up her contribution to labor law: "... I would like to thank [Margolin] tonight, because the bare bones of that Act would have been wholly inadequate without the implementation she forged in the courtrooms of our land. Hers must have been an exciting experience, because the labor laws and particularly the FLSA were anathema to many segments of our society. Miss Margolin has been largely responsible for making both of them meaningful and respectable in all quarters." Warren also captured the essence of Margolin's significance to women: "What a satisfaction it must be for her in this day and age when women are crying out for equality, to realize that she has proved equality for them in a man's world, by prevailing in the highest courts of the land in a larger percentage of her cases than any lawyer of modern times. And all of this in the interest of the working men and women of America."[2]

Margolin's distinguished career as a government lawyer was all the more impressive considering her religion, gender, and humble origins. "Becy Margolyn," as her name originally was recorded by the neighborhood mid-wife, was born in Brooklyn, New York

in 1909, the second child of recent Russian-Jewish immigrants, Harry and Rebecca Goldschmidt Margolin. Within a few years after Bessie was born, the Margolins left New York's tough and crowded conditions and made their way to Memphis, Tennessee, to join other Jewish immigrants. There, Rebecca died shortly after giving birth to a third child, Jacob, leaving Harry alone and without means to care for their three, very young children.

Harry's plight caught the attention of the Memphis Hebrew Benevolent Society, which arranged for four-year-old Bessie and her siblings to be admitted as "half-orphans" to live in the New Orleans Jewish Orphans' Home.[3] Originally founded in 1855 as the Home for Jewish Widows and Orphans, the Home in which Margolin was raised was situated prominently on St. Charles Avenue, near the stately mansions of New Orleans' most prosperous citizens. Guided by philanthropic trustees who sought to enhance their wards' potential for success by integrating them into the city's social and economic power structure, the Home provided a nurturing environment where Margolin and her siblings grew up together with more than 100 other orphans and half-orphans from throughout the Deep South.[4]

The Home's forward-thinking benefactors had also established the nearby Isidore Newman Manual Training School, which admitted children "without discrimination because of creed... after our own wards are provided for."[5] One of the best preparatory schools in the South, Newman prided itself for teaching that "wealth is no evidence of worth, that the favored must make a return in proportion to their advantages, and that the only respectable aristocracy is an aristocracy of honorable achievement and personal decency."[6] By Margolin's time, wearing Home uniforms was no longer required, allowing Home children to mix more comfortably with Newman classmates, many of whom represented the city's most affluent families. In school, Margolin forged a lifelong friendship, and a shared interest in fashion, with Kate Polack, whose prosperous family welcomed Margolin into their gracious home.[7]

Within the Home, the volunteer "Matron" who attended to Margolin was Hanna B. Stern, wife of Home Trustee Maurice B. Stern, who made his fortune as president of the cotton brokerage firm Lehman, Stern & Co. In a letter recommending Margolin to Newcomb College, Mrs. Stern wrote:

> Miss Margolin is one of my family (as we term them). [E]ach matron of Jewish Orphan's Home has charge of [a] certain number of boys and girls her duty towards them to mother them as much as possible & raise their standard in every way possible. We keep in touch with their school work. [We] have the privilege of having them in our own homes for entertainment and also take them out with us if we must and in this way [I] know Bessie very well & consider her a very splendid girl far above the average in every way. She is industrious, ambitious, appreciative, and in fact seems [of] splendid character.[8]

Margolin became another one of the Home's "typical over-achievers" who, instilled with a success ethic, learned that good citizenship, hard work, and respect for authority were a means of achieving a higher economic and social status.[9]

Home life was structured under an innovative system of self-governance known as "The Golden City," which emphasized the value of independence, the dignity of fair wages earned through hard work, and the notion of government as a participatory and protective institution. Thus, from her earliest years in the Home, Margolin experienced a basic legal system in which the children were divided into "families" led by an elected Big Brother or Big Sister. "They have their courts and judges and lawyers for prosecution and defense and all cases of [dereliction] and

Cases Argued by Bessie Margolin at the Supreme Court

	Case Name	Date(s) Argued	Opposing Counsel
1	*Phillips v. Walling,* 324 U.S. 490 (1945)	Mar. 2, 1945	Joseph B. Ely
2	*10 East 40th St. Bldg v. Callus,* 325 U.S. 578 (1945)*	Apr. 6, 1945	Joseph M. Proskauer
3	*Borden v. Borella*, 325 U.S. 679 (1945)*	Apr. 6, 1945	John A. Kelly
4	*Roland Electrical Co. v. Walling,* 326 U.S. 657 (1946)	Oct. 8, 1945	O.R. McGuire
5	*Boutell v. Walling,* 327 U.S. 463 (1946)	Oct. 9, 1945	Harry Gault
6	*Rutherford Food v. McComb,* 331 U.S. 722 (1947)	Apr. 9–10, 1947	E.R. Morrison
7	*McComb v. Jacksonville Paper,* 336 U.S. 187 (1949)	Dec. 14–15, 1948	Louis Kurz
8, 9, 10	*Powell v. U.S. Cartridge; Aaron v. Ford, Bacon & Davis, Inc.; Creel v. Lone Star Defense Corp.,* 339 U.S. 497 (1950)*	Dec. 8–9, 1949	William L. Marbury, Robert H. McRoberts, and Otto Atchley
11	*Alstate Construction v. Durkin,* 345 U.S. 13 (1953)	Feb. 2–3, 1953	S.A. Schreckengaust, Jr.
12	*Mitchell v. Joyce Agency Inc.,* 348 U.S. 945 (1955)	Feb. 4 & 7,1955	Stanford Clinton
13	*Maneja v. Waialua* , 349 U.S. 254 (1955)*	Mar. 30, 1955	Rufus G. Poole
14	*Mitchell v. Myrtle Grove Packing Co.*, 350 U.S. 891 (1955)	Nov. 10, 1955	W.L. Guice
15	*Steiner v. Mitchell*, 350 U.S. 247 (1956)	Nov. 16, 1955	Cecil Sims
16	*Mitchell v. King Packing*, 350 U.S. 260 (1956)	Nov. 16–17, 1955	Willard S. Johnson
17, 18, 19	*Mitchell v. Budd*; *Mitchell v. King Edward Tobacco Co., Mitchell v. May Tobacco Co.*, 350 U.S. 473 (1956)	Feb. 29–Mar. 1, 1956	Milton Denbo and Mark F. Hughes
20	*Mitchell v. Bekins Van and Storage,* 352 U.S. 1027 (1957)	Feb. 26–27, 1957	William French Smith
21	*Mitchell v. Lublin, McGaughy & Associates,* 358 U.S. 207 (1959)	Oct. 21, 1958	Alan J. Hofheimer
22	*Mitchell v. Kentucky Finance,* 359 U.S. 290 (1959)	Mar. 3, 1959	Harold H. Levin

(*continued*)

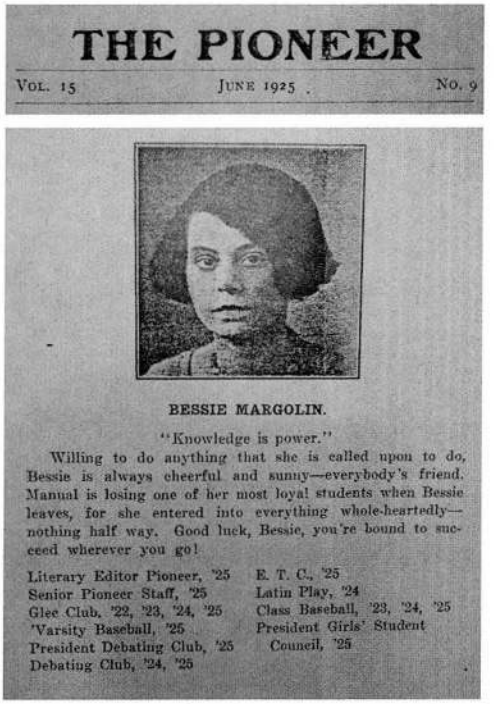
(Continued)

	Case Name	Date(s) Argued	Opposing Counsel
23	*Mitchell v. Robert DeMario Jewelry,* 361 U.S. 288 (1960)	Nov. 16, 1959	R. Lamar Moore
24	*Mitchell v. Oregon Frozen Foods,* 361 U.S. 231 (1960)	Nov. 17, 1959	Martin P. Gallagher
25	*Arnold v. Ben Kanowsky,* 361 U.S. 388 (1960)*	Jan. 11, 1960	G.H. Kelsoe, Jr.
26	*Mitchell v. H.B. Zachry Co.,* 362 U.S. 310 (1960)	Feb. 25, 1960	R. Dean Moorhead
27	*Goldberg v. Whitaker House Cooperative,* 366 U.S. 28 (1961)	Mar. 30, 1961	Philip S. Bird
28	*Wirtz v. Steepleton General Tire Co.,* 383 U.S. 190 (1966)	Dec. 8, 1965	Lucius E. Burch, Jr.

*Argued as Amicus Curiae

deflection from the high standards of honor and morals of the Golden City are tried and judgment pronounced" subject to the approval of the Home's Superintendent. The Golden City was designed to "mitigate the evil affects of institutional rearing" and make each child in the Home "feel that he is a human being and not merely a cog in the well-oiled machine, no matter how smoothly and systematically that machine or administration may run."[10] At the same time, the Golden City enabled Margolin and the other Home kids to earn five to twenty-five cents each week, depending on their age and the nature of the activity, in return for doing chores such as sweeping, darning, making beds, and baking bread (but no scrubbing or laundry work). They could spend a portion of their money on sweets and small toys at the Golden City's cooperative store but they were also required to open a savings account in a local bank so they could learn "the valuable lesson of thrift and economy."[11]

Margolin distinguished herself within the Home and at Newman with superior grades and extracurricular achievements. Years later, Margolin was unsure what made her become a lawyer but mused "I suspect that I always had something of a penchant for debating, which



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BESSIE MARGOLIN.

"Knowledge is power."

Willing to do anything that she is called upon to do, Bessie is always cheerful and sunny—everybody's friend. Manual is losing one of her most loyal students when Bessie leaves, for she entered into everything whole-heartedly—nothing half way. Good luck, Bessie, you're bound to succeed wherever you go!

Literary Editor Pioneer, '25
Senior Pioneer Staff, '25
Glee Club, '22, '23, '24, '25
'Varsity Baseball, '25
President Debating Club, '25
Debating Club, '24, '25
E. T. C., '25
Latin Play, '24
Class Baseball, '23, '24, '25
President Girls' Student Council, '25

Margolin graduated from the Isidore Newman Manual Training School with distinction in 1925, earning a full scholarship to Newcomb College. Above is her yearbook entry.

I recollect having enjoyed in high school."[12] In her senior year in 1925, Margolin won a gold baseball for playing on the girls' varsity team, sang in the glee club, edited the

yearbook, was president of both the debate club and the girls' student council, received a chemistry essay contest prize, and was chosen valedictorian of her graduating class. At Newman, Margolin's senior yearbook photograph was aptly captioned, "Knowledge is power."[13] She later credited the Home for providing her opportunities and the incentive to pursue them. "It may be hard to climb from some charitable homes, but this one is an exception. They pushed me and gave me my opportunities. I owe them a lot."[14]

Margolin's excellent high school record earned her admission on a full scholarship to Newcomb College, where she spent her freshman and sophomore years. Her Newcomb College file contains the following entry by a faculty member:

> Miss Bessie Margolin did excellent scholastic work during her two years at Newcomb. I should say that she stood among the first ten in her class. She lived during the time prior to her college course in the Jewish Orphans Home.... In answer to the questions above, I should say that she is not sensitive, she is very self-confident, she does not make friends easily. She devoted much of her time to her school work. She was a member of a Jewish fraternity here, and was interested in social activities for which she had no opportunity in previous years. She did not seem to care for athletics. I am unable to give you any information about the amount of reading she did. She took part in a number of trials for debate but failed to make any of the principal teams. She dressed rather elaborately for a person of her means, but I understand many of her clothes were given to her. She has a great deal of intellectual ability.[15]

After two years at Newcomb, Margolin decided to study law. Realizing that she could not afford to pay for three years of law school following college, she transferred to Tulane University to complete her undergraduate studies and begin the study of law—at the same time. The appointment of Rufus Harris as dean and the revival of the law review provided rewarding opportunities for Margolin to work closely with distinguished, part-time faculty members who were leading private practitioners.[16]

Although Tulane Law School had admitted women in prior years, Margolin found herself the only woman in the entire law school. She felt "very much isolated and self-conscious that first year," but gradually adjusted. And she was grateful for the opportunity:

> Tulane means something very special to me as a woman... the fullest opportunity and encouragement to fulfill myself as a human being intellectually, culturally, socially, and as a citizen with rights and responsibilities equal to those of men. As a student interested in a professional career, as well as a serious liberal arts education, I was uniquely fortunate that my home town university was one of the few in the nation at that time which not only had a tradition of serious higher education for women... exemplified by the excellent standards of Newcomb... but which welcomed women into its graduate and professional schools on a genuine non-discriminatory basis and gave them practical as well as moral support in the development of their potentialities.[17]

In 1930, at age twenty-one, Margolin received her bachelor's degree with a major in political science and history, as well as her law degree from Tulane University. Having served as civil law editor of the *Tulane Law Review*, in which she published three comments,

Margolin graduated second in her law school class of twenty-three students, and was admitted to the Order of the Coif.[18] It was also during her Tulane law school years that Margolin began a lifelong friendship and professional relationship with fellow Newman alumnus John Minor Wisdom, who served from 1957 until 1999 on the U.S. Court of Appeals for the Fifth Circuit, and before whom "Miss Bessie," as he and fellow judges warmly referred to her, would regularly appear for oral argument.

Glowing recommendations from Tulane law school's dean, her brilliant law school record, combined with her ability to read French, won Margolin a coveted position at Yale Law School as a research assistant to Professor Ernest G. Lorenzen, a noted authority on comparative law. In an article heralding her Yale appointment, the *New Orleans Item Tribune* reported that Margolin found research appealing. "It isn't at all dull. I suppose you'd say you get curious about something and then there's the thrill of searching and the satisfaction of having found out." She noted that she would like to "do research at Yale for the next two years, and then I should like to take my doctor's degree at Yale." The reporter went on to say that "In a profession where feminity [sic] is a liability, she displays a cool logical mind which amazes her associates. And in the final analysis of this personality one finds a charming, unusually interesting but utterly unspoiled girl."[19]

While in New Haven, Margolin continued to make news. As the first woman lawyer to join the Municipal Legal Aid Bureau, the July 10, 1932 *New Haven Register* reported that Margolin was to work "during the summer months while most of the Yale Law School students are away on their vacations."

In 1932, Margolin became the first woman to receive Yale's prestigious Sterling Fellowship. The following year, she received her doctorate of juridical science (J.S.D.), having earned the respect of Professor William O. Douglas, who had directly supervised her work


N. O. Girl Aid To Yale Savant

By MAZIE ADKINS

1930

BESSIE MARGOLIN 1930

After graduating from Tulane Law School, Margolin won a coveted position at Yale Law School as a research assistant to Professor Ernest G. Lorenzen, a noted authority on comparative law. Her superior grades, glowing recommendations, and ability to read French earned her the position.

in areas of corporate finance and reorganization.[20] At her retirement dinner in 1972, she reminisced about how Douglas had been an important mentor:

> Mr. Justice Douglas has played a great part in my career since student days at Yale. And he was largely responsible for encouraging me in my graduate work and I think probably responsible for securing a Sterling Fellowship for me which enabled me to start on my career. And through the years he's always been interested in showing a great support for anything that I wanted to do or to encourage me to go into some big adventures which I really didn't feel I had the capacity to take on.

Yale also introduced Margolin to fellow Southerners Henry H. "Joe" Fowler, from Roanoke, Virginia, and Abe Fortas, from Memphis, Tennessee, both of whom would play an important role in Margolin's later career. Fowler, who was also the recipient of a Sterling Fellowship, would work on the Tennessee Valley Authority with her. Abe Fortas was editor in chief when the Yale Law Journal published a comment Margolin wrote on proposed amendments to the bankruptcy laws.

For a Jewish woman, Margolin's impressive academic record, enthusiastic references, and strong background in corporate law were not enough to gain entrance to the practice of law on Wall Street, where the best job offer she received was in a firm's law library. She fared no better in securing a job teaching law. Yale Law Professor Ernest Lorenzen urged Tulane Law School's Dean Rufus Harris to hire Margolin:

> We are of the opinion that Miss Margolin's logical place as a teacher of law is at Tulane. Her knowledge of Civil law and her work here in Comparative law and Conflict of Laws give her a pre-eminence in those fields that would not be easy to match. In my opinion she ranks easily within the best students we have. If this were not the case she would not have been awarded a Sterling Fellowship, for none has ever been awarded to a woman in the past and in all probability none will be awarded to another woman for years to come. There is no doubt whatsoever that by adding Miss Margolin to your faculty you will be adding a member with extraordinary mental powers, who will give great strength to it for years to come. She has a bent for research and can be relied upon to do big things, by which I mean really superior things.[21]

As a temporary measure, Margolin spent the summer of 1933 in Washington, D.C., working for Doris Stevens at the Inter-American Commission on Women. There, for $125 a month, Margolin researched legal discrimination against women in Latin-American countries. Although most of her prior experience in researching foreign law was in French, Margolin confidently assured Stevens that she could do the job. "I do not believe I should have any trouble with the Spanish, inasmuch as the Spanish and Latin American legal systems and terminology are very similar to the French."[22]

Thus Margolin was perfectly situated in Washington that summer to answer the call of a new and exciting opportunity. She applied for a position on the legal staff at the Tennessee Valley Authority (TVA), which had just been established by President Franklin D. Roosevelt's New Deal legislation to provide electricity to poor rural areas. Her former professor William O. Douglas provided a strong recommendation:

> I have known Miss Margolin for the last three years, since she came to us from the Law School of Tulane University with a brilliant record. During the last year Miss Margolin has worked for substantially all her time under my direct supervision on various topics in the field of Corporate Finance and Reorganization. Thus I came to know her work very well. She is an able and conscientious person. Her work is always of the highest caliber. She has the ability to take responsibility and work upon her own quite independently from the supervision of another person.[23]

Another Yale law professor, Richard Joyce Smith, wrote directly to the TVA's David Lilienthal on Margolin's behalf:

> If you have a place for a woman lawyer, I would say that Miss

> Margolin would be one of the best that you could find. I have been familiar with her work because I was a member of the Committee of the Faculty in charge of Graduate Students.... She impressed everyone in New Haven, both by her industry and her analytical ability. In addition to these qualifications, we all thought she was a very attractive person. She is, of course, particularly well-equipped in the civil law of Louisiana and has an excellent grounding in public law generally. I hope that you will give her serious consideration.[24]

Margolin further submitted strong recommendations from Tulane Law School Dean Rufus Harris and Assistant Dean Paul Brosman. Brosman described Margolin as "a young lady of great force of character and a winning personality." Dean Harris said, "She is an unusual woman, I mean by that, in substance, that she possesses unusual professional ability, has an unusually charming personality and has an unusually broad, balanced and progressive social outlook" making her "in sympathy with the fine purposes for which the Tennessee Valley Authority was created."[25]

Despite these accolades, TVA personnel director Floyd Reeves had to persuade "a reluctant Lilienthal to hire Bessie Margolin" as TVA's first woman attorney.[26] Hired to work for TVA General Solicitor William A. Sutherland in Washington, D.C., Margolin joined the special assemblage of legal talent that was drawn to the federal government in 1933 as much for the lure of the New Deal's opportunities to build a better nation as for the lack of job opportunities elsewhere, especially given the reluctance of old line law firms to hire Jews or women.[27] The young lawyers were also willing to work for the public good for a relatively low salary, which would not have attracted older, more experienced practitioners. Margolin's TVA starting salary of $2,000 per year was a significant increase over the $1,800 per year she had earned as a research assistant at Yale. Moreover, within one year, she was promoted to Associate Attorney at a salary of $3,600, and was transferred to the TVA legal offices in Knoxville, Tennessee, where she worked directly for its new General Solicitor James Lawrence Fly.

According to Margolin's former Yale classmate Henry Fowler, at TVA she became part of "an extraordinarily able, brilliant group of relatively young lawyers, who had outstanding academic records and law school achievements. Most of them had been editors of law reviews at their various institutions—Harvard, Yale, other schools—and some of them had served clerkships with justices of the Supreme Court or other outstanding justices such as Judge Mack and Learned Hand and well-known Federal judges."[28] Federal government work challenged their imagination and interest, and many felt it would be a proving ground for the rapid accumulation of valuable experience in the field of public law.

A desire to reduce poverty was also a draw. One TVA staffer, Joseph Swidler, later recalled that he was "happy with the emergence of a positive program for using the resources of government to cure some of the economic and political evils of our time."[29] He said that many of the young TVA workers were "thoroughly imbued with patriotic zeal.... They were out to restore vast areas of poverty stricken people, bringing them back into civilization and raise their standards of living."[30] Fowler echoed this progressive sentiment: "Some of us were from... the South, and a large part of my motivation and interest in going with TVA was I thought it embodied a program for regional development of a large area of the country to which I was emotionally attached, and that it would be an opportunity to make a very positive contribution to the economic development of the area."[31]

Margolin, like other young New Dealers, quickly assumed considerable power and responsibility. She took part in two great

cases arising from challenges by private utility companies to the validity of the entire TVA project. These landmark cases overshadowed all other legal work at the TVA during her six years there. In *Ashwander v. TVA*,[32] the Supreme Court affirmed the TVA's right to sell electric power produced by the Wilson Dam on the ground that the government could dispose of its property (even in the form of electricity) in any manner it chose. In *Tennessee Electric Power Company v. TVA*,[33] the Court affirmed the ruling by the three-judge panel of the District Court for the Eastern District of Tennessee that the government's powers over commerce and national security, as well as its right to dispose of property, made all aspects of the TVA constitutional.

With *Ashwander*, Margolin witnessed and contributed to the evolution of the case, which began when Alabama Power Company stockholders filed suit in the Circuit Court of Limestone County, Alabama seeking to restrain the company from contracting with the TVA on the ground that the TVA Act was unconstitutional. On TVA's motion, the case was removed to the Alabama federal district court where following motions and trial with extensive testimony, Judge William Grubb ruled for the stockholders and annulled the contracts. On the TVA's appeal, the Fifth Circuit reversed the trial court and the stockholders successfully petitioned for review by the Supreme Court. Margolin took part in all of these stages of the case, traveling by train and in her Hudson coupe to prepare for and attend the trial in Birmingham and the appeal in Atlanta.

Margolin would later explain her role in these cases:

> While I did not take part in the courtroom presentation [of the two cases], I was a member of the staff which prepared the evidence, procedure, and substantive matters, and wrote substantial portions of the final comprehensive briefs filed in the district court, the circuit court and the Supreme Court. . . . In the course of the litigation of these two cases, I secured a pretty thorough practical background in Constitutional law, and in Federal trial and appellate practice.[34]

In heartily recommending Margolin for a promotion and raise early in her TVA career, her boss, General Solicitor Fly, supported this self-assessment. Fly wrote, "Miss Margolin has done more work on the *Ashwander* briefs than any of the other attorneys, and her work has been of an exceptionally high caliber and thorough-going nature."[35]

The *Ashwander* case officially introduced Margolin to the Supreme Court. Margolin had traveled to Washington from Knoxville a month before the argument, as had others on the TVA legal team. Her name appeared on the TVA's December 1935 merits brief as "counsel" under the names of Attorney General Homer Cummings, Solicitor General Stanley F. Reed, Special Counsel John Lord O'Brian, General Solicitor James Lawrence Fly, Paul Freund and Henry H. Fowler. Moreover, on Thursday, December 19, 1935, on oral motion made by Solicitor General Reed, Bessie Margolin of New Orleans, Louisiana was admitted to practice before the Court.[36] She then heard O'Brian and Solicitor General Reed present the oral arguments in *Ashwander* she helped to create—for which the Court allowed five hours over two days.[37]

Margolin's second round of involvement in litigation that would reach the Supreme Court began just three months after the Supreme Court announced its decision in *Ashwander*. This time, the Tennessee Electric Power Company and eighteen other privately owned electrical power companies filed a complaint in the chancery court in Knox County, Tennessee which, on the TVA's motion, was removed to the U.S. District Court for the Eastern District of Tennessee. The suit sought to enjoin the TVA's so-called "power program," claiming that it was threatening to destroy the

companies, that the TVA was acquiring electric energy by constructing and operating dams unrelated to any federal function, and that, even if it had lawfully acquired the energy, the TVA's method of disposition was unconstitutional. The district court's preliminary injunction was reversed on the TVA's appeal to the Sixth Circuit, and the case was remanded for trial. As a result of the newly enacted Judicial Reform Act, the case was tried by Fly and O'Brian before a three-judge panel consisting of Circuit Judge Florence Allen and District Judges John J. Gore and John D. Martin.

During this time, Margolin was promoted to Senior Attorney, with a raise in salary to $4,600, and was transferred to work in the TVA's Chattanooga office. As with the *Ashwander* case, Fly praised Margolin's contributions to the *Tennessee Electric Power (TEP)* case, noting that she carried a "large part of the most responsible work of the Legal Division . . . ."

> For more than a year she has been engaged almost exclusively in work on the case of *TEP, et al., v. TVA, et al.*, which required recommendations as to correct procedure, and drafting pleadings and briefs to be filed in the case. . . . At present Miss Margolin is devoting her entire time to the study and analysis of testimony previously given in the case of *TEP, et al., v. TVA, et al.*, and in the preparation of material to be used in the examination and cross-examination of witnesses, and on the argument, at the trial of this case . . . .[38]

With Fly and O'Brian as the TVA's lead counsel, the trial lasted two months with testimony taken from nearly 100 witnesses and more than 1,000 exhibits admitted into evidence. *Life Magazine* devoted a full-page pictorial article to the trial titled "TVA Goes on Trial for Its Life." A smiling Margolin can be seen in one photo of the crowded courtroom, seated directly behind John Lord O'Brian and other TVA counsel. *Life Magazine* described the scene:

> In a frescoed courtroom at Chattanooga, Tenn., on Nov. 15, three Federal judges, one a woman, mounted the bench to hear one of the most far-reaching cases in U.S. constitutional history. Massed on one side were 18 Southern utility firms with assets totaling a billion dollars. Opposed were the directors of the Tennessee Valley Authority whose gigantic hydraulic program will absorb over half that sum. On the legal scales were the prestige of the U.S. Government and the question of its right to

LAWYERS OF UTILITIES (LEFT TABLE) AND TVA (RIGHT) BEGIN COURT BATTLE. NEWTON D. BAKER, No. 1 UTILITIES COUNSEL, IS AT FAR LEFT

Life Magazine devoted a full-page pictorial article to the landmark TVA trial; a smiling Margolin can be seen seated directly behind John Lord O'Brian and other TVA counsel.

> sell power in competition with private enterprise.[39]

Judge Allen surely must have impressed Margolin. Not only was Allen the first and only woman federal appellate judge at the time (and likely the first woman judge Margolin had ever seen), but during the *TEP v. TVA* trial, Allen was also being seriously considered to fill Justice George Sutherland's seat on the Supreme Court.[40] (Six years later, Margolin would appear before Circuit Judge Allen to argue on behalf of the Department of Labor, and would on more than one occasion cite Allen's lone female federal appellate judgeship in support of her own candidacy for a federal judgeship.)

When the TVA submitted its merits brief in TEP to the Supreme Court in October 1938, Margolin's name appeared below Solicitor General Robert H. Jackson, Fly, O'Brian, Freund, William C. Fitts, Jr., Melvin Siegel and Fowler. O'Brian considered the TVA legal team "top-flight." "[T]hey were young; they were fully aware of the gravity of the litigation and the implications of it.... [T]he legal staff not only worked intensely, but more or less lived together during this period. We all occupied offices in the same building; we so to speak, lived together and ate together and talked together in the day time and at night as well. The work was incessant in the preparation of all of the arguments." O'Brian said that Margolin "had a special gift of lucidity in the writing of briefs and contributed materially to the character of all the briefs written in the case[s]." O'Brian went on to say, "She's a very singular person, and she has a legal brain, as I would express it. She's a very feminine person, and a very nice person, but she has a gift for lucid expression which is invaluable in brief writing."[41]

When the Supreme Court issued its favorable ruling in the TEP case in January 1939, Margolin nonetheless complained to her colleague Herb Marks, "It was a trifle disappointing not to get some little word on the merits—don't you think?"[42]

Aside from these two landmark cases, Margolin provided other services for TVA. She later summed up the experience:

> The years at the Tennessee Valley Authority also afforded a variety of legal experience in interpretative work, drafting of legislation, negotiation and drafting of Government contracts, preparation of data for Congressional investigatory committees, extensive brief writing and trial experience. I participated in the trials of a number of more important condemnation cases instituted by the Tennessee Valley Authority and independently conducted three or four of the trials of lesser importance involving a variety of valuation and condemnation questions.[43]

But with the validity of the TVA firmly established, Margolin set her sights on the Department of Labor, where Secretary Frances Perkins was beginning to enforce the newly enacted Fair Labor Standards Act. Margolin would have to prove her worth to Calvert Magruder, the Harvard law professor and former secretary to Justice Louis D. Brandeis who was general counsel to the Labor Department's new Wage and Hour Division. Margolin wrote to Herb Marks, "I am still negotiating for the wages and hours position. The only outstanding question is the salary." O'Brian, former fellow Yale law student Abe Fortas (who had left the Securities and Exchange Commission to work for Interior Secretary Harold Ickes), and her former TVA boss William Sutherland "have all gone to bat for me in a big way—and wholly voluntary much to my pleasure.... Have asked for $5600 which Magruder and his assistant think is an awful lot 'for a girl.' Mr. O'Brian and Larry [Fly] have been trying to convince him he's dealing with a 'seasoned attorney' and not a mere girl. Did I hear you laugh, Herb—or are you only smiling?"[44]

The negotiations with Magruder continued over the next month, with Margolin finally agreeing to accept a position in the Wage and Hour Division at $5,000 per year. "Larry [Fly] is not too happy about the salary angle but thinks it is a satisfactory move since I had a clear understanding with Magruder about the nature of my work and responsibility in the office. Personally, I am highly pleased with the result."[45] Finally, in March 1939, Margolin transferred from the TVA to become a Senior Litigation Attorney in the Wage and Hour Division under the supervision of Magruder (who would soon be appointed to the U.S. Court of Appeals for the First Circuit).

Within her first week on the job, Margolin traveled home to New Orleans to represent the Wage and Hour Administrator in federal district court. She wrote her former TVA colleague Herb Marks:

> Was put to work on a case in New Orleans my first week up here & had to go down there to argue some motions in court.... We won our two motions—1) to quash a subpoena served on [Administrator Elmer Andrews] while he was down there making a speech—on grounds of inconvenience and lack of necessity to take his oral testimony & 2) to quash a subpoena duces tecum for our investigator's records—on grounds of confidential character.... I went down with the chief of our litigation section (Irving Levy) and we each argued one motion apiece—& won both with decisions from the bench. We were quite pleased as the case has received considerable publicity.[46]

Indeed, Margolin herself generated as much publicity as the wage and hour case. Celebrating Margolin's triumphant return to her hometown as a lawyer for the federal government, all three major New Orleans newspapers ran stories with photos: "New Orleans Girl Represents U.S. at Hearing," "Orleans


April 6, 1939

MOVE TO [illegible]
WAGE-HOUR CHIEF
TO APPEAR LOST

Attempt to Force Regional Head to Bare Records Also Fails

April 6, 1939 THE TIMES-PICAYUNE

New Orleans Girl Represents U. S. at Hearing

Within her first week on the job at the Wage and Hour Administration at the Department of Labor, Margolin traveled home to New Orleans to represent the government in federal district court. As a successful local "girl," she received as much attention in the press as did the case.

Girl with Federal Counsel," and "'Local Girl' Makes Good in Big Way—Reared in Children's Home Gets Two Degrees at Once."[47] According to one account, Margolin loved her new job. "I'm interested in labor and I'm a New Dealer. The [Fair Labor Standards] act is pretty conservative, I think, but it's a step in the right direction and I'm right with it. Incidentally, I'm not a radical."[48]

The reporter focused on Margolin's appearance and marital status as much as on her professional accomplishments. "[Margolin's] a brunette, with flashing black eyes and a stunning figure, and she looks like all the money she didn't have, she looks like more than a million dollars.... When you see a face like Miss Margolin's you almost immediately wonder what that 'Miss' is tacked on before for." After initial reluctance to talk about being unmarried, Margolin finally responded to the reporter's questions, "'I haven't had time for love.' Then she smiled. 'But I'm not immune, I'm just uncontaminated.' Dr. Margolin brushed back a lock of soft black hair. 'So far,' she added."[49]

Although the press portrayed the glamour of the job, Margolin paid her dues as a new Wage and Hour lawyer, traveling to damp warehouses and unwelcoming factories where she reviewed invoices, payroll records, piecework tickets, and time sheets to develop the facts for the Fair Labor Standards Act injunction cases.

> Never have I been in a drearier dingier atmosphere—Boston & surrounding mill towns. If I have much of this I know I won't last long in Wages & Hours. But I guess I'm getting some helpful experience. However, I find the cases very tedious and dull—mulling over endless time cards, piece work slips, payroll records and invoices. I didn't realize what a deadly bore the trial of some cases can be. I think after this trip (which is due to last 3 weeks only 4 days of which have elapsed) I shall ask to be transferred to opinion work. Perhaps it is the damp cold weather we've been having—is it really springtime elsewhere?... Must get back to shoes and hats and invoices and piece work slips and time cards and foreladies and supervisors and bookkeepers—my!! What a drab world this is for mill hands—and their attorneys.[50]

Over the next three years, Margolin helped organize the Labor Solicitor's regional offices and train the regional attorneys. Her hard work, good attitude, and legal acumen earned her a promotion to litigation supervisor to take charge of appellate work at the Department of Labor. This new job provided her the opportunity to argue cases in the circuit courts and work directly with the U.S. Solicitor General's office on briefs in cases headed for the Supreme Court.

One of her earliest appellate arguments (and successes) was in *Janes v. Lake Wales Citrus Growers Association*.[51] According to Margolin, this was one of the earliest suits seeking to enjoin a local Labor Department Inspector and the local U.S. Attorney from enforcing the Fair Labor Standards Act.[52] Another of Margolin's early appellate arguments was *Cudahy Packing of Louisiana, Ltd. v. Fleming*,[53] in which the Sixth Circuit affirmed the trial judge's order compelling the meat-packer to testify and produce documents regarding wages and hours worked. Margolin said the case "was one of the Department's early subpoena enforcement cases under the Fair Labor Standards Act (and which required briefing of almost every conceivable objection which could be raised, although this is not reflected in the court's short per curiam opinion)." [54]

Margolin was particularly proud of her lead role in the Department's 1943 "test case" regarding the FLSA's provision allowing the employer's "reasonable cost" of board, lodging or other facilities to employees to be included

in the statutory wage.[55] The case required a host of complicated factual, accounting and legal issues reflected in the court's forty-two-page opinion.

In another important case, *Walling v. Sun Publishing,*[56] Margolin was the Department's chief trial counsel and also argued the appeal at the Sixth Circuit. *Sun Publishing* raised First Amendment (freedom of the press) and Fifth Amendment Due Process issues, interstate commerce coverage issues, and executive and professional exemption questions. It also delved into such specifics as counting waiting time as hours worked, defining "regular rate" of pay, and the right of the Wage and Hour Administrator to maintain an injunction action without participation by the Attorney General. After the argument at the Sixth Circuit, the headline in *The Cincinnati Enquirer* read, "Wage Law Cannot Be Used in Newspaper Cases Is Plea of Attorney–Guarantee of Freedom of Press Is Involved in Court Argument." It said further:

> Miss Margolin replying for the government, argued that [the newspaper's counsel Elisha] Hanson's objections to application of the Fair Labor Standards Act on constitutional grounds were meritless and that the newspaper publishing business is in interstate commerce. Referring to the question of violation of freedom of press, Miss Margolin countered with "we (the Wage and Hour Division) think it is almost a frivolous issue," adding that it is "so far removed from the intent of the First Amendment that it does not apply."[57]

The Sixth Circuit agreed with Margolin, who then wrote the brief opposing the publishers' petition for certiorari, which the Supreme Court denied.[58]

Throughout the *Sun Publishing* case, Margolin was quietly pursuing a more personal "fair labor" case. As she continued to assume greater trial and appellate responsibilities, both personally and in a supervisory capacity, Margolin wanted to be considered for promotion to Assistant Solicitor, a position she had seen given to men "who, so far as the objective record showed, had less qualifications than I had, in terms of educational background, length and type of experience, quality of professional work, and in length of professional service."[59] Margolin presented her case directly to Labor Secretary Frances Perkins:

THE ENQUIRER,

OPPONENTS IN BATTLE OVER PRESS FREEDOM

Opposing counsel in an important legal battle to determine whether the doctrine of freedom of the press is a bar to regulation of wages and hours for newspapers are pictured above as they emerged from Sixth Circuit Court of Appeals yesterday in the Federal Building. They are Miss Bessie Margolin, Washington, Assistant Solicitor for the Department of Labor, and Elisha Hanson, Washington, attorney for the Sun Publishing Company, Jackson, Tenn.

In *Walling v. Sun Publishing,* Margolin was the Labor Department's chief trial counsel and also argued the appeal at the Sixth Circuit. *Sun Publishing* raised First Amendment (freedom of the press) and Fifth Amendment Due Process issues, interstate commerce coverage issues, and executive and professional exemption questions. It also delved into such specifics as counting waiting time as hours worked, defining "regular rate" of pay, and the right of the Wage and Hour Administrator to maintain an injunction action without participation by the Attorney General.

> My dear Madam Secretary:
>
> Superficially, it may appear presumptuous to request your personal consideration of this matter. However, I believe if you will read the

> attached memorandum, you will appreciate the propriety of presenting the matter to you personally.
>
> Respectfully,
> Bessie Margolin

In her four-page memorandum, Margolin took the opportunity to "squarely face . . . a more or less subconscious attitude" of discrimination that prevented her from being considered for promotion to Assistant Solicitor. Margolin wrote:

> My situation, the record will show, has significance beyond the interests of one individual. Because of its implications generally for women seeking professional careers in the Government service, this special request for consideration will be found, I am sure, to be reasonable and justified.
> It is apparent that there has been no lack of confidence on the part of my superiors in my capacity to perform such duties. They have given me responsible and interesting assignments and the quality of my performance has not been questioned. I have always been treated with greatest respect and consideration personally. My associations with my superiors and with other attorneys in the Department have been consistently pleasant, and for all practical purposes in the day to day work, they have accepted me as one of them.

Margolin emphasized that there had been no intentional discrimination, and that responsibility did not attach to any one individual. "It is rather a general, and I believe, a more or less subconscious attitude. A woman simply is not considered for the high ranking positions in the Solicitor's Office."[60]

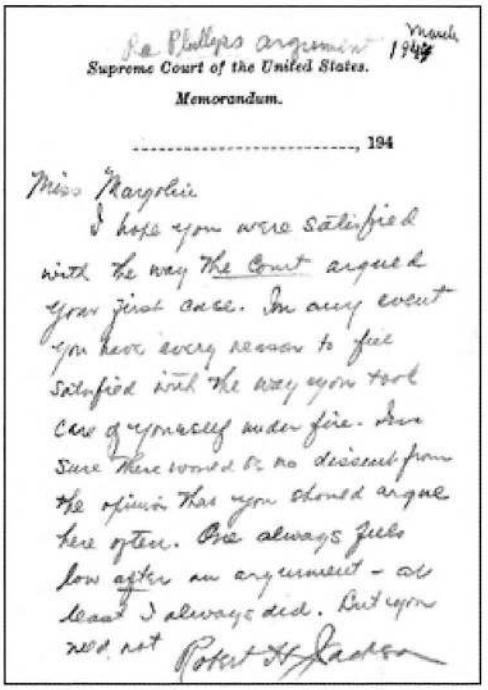
Labor's Director of Personnel Robert Smith investigated Margolin's complaint and reported to Secretary Perkins, "With the possible exception of Mr. [Mortimer B.] Wolf's appointment, I can see no justifiable basis for Miss Margolin's representation that she has been discriminated against." Smith added one final and practical note, "In view of the fact that a new Solicitor will be appointed, I would suggest that Miss Margolin's memorandum be brought to his attention" to allow him to consider her qualifications and determine whether to recommend her or some other qualified person as Assistant Solicitor.[61] In October 1942, just one month after Margolin pleaded her own case to Secretary Perkins, Acting Solicitor Irving Levy recommended that Margolin be promoted to Assistant Solicitor, which Secretary Perkins promptly approved.[62]

Margolin's high-quality work continued to earn her recognition within and beyond the Labor Department. In December 1943, Solicitor of Labor Douglas Maggs shared with Secretary Perkins the praise received from Solicitor General Charles Fahy as a result of Margolin's work in *Tennessee Coal, Iron & Railroad Company v. Muscoda*:

> The Solicitor General will argue the T.C.I. [Tennessee Coal, Iron & Railroad Company] metal mining portal-to-portal case in the Supreme Court. In accordance with custom, my office wrote the brief for him. I was (and I think you will) be gratified to learn that it is, in his judgment, about the best brief that has ever been written for him outside the Department of Justice.
>
> I hasten to add that I personally had very little to do with the writing of the brief. It is 99% a product of Bessie Margolin, Assistant Solicitor, In Charge of the Appellate Litigation Branch.[63]

Margolin had argued the T.C.I metal mining case, and prevailed, in the Fifth Circuit.[64] According to Margolin, during the course of preparing Solicitor General Fahy for his argument at the Supreme Court she mentioned that she had argued cases in the federal courts of appeal, in fact, in every one of the eleven

circuits. According to Margolin, "[He replied] 'There's no reason that you should not argue in the Supreme Court when another FLSA case comes up.' He remembered, and the next case in which certiorari was granted (less than a year later) Mr. Fahy assigned the oral argument to me."[65]



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Miss Margolin

I hope you were satisfied with the way the Court argued your first case. In any event you have every reason to feel satisfied with the way you took care of yourself under fire. I'm sure there would be no dissent from the opinion that you should argue here often. One always feels low after an argument - at least I always did. But you need not

Robert H. Jackson

In a handwritten note, Justice Robert H. Jackson complimented Margolin in 1945 on her first argument before the Supreme Court. In *Phillips v. Walling*, she asserted that an FLSA exemption for employees engaged in any "retail establishment" did not include warehouse and central office employees of an interstate grocery store chain.

The case was *Phillips v. Walling*,[66] which Margolin argued in the Supreme Court on March 2, 1945. She sought affirmation of the First Circuit's decision,[67] where Archibald Cox, then Associate Solicitor of the Wage & Hour Division, had prevailed in asserting that an FLSA exemption for employees engaged in any "retail establishment" did not include warehouse and central office employees of an interstate grocery store chain. Margolin's formidable opponent in the Supreme Court was former Massachusetts Governor Joseph B. Ely who, after failing to win the Democratic presidential nomination in 1944, demonstrated his contempt for Roosevelt and his New Deal by supporting Republican Thomas Dewey. Although there is no audio recording of Margolin's first argument (or of her other arguments prior to 1955), her former law professor, William O. Douglas, by that time a sitting Supreme Court Justice, later described Margolin's style of argument, "She was crisp in her speech and penetrating in her analyses, reducing complex factual situations to simple, orderly problems." Douglas deemed Margolin's argument in *Phillips v. Walling* as "[t]ypical perhaps of the worrisome but important issues which she argued" at the Supreme Court.[68]

Justice Robert H. Jackson, who had proved an outstanding oral advocate when he served as Solicitor General, marked the occasion with a nice handwritten note:

> Miss Margolin:
>
> I hope you were satisfied with the way the Court argued your first case. In any event you have every reason to feel satisfied with the way you took care of yourself under fire. I'm sure there would be no dissent from the opinion that you should argue here often. One always feels low after an argument—at least I always did. But you need not.
>
> Robert H. Jackson[69]

Just three weeks later, Margolin learned that she had won the case, and in so doing established the principle that "any exemption" from the FLSA's "humanitarian and remedial legislation must . . . be narrowly construed."[70] The news must have buoyed her confidence as she prepared to argue the next case assigned to her by Solicitor General Fahy, *10 East 40th St. Bldg. v. Callus*, which was set to be argued on April 6, 1945—less than two weeks away. That same confidence was tested when Margolin learned on April 6 that she would be presenting her second *and third* Supreme Court arguments that very day. Margolin explained

the unusual circumstances of her last-minute assignment to argue *Borden Co. v. Borella*:

> Argument had been assigned to a senior attorney in the Solicitor General's office—Chester Lane. I had worked on the brief. Lane showed up on the day of the argument with his voice lost—he could hardly whisper—[Assistant Solicitor General] Bob Stern called me at about 10:30 a.m. and said Mr. Fahy wanted me to take over since I knew more about the case than anyone else. Bob gave me the courage to go on by saying that I had nothing to lose since the Court would know the circumstances. Indeed Chester got up and explained in a hoarse whisper that I was pinch-hitting on very short notice. I made a pretty lousy argument—overwhelmed with fear and nervousness. Fortunately the Court ruled in our favor anyway (by a 7–2 decision)—so my incipient career as a Supreme Court advocate was not "nipped in the bud." Thereafter, all of the successive Solicitor Generals assigned most of the FLSA arguments to me.[71]

Ironically, the Court, ruled against Margolin (by a 5–4 decision) on the case she had prepared to argue that day, *10 East 40th St. Bldg. v. Callus*.[72] Both cases focused on whether building maintenance employees, elevator operators and watchmen were covered by the FLSA because their work was "necessary" to the production of goods in interstate commerce. This turned on the extent to which the building owner or major tenants were engaged in manufacturing of goods for shipment in interstate commerce. The difference was that in *Borden*, where the Court extended coverage to the building employees, the building was owned by the Borden Company. Although no manufacturing took place in the building, it was the office building of a manufacturer, occupying seventeen of twenty-four floors), whose goods were shipped across state lines. In *Callus*, the employees in question serviced a building occupied by renters of an unrestricted variety of offices with no manufacturing.

Justice Felix Frankfurter, writing for the majority in *Callus* and concurring in the result in *Borden*, articulated his frustration with Congress having put upon the Courts through the FLSA "the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations." He made "abundantly clear" that he objected to involving the courts "in the empiric process of drawing lines from case to case, and inevitably nice lines" to ensure that essentially local activities, which should be left to regulation by the states, were not absorbed by adjudication. The employees in *Callus*, according to Frankfurter, were engaged in local business. "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."[73]

Margolin returned to the Supreme Court to argue two more cases in 1945, *Roland Electrical Co. v. Walling* on October 8, and *Boutell v. Walling* the next day. She earned favorable rulings in both cases. With *Roland Electrical Co.*, the Court adopted the view that the FLSA's coverage of Roland's employees (who repaired equipment for industrial and commercial customers) was premised on the fact that their work was necessary to the production of the commodities produced for commerce by Roland's customers, and that Roland was not entitled to the exemption for "service establishments," which were limited to local merchants, local grocers, or filling stations whose customers buy for personal consumption.[74] In *Boutell*,[75] the Supreme Court affirmed the Sixth Circuit's conclusion that the mechanics of a business that serviced motor transportation equipment operated by a business engaged in interstate commerce were themselves

engaged in interstate commerce, and were not exempt under the FLSA's exemptions for "retail or service establishment" or for employees under Interstate Commerce Commission regulation.

The lesson Margolin learned from being called upon at the last minute to argue *Borden v. Borella*—that is, a lawyer must be prepared to argue any case in which her name appears on the brief—served her well again in *Boutell v. Walling*, where she learned an equally important lesson about the Court's time limits:

> The preceding argument before Boutell was an employee suit under FLSA involving coverage of window washers cleaning windows of industrial plants. The Government had filed a brief amicus supporting coverage, but was not participating in oral argument. When I got up to argue the Boutell case (which involved a wholly different (exemption) issue)—and was on summary docket, several Justices bombarded [me] with questions on the preceding window-washer case. These questions continued until the 5-minute warning light came on. [Assistant Solicitor General] Bob Stern, seeing my predicament, brought me a note saying he thought it would be appropriate for me to request the Chief Justice [Harlan Fiske Stone] for a little extra time to argue the case to which I was assigned. So, as deferentially as I could, I said: "Mr. Chief Justice, would it be appropriate for me to ask for some additional time inasmuch as virtually all of my time has been consumed in answering questions on the preceding case?" Whereupon, the Chief Justice promptly replied: "You have only four minutes left to complete your argument, Miss Margolin." Mr. Justice Douglas then asked me a very difficult question, my inadequate answer to which used up the remainder of my time. Luckily for me, the majority ruled in our favor by a 5–3 split Court (Justice Douglas writing the dissenting opinion).[76]

Justice Jackson was not present when Margolin argued these cases, having accepted President Harry S. Truman's appointment as Chief Counsel to the Nazi War Crimes Trials in Nuremberg, Germany. In May 1946, Margolin would also answer the call to assist in this national effort, which, like the New Deal in the 1930s, captured the interest and passion of hundreds of talented lawyers.[77] Margolin volunteered for a civilian tour of duty with the Army to support the prosecution of the Nazi criminals at Nuremberg. In June 1946, Margolin described her "interesting adventure" to her mentor, John Lord O'Brian.

> The longer I remain in Germany—particularly the more I see and read about Nazis—and listen to them testifying in court, the more impatient I become of any leniency shown them, and the more concerned I become over the lack of interest shown by Americans in prosecuting sufficient numbers of them to insure against the revival of their shocking and nauseating doctrines and crimes.... Mr. Justice Jackson said to me the other day that he fears that from the long term point of view, the Nazis have been victorious because 20 years from now the Germans are bound to be dominant in Europe through sheer force of numbers. They have certainly succeeded in their diabolical population-control plans. I said to Sir David, whom I met on Saturday, that while it might sound blood-thirsty, I thought we should prosecute at least five million and impose the death penalty freely on

all that had any connection with the mass murders and atrocities....

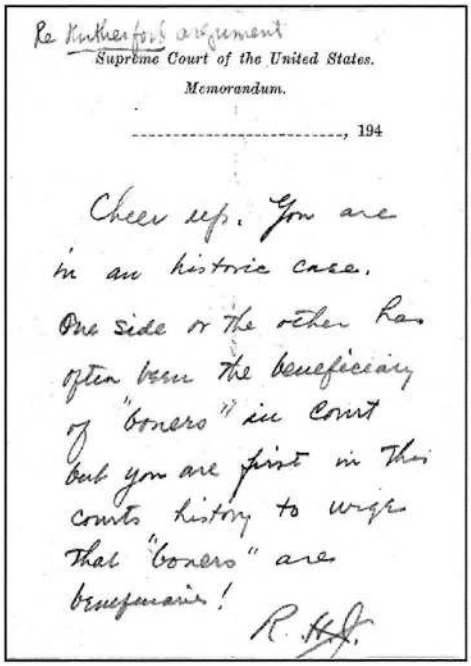
So my first two weeks here have brought me to the conclusion that any little weight I may carry should be thrown in the direction of increasing the number of Nazis to be prosecuted for murder. The great difficulty, as you know, is securing manpower for the job of prosecution. I have taken occasion to suggest to both Justice Jackson and [U.S. General] Telford Taylor that it would be well worthwhile to bring over large numbers of Americans for three or four month periods—the educational value of it would in itself make it worthwhile. I'm convinced that the gravity of the situation is not appreciated until one gets here on the scene and personally starts to cope with it. Certainly it has been a revelation to me....

Don't judge from the foregoing outburst that I aspire to solving the big and basic problems over here—my assignment is quite limited—and I think it will be a very interesting one. I'm to work on proposals for the organization and procedure of courts to try the subsequent cases. The problem is one which virtually nothing has yet been done although people have been working up the evidence on many more defendants. It seems impracticable to try many more defendants before quadripartite courts. So my job will be to work out, in collaboration with other governments, and with our military government and State Department and Army representatives, plans for alternative tribunals... I've had some interesting social life, too. I was fortunate enough to call on Mr. Jackson on a day when he was having a dinner party at which there was room for another lady guest, and he invited me very generously. That gave me an early opportunity to get acquainted with a number of interesting characters, including the French alternate judge—Judge Falco. That party was for some French officials. Tomorrow night there is a party for some Belgian officials, to which the Justice has also invited me. Yesterday afternoon Telford Taylor and his wife had a cocktail party at which I met a number of British and Russian officials—including Sir David and General Rudenko. So you see it is quite an interesting adventure for me.[78]

Margolin's major contribution was to draft the original regulation under which the tribunals were constituted. General Telford Taylor wrote to Labor Secretary Schwellenbach describing Margolin's efforts during her tour of duty. "She made a very distinct and important contribution to our work here, and in particular was primarily responsible for planning and drafting Military Government Ordinance No. 7, under which the remainder of our war crimes will be conducted. I cannot praise her professional accomplishments too highly."[79] Even after Margolin returned to the United States, she traveled to recruit judges and lawyers to preside over the subsequent proceedings she helped to create at Nuremburg.[80]

After six months away, Margolin promptly resumed her work to enforce the FLSA, directing the litigation strategies of the regional attorneys and overseeing the appellate cases. She was back at the Supreme Court in April 1947 to argue her sixth case, *Rutherford Food Corporation v. McComb*,[81] where she sought to ensure FLSA wage and hour protections for meat boners (the workers who removed beef from the bones of slaughtered cattle), as employees of the slaughterhouse operator and not independent contractors, even though they worked under a contract, owned their own tools, and were paid collectively a certain amount per

hundred weight of boned beef, which pay they divided among themselves.


Re further argument

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Cheer up. You are in an historic case. One side or the other has often been the beneficiary of "boners" in Court but you are first in this Court's history to urge that "boners" are beneficiaries!

R. H. J.

Jackson wrote this cheerful note to Margolin when she argued her sixth case, in April 1947. They had socialized together while serving at the war trials in Nuremburg, where she drafted the original regulation under which the tribunals were constituted.

Justice Jackson, who had also returned from Nuremburg, wrote her the following playful note after her argument:

> Cheer up. You are in an historic case. One side or the other has often been the beneficiary of "boners" in Court but you are first in this Court's history to urge that "boners" are beneficiaries!
>
> R.H.J.

The informal tone of this note, coupled with Margolin's description of attending social events with him in Nuremburg, suggests that they had become friends.

Just as his predecessors had done since Charles Fahy, Solicitor General Philip Perlman, appointed in 1949, continued to assign Fair Labor Standards Act cases to Margolin for argument before the Supreme Court. Arguing on behalf of the United States as amicus curiae by special leave of court, Margolin began argument in her eighth, ninth and tenth cases on Thursday, December 8, and concluded her argument on Friday, December 9, 1949. The question in all three cases was whether the Fair Labor Standards Act applies to employees of a private contractor at a government-owned munitions plant operated by the contractor under a cost-plus-a-fixed-fee contract with the United States. When she returned to the counsel table, Margolin jotted a quick note to Assistant Solicitor General Robert L. Stern, "Bob—Did I give away too much—or not enough?" He wrote on the back of the note, "I don't think anyone could have done any better or said anything different."[82]

Stern's positive assessment of Margolin's argument was shared by at least one other spectator. H.P. Zarky, Special Assistant to U.S. Attorney General J. Howard McGrath, sent the following note to Margolin. "Bessie, One of the private counsel appearing later on Friday asked who you were. Said it was the best argument he ever heard. Had I been there to hear it all I am sure I would agree."[83] On May 8, 1950, the Supreme Court issued its opinion, reversing the judgments below as Margolin advocated.[84]

As Margolin worked to protect the wages of workers across the country, she suffered from what she considered unfair treatment in her own salary at the Labor Department. In July 1953, a departmental budget cut reduced the number of Assistant Solicitors from eight to four, with Margolin downgraded from a GS-15 to a GS-14, continuing in the same duties and responsibilities but without the title of Assistant Solicitor, and placed as a formality under the general supervision of another Assistant Solicitor.[85] Although Margolin had seniority, both in length of government service and in the GS-15 position over two of the lawyers retained as Assistant Solicitors, the absolute preference given to veterans operated against her. Even after she was restored to her GS-15 salary and her Assistant Solicitor title

16 months later, she claimed the loss of time that would have been credited toward in-grade increases permanently placed her three steps lower in salary than the Assistant Solicitors who had not been downgraded.[86]

Prompted as much by a desire to rectify her downgrade as to recognize her achievements, Margolin's superiors went to great efforts to secure Departmental honors and cash awards for her. In the same month that Margolin was downgraded, Acting Solicitor Jeter S. Ray nominated her for a Distinguished Service Award, which she received.

> The welfare of literally millions of workers depends on the protection afforded them by the Fair Labor Standards Act and the Walsh Healy Act. The numbers of workers to whom these acts apply and the degree of protection afforded them depends in large measure on the rules of decisions as to the Acts' interpretation which have been formulated by the Supreme Court of the United States and the several courts of appeals in the contested cases which come before them. As the Assistant Solicitor directly in charge of this work for the past eleven years, Miss Margolin's outstanding skill and tireless devotion to her duty have produced results in this most important aspect of the Department's litigation phenomenally beyond those normally to have been expected.[87]

Margolin's devotion to her duty and phenomenal results continued to be the hallmark of her thirty-three year career at the Department of Labor. By the time she retired in 1972, approximately 600 Supreme Court and appellate cases (on the merits) had been prepared under her immediate direction and review. In addition, there were approximately 150 petitions for certiorari and responses to petitions denied. Most impressively, she had principally briefed *and* personally argued 178 cases, of which 28 were in the Supreme Court and 150 in the appellate courts in every federal circuit in the country.[88] Of the cases she argued in the Supreme Court, Margolin failed to obtain a favorable ruling in only three. After her first loss in *Callus* in 1945, Margolin prevailed in all the cases she argued at the Supreme Court until 1959, in *Mitchell v. Oregon Frozen Foods*,[89] Margolin's twenty-third such case. There, following argument, the Court dismissed the writ of certiorari as improvidently granted due to ambiguities in the record, allowing the adverse ruling of the Ninth Circuit to stand. Margolin's third and final loss followed her 1959 argument in *Mitchell v. H.B. Zachry*,[90] where the Court held that a construction company hired by a water supply district to build a dam was not "closely related" or "directly essential" to production for commerce and therefore the employees were not entitled to FLSA coverage. And even in that case, decided five to four, Margolin claimed victory to the extent the Supreme Court's ruling was favorable for the Department:

> Although the Supreme Court affirmed the decision (by a 5 to 4 divided Court), it repudiated much of the reasoning of the Court of Appeals [Fifth Circuit] which would have had far-reaching implications on the scope of the Act's "production" coverage considerably beyond this case. The decision is also of considerable significance to many other cases because of the general criteria it suggests as guides for determining the Act's application in difficult and doubtful cases, and its emphasis on the controlling importance of pertinent legislative history, which the Court of Appeals had dismissed as unnecessary to consider.[91]

The 28 Supreme Court cases Margolin argued pale in comparison to the total number of circuit court arguments she presented—150. Of these 150 cases, Margolin received

favorable rulings in 114, of which only 1 was later reversed by the Supreme Court (argued by someone other than Margolin). Of the 36 circuit court cases she lost, 7 were reversed by the Supreme Court—6 of which Margolin argued.[92]

Margolin argued twenty-eight times before the Supreme Court. In her thirty-three years at the Department of Labor she oversaw the Court's enforcement of the Fair Labor Standards Act (FLSA), and later the Equal Pay Act.

Her work did not go unheralded. For example, Solicitor General Simon Sobeloff wrote to Labor Secretary James P. Mitchell expressing his "deep appreciation for the outstanding work of Miss Bessie Margolin" in Supreme Court matters pertaining to the Department of Labor during the 1954 October Term:

> Three very important Fair Labor Standards Act cases, which I urged the Supreme Court to consider, were briefed on the merits and argued orally at that time (Mitchell v. Joyce Agency, Inc. 348 U.S. 445, Mitchell v. Vollmer & Co., 349 U.S. 427, Maneja v. Waialua Agricultural Co., 349 U.S. 254), and several other significant cases were dealt with in briefs in opposition or petitions for certiorari. The three cases heard by the Court were each of widespread consequence, involving one or more basic aspects of the enforcement of the Fair Labor Standards Act and affecting large numbers of workers throughout the country. . . .
>
> In simple justice to Miss Margolin, and without disparaging the work of others, I must say she was primarily responsible for the briefing of the cases. Moreover, she personally argued the Joyce Agency and Maneja cases. Without her excellent, careful, thorough and persuasive briefs these significant cases would not have achieved the measure of success actually attained. Her distinguished and effective oral arguments—in complex and difficult cases—also played a very large role in these results and members of the Court have spoken of her to me in highest praise. I consider my Office fortunate in having a lawyer of Miss Margolin's outstanding calibre on whom to rely in this important phase of government litigation in the Supreme Court.[93]

Margolin owed her career as an appellate advocate to Congress's decision in the FLSA to withhold general rule-making authority from the Department of Labor. As a result, the courts, including the Supreme Court, were frequently called upon to clarify the vague language of the Act unaided by any rule or decision of an administrative agency to which deference should be granted for expertise in the subject matter.[94] In only the first five years after the FLSA took effect, the Supreme Court decided thirty-one FLSA cases.[95] After the Court upheld the constitutionality of the Act in *Darby* and *Opp Cotton Mills*,[96] the litigation focused on the Act's interpretation, and Margolin served for nearly four decades as the

principal architect of that litigation. Her longtime legal protégé Carin Clauss, described her strategy:

> Although the FLSA withheld formal rulemaking power from the Labor Department, Bessie used two important techniques to influence the Court's interpretation of the statute. In the first instance, she worked with colleague Harold Nystrom to issue interpretations of the law that were captured in "interpretative bulletins" to which the Court gave a great deal of weight. And because he and Bessie were such good friends, she was very much involved in how the law would be interpreted. And they used to fight and argue because Harold would take a position that Bessie would say, "You can't get from the statute to there without litigation. It's too big a jump. The Court won't make that big a jump."[97]

Margolin also shaped how controversies over interpretation reached the Court through her comprehensive legal analyses. Margolin personally wrote or oversaw the writing of scholarly, thorough legal memoranda, which she distributed throughout her division at the national office and the Solicitor's regional offices. By the time she retired, Margolin had issued nearly 200 analyses that filled several loose-leaf binders. Some of these pertained to fundamental FLSA issues such as coverage or the employment relationship. Other analyses followed each new Supreme Court decision. According to Carin Clauss and Donald Shire, who worked for Margolin from the early to mid-1960s through her retirement, the analyses reviewed what had been accomplished by the Court's decision and set forth guidance to identify future cases to achieve what had not yet been accomplished. Clauss gave general examples of what Margolin wrote in the analyses, "We wanted [the Court] to address the following issues. They dumped this issue. So they gave us good language on these two issues. We want to develop this third issue. This case was too tough for them. So I'm not going to approve for litigation any case that doesn't have the following elements."[98] Considered a "bible," Margolin's legal analyses were crucial to the Solicitor's Office not only in writing appellate briefs but also in deciding whether regional offices "could bring a particularly tough case involving a novel issue of law."[99]

Margolin's tenure at the Department of Labor spanned five presidents, nine Secretaries of Labor (Frances Perkins 1933–1945, Lewis B. Schwellenbach 1945–1948, Maurice Tobin 1948–1953, Martin P. Durkin 1953, James P. Mitchell 1953–1961, Arthur J. Goldberg 1961–1962, W. Willard Wirtz 1962–1969, George P. Shultz 1969–1970, and James D. Hodgson 1970–1973), and eleven Solicitors of Labor (Gerard D. Reilly, Irving Levy, Douglas B. Maggs, Warner Gardner, William S. Tyson, Stuart Rothman, Charles Donohue, Harold Nystrom (Acting), Laurence H. Silberman, Peter G. Nash, and Richard Schubert). "Solicitors come and go but I'll always be here," Margolin once remarked. According to Clauss, Margolin "was able—by virtue of her reputation and integrity and persuasive power to push new (and ever younger and more conservative) solicitors to a more pro-worker stance, all in the name of administering and enforcing the statutes as Congress wrote them."[100] New political appointees would arrive saying, "they're going to change the Solicitor's office. And then they'd bump up against Bessie."[101]

At Margolin's retirement dinner, Laurence Silberman described his first encounter in 1969—as a brand new, thirty-three year-old Solicitor of Labor—with Margolin, who was then Associate Solicitor for Fair Labor Standards, and had started her career as a federal government lawyer before Silberman was born.

> First of all, she has, as you all know, a formidable reputation.... I was

> terrified because I found out that before I became solicitor there were three steps: I had to be nominated by the President, confirmed by the Senate, and interviewed by Bessie. And she made it clear at the outset that the fact that I was a Republican would not make the interview any easier. But I was perspicacious enough to find out from someone in the Solicitor's office that if I expressed undying loyalty to what somebody described as the equal pay provisions of the Fair Labor Standards Act, it didn't matter what I else I did. And so I followed their advice and the interview went very well.

Although recounted with humor, Silberman's anecdote was not far from the truth.[102]

Margolin earned the deep respect of lawyers and judges across the country, including members of the Supreme Court. So much so that she was able—in appropriate circumstances—to employ humor when addressing the Justices. The audio recording of Margolin's November 16, 1955 argument in *Steiner v. Mitchell*[103] reveals Justice Frankfurter rapidly firing questions at Margolin, reflecting his ongoing dislike of the "line drawing" burden Congress imposed on the Court by the FLSA. Margolin deflected the frustration Justice Frankfurter frequently directed at her and used carefully measured humor to persuade the Court to interpret the FLSA's "Portal to Portal" amendments to require employers to pay workers in a wet storage battery plant, whose jobs involved contact with caustic and toxic chemicals, for the time they spent changing their clothes and showering.

> Margolin: Now I grant you that that's not something that is ABC or a simple decision to make, but it's no different than many questions of statutory interpretation as to the application of a legal criterion of a statute.
> J. Frankfurter: [inaudible]
> Margolin: [You've] many times said to me the Court should leave the question for Congress, and not for the Court. **But, after all, Congress has 4 or 500 people that they have to get into agreement on language, and the Court has just nine. Which is enough!**
> **[laughter in courtroom]**
> J. Frankfurter: [inaudible]
> Margolin: I'm sure, Mr. Justice Frankfurter, I don't need to tell you that language is not something that is easy to make clear.

Another instance of Margolin's well-timed and well-received humor occurred in her January 1960 argument as amicus in *Arnold v. Ben Kanowsky*.[104] Following up on a question posed by Chief Justice Earl Warren, another Justice asked Margolin: "May I ask just this question? Do you stand or fall in this case on your answer to the Chief Justice?" Margolin's quick response, cast in feigned bewilderment, brought on laughter from the entire courtroom, including the Justice who posed the question. "What do you mean, do I stand? As I see it, I stand. I don't fall on either."

Margolin enjoyed telling about her attempts during her 1947 oral argument in *Rutherford Food* to satisfy Justice Frankfurter who was "showing (or pretending) great irritation that I could not suggest more specific standards as substitute for common law principles for determining whether an employment relationship existed" between the boners and the slaughterhouse. According to Margolin, Justice Frankfurter said to her,

> "You are asking the Court to abandon common law principles but are not suggesting any tangible standards as substitute." I repeatedly answered his questions by referring to the principle the Court had itself set forth three years earlier in *Labor Board v. Hearst Publishing Co.* (322 U.S. 111) (an 8–1 decision, in which Justice

Frankfurter had concurred, only Justice Roberts dissenting). Justice Frankfurter was still badgering me hard when adjournment time was reached, leaving me about 10 minutes to go when Court resumed at noon the next day.

Overnight I wracked my brains—with the help of able associates—to prepare an adequate answer, in the event Justice Frankfurter should renew the pressure. Jokingly, I suggested, if pushed, I might quote one of Justice Frankfurter's own highly generalized standards from his opinion in an FLSA case I had argued about two years earlier (_ v. _, 325 U.S. 578—lost by a 5–4 split Court, with Justice Frankfurter writing the majority opinion).

I really did not intend to use the quote, as I thought it would be impertinent. However, as soon as I got on my feet the next day, Justice Frankfurter started in immediately with the same questions—lengthening out his questions and objections to my answers, so that my 10 minutes were fast dwindling away. Finally—somewhat to my own surprise—I found myself saying: "Well, Your Honor, the only other specific test I can think of is one Your Honor suggested in another case involving a question of coverage of the Act—Your Honor suggested that the test for distinguishing between non-covered local business and covered national business was what "spontaneously satisfies the common understanding." At which point, all of the other Justices joined in laughter, and Justice Frankfurter became and remained silent for the rest of the argument. And he later joined the unanimous decision in favor of the Government.[105]

That Margolin captured Justice Frankfurter's attention is further evidenced in notes he sent from the Bench to Philip Elman, former law clerk and Assistant Solicitor General. On November 18, 1959, just one day after Margolin argued *Mitchell v. Oregon Frozen Foods*,[106] and two days after she argued *Mitchell v. DeMario Jewelry*,[107] Frankfurter penned a note "Re Bessie Margolin," which appears to capture a conversation between two persons identified only as "F" and "X":

> After some dithyrambic praise
> F "She is a very good girl and a good advocate but not a lawyer of unsettling brilliance apart from the deft use of her feminine charms."
> X–Don't you think that female charms are terribly important!!!"
>
> FF[108]

Another rather cryptic note from Justice Frankfurter, dated May 9, and which Elman placed in a folder labeled "Bessie Margolin," queried, "I'll give you one guess who is the most susceptible to MAHR's exploitation of her female talents?" The answer, or possibly Elman's guess, at the bottom of the note, is "Harlan."[109]

Margolin did indeed have a feminine style to accompany her "crisp" speech and "penetrating" analyses at oral argument, which were rivaled only by her "special gift of lucidity in the writing of briefs," the product of seemingly endless wordsmithing and exhaustive research.[110] She spoke with an engaging drawl and calm confidence that revealed her Southern heritage and the power of her knowledge. She was a striking brunette known for her elegant wardrobe and impeccable coiffure—the latter owed to regular, morning visits to the Elizabeth Arden Salon, where she often

edited briefs. Whether because of her gender, her appearance, or her demeanor (or all three), Margolin turned heads as she entered courtrooms throughout the federal circuits and at the Court. "She walked with absolute assurance that a door would be opened before she got to it."[111]

At the Supreme Court, Margolin's self-assurance stemmed not only from her growing number of appearances, but also because each appearance further enhanced her unique expertise as a Supreme Court advocate with personal knowledge of the growing body of FLSA cases she cited. Margolin's preeminence in the subject matter of the FLSA enabled her to engage the Justices in bold colloquy—always tempered with a Southern grace—which would have been rejected as impertinent or foolhardy from a less experienced advocate. Take, for example, her exchange with Justice Charles Whitaker during her February 25, 1960 argument in *Mitchell v. H.B. Zachry*. More than a decade earlier, Margolin had argued *McComb v. Jacksonville Paper Co.*,[112] in which the Court established that the trial court had the authority to order back pay where the employer violates the court's prior judgment enjoining further violations of the Act's wage, overtime, and record-keeping requirements. However, without the injunction in the first instance, the FLSA did not otherwise authorize back pay awards. Margolin was greatly concerned about the growing number of trial judges—like the one in the case at bar—who refused to grant injunctive relief even when they found FLSA violations, thereby preventing the Department from seeking back pay for repeat violations and, in turn, encouraging employers to contest FLSA coverage while withholding wages, without financial disincentive. Margolin used half of the time allotted for her argument in *H.B. Zachry* to ask the Supreme Court to address this abuse of discretion. The audio recording of the oral argument reveals that Margolin did not shy away when Justice Whitaker challenged the government's position:

> J. Whitaker: I've had citations issued against clients of mine, a number of cases by your department on just this kind of business. And I tell you it's not fair and it's not right to deny one citizen the right to live under the law of the land simply because he's had one piece of litigation with the government and let his competitors [alone]... make him live under the citation of contempt just because he's living under the law of the land.
>
> Margolin: Again, can I just put this question to you? Is it right or fair that employees should not be paid what their rights—now this Act is 20 years old now—that their employees should lose their wages under this Act every time there is a doubt as to coverage?
>
> J. Whitaker: Not at all. The Courts are open to them just as they are to the employers, but the weight of government shouldn't be thrown either way.
>
> Margolin: You think that this law was intended to put them on an equal basis as to minimum wages?
>
> J. Whitaker: The government throws its weight to one side.
>
> Margolin: Well, I think, the government, certainly Congress intended the government to throw its weight on the side of the minimum—the substandard wage earners in this country when it passed this law. I think that is certainly clear beyond doubt, Mr. Justice Whitaker.

As masterful as she was in controlling what happened in the courtrooms where she argued, neither Margolin's intellect nor "feminine charm" protected her from harsh treatment or disappointment in other facets of her life. Being a striking, single woman, often in the company of male colleagues, may account for frequent speculation about

her personal and romantic relationships. In 1943, Margolin was caught up in a particularly nasty investigation by Congressman Eugene E. Cox, who sought to discredit Federal Communications Commission Chairman Larry Fly, in part by threatening to reveal his alleged extramarital relationship with Margolin during their time together at the TVA.[113] Then Congressman Lyndon B. Johnson and House Speaker Sam Rayburn stopped Cox from publicly questioning Fly about his relationship with Margolin during the House Select Committee hearings. Rayburn reportedly told Cox, "Now, Gene, there ain't going to be no sex in this investigation. You understand me, Gene. There ain't going to be no sex. There's too damn many of us that are vulnerable on that score."[114] Although Cox obliged, the investigative reports with TVA travel vouchers and details (or wild speculation) from Margolin's housekeepers and landlords about the company Margolin kept while at her Knoxville, Tennessee apartment or while traveling for the TVA remain to this day in Congress's files.[115]

Perhaps the biggest disappointment of Margolin's career was her unsuccessful attempt to secure nomination by President Lyndon B. Johnson for a federal judgeship in the mid 1960s, despite the persistent efforts of impressive backers such as Congressman and fellow Tulane alumnus Hale Boggs, fellow Newcomb alumnus Corinne "Lindy" Boggs, Secretary Willard Wirtz, Justice Douglas, Justice Goldberg, Treasury Secretary Henry Fowler, Assistant Labor Secretary Esther Peterson, John Lord O'Brian, and many other close and loyal supporters. In recommending Margolin to President Johnson for a judgeship, Justice Douglas wrote, "If I had to list the ten best advocates who have appeared before us in the last 25 years that I have been on the bench, I would put Bessie Margolin down as one of the ten. She is tops."[116]

Despite stunning accomplishments and strong references, neither Margolin nor any other woman (except for Constance Baker Motley, who was appointed to the federal district court in New York) received a federal judgeship anywhere in the country between 1963 and 1967. Of the then total 395 federal judges, there were only two women—both federal district court judges, Burnita Shelton Matthews (D.C.) and Sarah Tilghman Hughes (Tex.)—and there had been no woman on the federal appellate bench since the retirement of Circuit Judge Florence Allen in 1959. As Margolin wrote in 1964 to supporter Katie Louchheim, Deputy Assistant Secretary of State for Public Affairs, "There are very few men attorneys, and I know there is no other woman attorney, with as much experience in federal appellate practice as I have been privileged to acquire."[117] Intent on appointing at least fifty women to high-level government positions, over several days in March 1964, President Johnson discussed Margolin as a candidate for the Court of Claims or other federal judgeships, asking his aides about her age and political assets. "What about this Jewish woman for this Court of Claims? Is she a little dangerous on that?"[118]

Margolin's name—and her excellent appellate record—would continue to be discussed within the White House for each of several vacancies on the Court of Claims and the U.S. Court of Appeals for the District of Columbia over the next three years.[119] For whatever reasons, Margolin was passed over each time. By January 1967, John Macy, Special Assistant to the President, agreed with a staff recommendation "that her age (58) would tend to preclude her from consideration. One does not get the impression, from perusing her record, that she outshines some of the younger feminine candidates that we have."[120] Apparently, that was her last chance.

Privately disappointed by not being chosen for a judgeship, Margolin turned her attention during her last eight years at the Labor Department to the 1963 Equal Pay Amendment to the FLSA, the 1964 Civil Rights Act (actively refuting claims that its prohibition against sex discrimination was a "fluke"), and

the 1967 Age Discrimination in Employment Act. Again she oversaw the Department's national litigation strategies and personally argued the first appeals under some of those statutes.[121] The Equal Pay Act cases, in particular, presented very difficult issues of law and fact and the Department's suits against employers were defended vigorously by some of the country's most prestigious law firms that specialized in labor law. One of Margolin's most significant accomplishments was in convincing the Third Circuit Court of Appeals to reverse the federal district court's decision—considered "bullet-proof" because of its extensive reliance on facts—by establishing that, when Congress enacted the Equal Pay Act requiring that women receive equal pay for equal work, it "did not require that the jobs be identical, but only that they must be substantially equal. Any other interpretation would destroy the remedial purpose of the Act."[122]

Laurence Silberman, who was Solicitor of Labor when the Third Circuit issued its ruling, later recounted discussing with Margolin whether to oppose the employer's petition for review by the Supreme Court.

> Now you could see the light in Bessie's eyes. She had a sweeping decision in the Third Circuit and here was an opportunity to take an Equal Pay case to the Supreme Court. And Bessie suggested that maybe we should not oppose cert because it would be appropriate to have the Supreme Court see this issue. Well, I didn't think there was any way in the world we were ever going to get a decision that was better than that Third Circuit decision . . . But I figured a way to deal with the problem. I just sort of leaned back in my chair and I said, "Bessie, you know I've never argued a case in the Supreme Court." She said, "We'll oppose cert."[123]

By the time Margolin retired in 1972, she had received every award offered by the Department of Labor as well as the Federal Woman's Award.[124] She had also won millions of dollars for America's wage earners, although few if any had ever heard of her. But she was well known, highly respected and profoundly appreciated by countless attorneys and support staff—men and women alike—whose distinguished careers she had shaped and supported, by imposing on them the same remarkably high standards she set for herself. Carin Clauss, now Professor Emeritus of Labor Law at the University of Wisconsin Law School, started her legal career as a staff attorney with Margolin in 1963 and became the first woman Solicitor of Labor in 1978. As her protégé, Margolin taught Clauss that, in brief writing, the first thing a judge reads is the table of contents so every one of the argument headings must tell a complete story. As for oral arguments, a lawyer needs a thirty-second argument, a sixty-minute argument, and a compelling version of every length in between. Clauss credits Margolin—a selfless mentor who understood that people do not rise to the top on merit alone—with pushing her and others who worked for her to attain positions of responsibility, including positions that Margolin could not achieve herself.

For several years after her retirement in 1972, Margolin taught labor law at George

In 1972, more than 200 coworkers, family and friends, as well as dozens of prominent judges and government officials, arrived at the Washington Hilton Hotel for a formal dinner to mark the retirement of Margolin, Associate Solicitor of Labor. Retired Chief Justice Earl Warren, before whom she had argued fifteen times, was one of many who sang her praises.

Washington University Law School and served as an arbitrator in a number of private labor disputes. And, just as she had done every spring for years prior to her retirement, Margolin continued to arrange—as a highlight of the annual Civics trip from New Orleans to Washington, D.C.—for the ninth grade class of her beloved Isidore Newman School to have a private meeting with a Supreme Court Justice.

After several years of declining health, Margolin died in 1996 at age eighty-seven. In lieu of a funeral, a small group of relatives, former colleagues, and close friends gathered to share stories, express gratitude, and pay tribute to Bessie Margolin's remarkable life and career.

ENDNOTES

[1]The author grew up in New Orleans as a ward of the Jewish Children's Regional Service, the successor agency to the Jewish Orphan's Home (later renamed the Jewish Children's Home) in which Bessie Margolin was raised, and attended the Isidore Newman School under the mandate of its charter to educate Jewish orphans. These shared childhood experiences—a half-century apart—prompted the author to meet Margolin in 1974 and to spend time with her over the next decade. The author, who has undertaken to write Margolin's biography in tribute to her and to these two New Orleans institutions that changed both their lives, is especially grateful to Malcolm Trifon, Margolin's nephew, for sharing fond memories of "Aunt Bess" and for entrusting the author with Margolin's personal papers; to Carin A. Clauss, Anastasia T. Dunau, Eva B. Fitzgerald, LeRoy Jahn, Robert E. Nagle, Donald S. Shire, and Judge Laurence H. Silberman, among other former or current members of the Office of the Solicitor of Labor, who graciously granted interviews, in some cases lengthy and on repeated occasions; to Andrea Giampetro-Myer for her enthusiasm and advice; and to Clare Cushman for her skillful editing. Finally, the author appreciates her husband, Henry Kahn, and their children, Helene and Eli Kahn, for many things, not the least of which has been their support of this continuing endeavor.

[2]Phonotape recording of "Bessie Margolin Farewell Dinner" (Jan. 28, 1972), Laurence H. Silberman Papers, Hoover Institution Archives, Stanford University (hereinafter "Retirement Dinner Recording").

[3]According to handwritten entries (numbers 1248 and 1249) in the registry of the Jewish Orphan's Home, Margolin and her older sister, Dora, were admitted on June 5, 1913 on the recommendation of Rabbi M. Samfield, President of the Memphis United Hebrew Relief Association and a Director of the International Order of B'Nai Brith, Region 7. These records, a copy of which are on file with the author, were made available by Ned Goldberg, Executive Director, Jewish Children's Regional Service.

[4]Harold Rubin, ed., **Century of Progress in Child Care: Jewish Children's Home, 1855–1955**, at 1–10 (New Orleans: Jewish Children's Home, 1955) (available at Howard-Tilton Memorial Library, Tulane University, Manuscripts Collection number 180, Jewish Children's Home Records) (hereinafter "Jewish Children's Home Records"); Anne Rochell Konigsmark, **Isidore Newman School: 100 Years** at 18–22 (New Orleans: Isidore Newman School, 2004); Wendy Besmann, "The 'Typical Home Kid Overachievers': Instilling a Success Ethic in the Jewish Children's Home of New Orleans," 2005 *Southern Jewish History* 8, at 121–159.

[5]Jewish Orphans' Home, Board Resolution, April 27, 1902, quoted in Rubin, **Century of Progress,** *supra* n. 4 at 5.

[6]*Jewish Orphans' Home, Golden City Messenger*, July 1923, at 1 (Jewish Children's Home Records).

[7]Telephone Interview with Joseph Polack, brother of Katherine Polack Rittenberg (July 7, 2010). In 1948, according to her obituary, Rittenberg was named one of the New Orleans *Times-Picayune's* Ten Best-Dressed Women. *Times-Picayune*, July 7, 1998, available at http://files.usgwarchives.net/la/orleans/obits/1/r-09.txt (last visited Dec. 9, 2011).

[8]Statement of Reference for Bessie Margolin from Hanna B. Stern to A.E. Many, Counselor to Women, Newcomb College (April 1926) (on file with Newcomb College Center for Research on Women, Newcomb Archives, Tulane University).

[9]*See* Besmann, "The 'Typical Home Kid Overachievers,'" *supra* n. 4 at 142.

[10]*Jewish Orphans' Home, Golden City Messenger*, Oct.–Nov. 1923 (Jewish Children's Home Records).

[11]*Id.*

[12]Barbara Brin, et al., "Alumni Feature: Newman's Representative in Washington," *Pioneer*, Isidore Newman School, May 1966, at 6, 8.

[13]Isidore Newman School, *Pioneer*, June 1925 at 39.

[14]Booton Herndon, "Brain Investment Pays Dividends," *New Orleans States*, April 6, 1939 at 1.

[15]Unsigned Memorandum by Newcomb College Faculty Member Regarding Bessie Margolin (Oct. 27, 1927) (on file with Newcomb College Center for Research on Women, Newcomb Archives, Tulane University).

[16]*Tulane University Class of 1930 Fifty Year Reunion Booklet* (May 10, 1980), Margolin Papers. One leading private practitioner with whom Margolin became acquainted during her term as Civil Law Review Editor was Monte M. Lemann, Chair of

Tulane Law Review's Board of Advisory Editors. Eulogized in 1959 by Justice Felix Frankfurter as "one of the country's outstanding practitioners at the bar" and "exemplar of the legal profession," Lemann was a member of the United States Supreme Court's Advisory Committee on Rules of Civil Procedure and a member of President Hoover's so-called Wickersham Commission to study prohibition. Lemann "admired [Margolin] considerably." E-mail from Thomas B. Lemann, Esq., son of Monte Lemann, to Leon Rittenberg, Jr. (July 9, 2010) (on file with author).

[17]Profile of Bessie Margolin in Tulane Alumni Publication (1967) (made available by Ellen Birerre, Director, Law Alumni Affairs, Tulane Law School, on file with author).

[18]Immovables by Destination, 5 *Tul. L.Rev.* 90 (1930–1931); "Usufruct of a Promissory Note—Perfect or Imperfect, 4 *Tul. L.Rev.* 104 (1929–1930); and "Vendor's Privilege," 4 *Tul. L.Rev.* 239 (1929–1930). The Tulane Chapter of the Order of the Coif was established in December 1931, at which time members were elected from classes of three preceding years, including Margolin '30 and John Minor Wisdom '29. "Students Named for Coif Society," *The Times-Picayune*, April 12, 1934 at 11.

[19]Mazie Adkins, "N.O. Girl Aid to Yale Savant," *Item Tribune*, Aug. 21, 1931.

[20]While at Yale, Margolin completed two research papers. Her doctorate thesis, "Corporate Reorganization in France: A Comparative Study of French and American Practices" (May 30, 1933), is available at Yale Law School Lillian Goldman Law Library, and the other paper was published as "The Corporate Reorganization Provision in Senate Bill 3866, A Proposed Draft of a New Bankruptcy Act," 42 *Yale L.J.* 387 (1933)

[21]Letter from Professor Ernest G. Lorenzen, Yale Law School to Dean Rufus C. Harris, Tulane Law School (March 1, 1932) (Margolin Papers, on file with author).

[22]Letter from Margolin to Doris Stevens, Chairman, Inter American Commission on Women (Feb. 19, 1933) (Doris Stevens Papers Box 33, Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University).

[23]Letter from Prof. William O. Douglas, Yale University, to Tennessee Valley Authority (June 23, 1933) (Margolin Papers, on file with author).

[24]Letter from Richard Joyce Smith, Esquire, Whitman, Ransom Coulson & Goetz, formerly Professor, Yale Law School, to David E. Lilienthal, Tennessee Valley Authority (July 8, 1933) (Margolin Papers, on file with author).

[25]Letters from Paul W. Brosman, Assistant Dean, Tulane Law School to Floyd W. Reeves, TVA (July 3, 1933) and Rufus C. Harris, Dean, Tulane Law School to Floyd W. Reeves, TVA (July 13, 1933) (Margolin Papers, on file with author).

[26]Steven M. Neuse, **David E. Lilienthal—The Journey of an American Liberal** (University of Tennessee Press: Knoxville, 1996), 115.

[27]Frank Friedel, "Foreward" in **The Making of the New Deal—The Insiders Speak**, edited by Katie Louchheim (Harvard University Press, 1983), xii–xiii.

[28]Interview with Henry H. Fowler by Dr. Charles W. Crawford in New York, New York (April 22, 1971) (available in Tennessee Valley Authority Oral History Collection, Memphis State University Oral History Research Office), 6.

[29]Interview with Joseph Swidler by Dr. Charles W. Crawford in Washington, D.C. (October 29, 1969) (available in Tennessee Valley Authority Oral History Collection, Memphis State University Oral History Research Office), 10–11.

[30]*Id.*

[31]Fowler Interview, *supra* n. 28, at 8–9.

[32]*Ashwander v. TVA*, 297 U.S. 288 (1936).

[33]*Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939)

[34]Letter from Bessie Margolin to Wesley A. Sturges, Dean, Yale Law School (May 10, 1948) (Margolin Papers, on file with author).

[35]TVA Classification Sheet (Form 12A) and Employee Status Change (Form 78) for Bessie Margolin (Jan. 1, 1936) (Margolin TVA Personnel Records, obtained by author through FOIA request, on file with author).

[36]Margolin's TVA colleague and lifelong friend, Joe Swidler, was admitted the same day. 1935 *U.S. Supreme Court Journal* 109–110 (Dec. 19–20, 1935). Information about Margolin's Supreme Court sponsor was provided by Robert Ellis, Federal Judicial Records Archivist, National Archives and Records Administration (NARA), from Record Group 267, *Records of the U.S. Supreme Court, Minutes* 1935 October Term, National Archives Building, Washington, D.C. (NAB). The infrequency of women admitted to the Court is reflected by the minutes, "On motion first made to the Court in this behalf by Mr. Solicitor General Reed, it is ordered that Bessie Margolin of New Orleans, Louisiana, Be admitted to practice as an Attorney and Counselor of this Court, and *he* was sworn accordingly." (Emphasis added.)

[37]Henry Fowler described O'Brian's argument as "masterful," notwithstanding "hostile questions from Justice McReynolds who had a great time baiting his old friend." Fowler said Solicitor General Reed made an equally favorable closing argument. Fowler Interview, *supra* n. 28, at 26–27.

[38]TVA Classification Sheet (Form 12A) and Employee Status Change (Form 78) for Bessie Margolin (Aug. 16, 1937) (Margolin TVA Personnel Records, obtained by author through FOIA request, on file with author).

[39]"TVA Goes on Trial for Its Life," *Life*, Nov. 29, 1937, at 25.

[40]Judge Gore told Allen to smile when she entered the Courtroom while presiding over *TEP v. TVA* "so

that the watching reporters could not impute to her a disappointment" over not receiving the nomination. Beverly Cook, "The First Woman Candidate for the Supreme Court–Florence E. Allen," 1981 *Yearbook of the Supreme Court Historical Society*, 19, citing Florence Allen, **To Do Justly** (Ohio: Western Reserve University Press, 1965), 110.

[41] Interview with John Lord O'Brian, Senior Partner, Covington and Burling, by Dr. Charles Crawford in Washington, D.C. (Jan. 10, 1970) (available in Tennessee Valley Authority Oral History Collection, Memphis State University Oral History Research Office), 8–9. At his interview, O'Brian was ninety-six years old and believed he was the oldest member of the Supreme Court Bar. Asked about the number of cases he had argued at the Supreme Court, O'Brian said, "I don't know how many. I've been told that it is near sixty." *Id.* at 14.

[42] Letter from Margolin to Herbert Marks (undated) (available at Franklin D. Roosevelt Presidential Library, Papers of Herbert S. Marks, "Bessie Margolin" File) ("Marks Papers"). Marks was TVA Assistant General Counsel (1934–1939), General Counsel to the Bonneville Power Administration (1939–1941), Assistant General Counsel for the Office of Production Management and the War Production Board (1941–1945), Special Assistant to the Under Secretary of State (1945–1946), and General Counsel to the Atomic Energy Commission.

[43] Letter from Margolin to Wesley C. Sturges, Dean, Yale Law School (May 10, 1948) (Margolin Papers, on file with author).

[44] Letter from Margolin to Herbert S. Marks (undated) (Marks Papers).

[45] Letter from Margolin to Herbert S. Marks (Feb. 19, 1939) (Marks Papers).

[46] Letter from Margolin to Herbert S. Marks (April 25, 1939) (Marks Papers).

[47] "New Orleans Girl Represents U.S. at Hearing—Move to Require Wage Hour Chief to Appear Lost," *Times-Picayune* (April 6, 1939), 3; "Orleans Girl with Federal Counsel," *New Orleans States* (April 5, 1939), 1; Booton Herndon, "Local Girl Makes Good in Big Way—Reared in Children's Home She Gets Two Degrees at Once," *New Orleans Item* (April 6, 1939), 1.

[48] Booton Herndon Article, *supra* n. 47.

[49] *Id.*

[50] Letter from Margolin to Herbert S. Marks (May 22, 1939) (Marks Papers).

[51] *Janes v. Lake Wales Citrus Growers Association,* 110 F. 2d 653 (5th Cir. 1940).

[52] Letter from Margolin, submitting "Answers to Personal Data Questionnaire," to Joseph F. Dolan, Assistant Deputy Attorney General, U.S. Department of Justice (March 24, 1964) (Margolin Papers).

[53] *Cudahy Packing of Louisiana, Ltd. v. Fleming,* 109 F.2d 209 (5th Cir. 1941).

[54] *Id.* On review by the Supreme Court, Solicitor of Labor Warner Gardner argued the case. The Court reversed on the single ground that the Wage and Hour Administrator had no authority to delegate power to sign the subpoena. *Cudahy Packing Co. of Lousiana v. Holland*, 315 U.S. 785 (1942).

[55] *Walling v. Peavy Wilson*, 49 F. Supp. 846 (W.D. La. 1943).

[56] *Walling v. Sun Publishing Co.*, 47 F. Supp 180 (W.D. Tenn. 1942).

[57] "Wage Law Cannot Be Used in Newspaper Cases, Is Plea of Attorney," The Enquirer (Cincinnati, Ohio), Dec. 1, 1943, at 24.

[58] *Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir.), *cert. denied*, 322 U.S. 728 (1944).

[59] Letter from Margolin to Frances Perkins, Secretary, U.S. Department of Labor, and attached memorandum (Sept. 28, 1942) (General Records of the Department of Labor, Record Group 174 (RG 174), Box 157, National Archives at College Park, College Park, MD (NACP)). (A carbon copy of the letter and attached memorandum are also in Margolin Papers.)

[60] *Id.*

[61] Memorandum from Robert C. Smith, Director of Personnel, DOL, to Frances Perkins, Secretary, DOL (Oct. 14, 1942) (RG 174, Box 157, NACP).

[62] Personnel Recommendation Re: Promotion of Bessie Margolin from Irving J. Levy, Acting Solicitor of Labor to Robert C. Smith, Director of Personnel (Oct. 20, 1942) (Margolin Civilian Personnel Records, NARA—National Personnel Records Center, St. Louis, MO (NARA-NPRC), obtained through FOIA request, on file with author).

[63] Memorandum from Douglas B. Maggs, Solicitor of Labor, to Frances Perkins, Secretary of Labor (December 31, 1943) (RG 174, Box 157, NACP). (Copy in Margolin Papers.)

[64] *Tennessee Coal, Iron & Railroad Company v. Muscoda*, 135 F.2d 320 (5th Cir. 1943).

[65] Margolin included this account in notes she prepared for Chief Justice Earl Warren to use in his remarks at her 1972 retirement dinner. A typed version of her notes is available at the Library of Congress, Manuscript Division, Earl Warren Papers, Box 832, and Margolin's handwritten original is in her papers, on file with the author.

[66] *A.H. Phillips v. Walling*, 324 U.S. 490 (1945).

[67] *A.H. Phillips v. Walling*, 144 F. 2d 102 (1st Cir. 1944).

[68] William O. Douglas, **The Court Years 1939–1975** (New York: Random House, 1980), 184–185.

[69] Handwritten Note from Robert H. Jackson, Associate Justice to Margolin (March 1945) (Margolin Papers, on file with author).

[70] *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

[71] Margolin Notes for Justice Warren, *supra* n. 65.

[72] *10 East 40th St. Bldg. v. Callus,* 325 U.S. 578 (1945).

[73] *Id.,* 325 U.S. at 579–583.

[74]*Roland Electrical Co. v. Walling*, 326 U.S. 657 (1946).
[75]*Boutell v. Walling*, 327 U.S. 463 (1946).
[76]Margolin Notes for Justice Warren, *supra* n. 65. The Supreme Court Journal entries for Monday, October 8, and Tuesday, October 9, 1945, reveal that the case argued after *Roland Electrical Company v. Walling* and immediately before *Boutell v. Walling* was *Martino v. Michigan Window Cleaning Company*, 327 U.S. 173 (1946), in which the Supreme Court ruled that the window washers were covered by the FLSA, as Margolin had urged in her unscheduled argument.
[77]As Justice Jackson said in his April 1945 address to the American Society of International Law in Washington, D.C., "But the dullest mind must now see that our national society cannot be so self-sufficient and so isolated that freedom, security and opportunity of our own citizens can be assured by good domestic laws alone." Margolin kept a typed copy of Jackson's address in her personal papers.
[78]Letter from Margolin to John Lord O'Brian (June 2, 1946) (available at the Charles B. Sears Law Library, University of Buffalo, John Lord O'Brian Papers).
[79]Letter from Telford Taylor, U.S. Brigadier General, to Louis Schwellenbach, Secretary of Labor (November 2, 1946) (Margolin Papers).
[80]Letter from Margolin to Telford Taylor (January 20, 1947) (Margolin Papers). Reporting on the results of her "trip South for the War Department," Margolin noted that "the Chief Justice's refusal to permit Federal judges to go to Nurnberg was something of a blow, but it seemed to me from my conferences that some very good people were interested."
[81]*Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).
[82]Margolin Papers.
[83]*Id.*
[84]*Powell v. U.S. Cartridge Co.*, 339 U.S. 497 (1950).
[85]Letter from Jeter S. Ray, Acting Solicitor of Labor, to Margolin regarding Reduction in Force—Notification of Personnel Action—Change to Lower Grade (May 25, 1953) (Margolin Civilian Personnel Records, NARA-NPRC).
[86]Confidential Questionnaire completed by Margolin for Study of Federal Executives by Cornell University and the University of Chicago (undated) (Margolin Papers).
[87]Memorandum from Jeter S. Ray, Acting Solicitor of Labor, Regarding Nomination of Bessie Margolin for a Distinguished or Meritorious Service Award to (July 23, 1953) (Margolin Papers).
[88]The figures cited in text rely primarily on Margolin's own compilation, "Supreme Court and Court of Appeals Cases Prepared by or Under Direction of Bessie Margolin as Assistant or Associate Solicitor in Charge of Labor Department's Appellate Litigation (1943 through September 1967)" (Margolin Papers), and are supplemented by the author's research on Margolin's appellate cases from September 1967 through her January 1972 retirement. The author notes, however, one 1972 summary in Margolin's papers credits her with having "personally prepared briefs and orally argued about 200 appeals" in the circuit courts, in addition to her Supreme Court cases.
[89]*Mitchell v. Oregon Frozen Foods*, 361 U.S. 231 (1959).
[90]*Mitchell v. H.B. Zachry*, 362 U.S. 310 (1960).
[91]Letter from Margolin, submitting "Answers to Personal Data Questionnaire," to Joseph F. Dolan, Assistant Deputy Attorney General, U.S. Department of Justice (March 24, 1964) (Margolin Papers). As reflected in her letter, Margolin submitted the Questionnaire to the Department of Justice and the American Bar Association's Standing Committee on the Federal Judiciary to be considered for recommendation to the President for nomination to the United States Court of Claims.
[92]See *supra* n. 88.
[93]Letter from Simon Sobeloff, Solicitor General, to James P. Mitchell, Secretary of Labor (July 29, 1955) (Margolin Papers).
[94]G.W. Foster, "Jurisdiction, Rights, and Remedies for Group Wrongs under the Fair Labor Standards Act: Special Federal Questions," 1975 *Wisc. L.Rev.* 295, 305 (1975). Professor Foster dedicated his article to Margolin "whose name appeared so often and for so long on the briefs that did so much to shape the ultimate effectiveness of the machinery for enforcing the national policies embodied in the Fair Labor Standards Act." *Id.* at 295.
[95]E. Merrick Dodd, "The Supreme Court and Fair Labor Standards, 1941–1945," 59 *Harv. L. Rev.* 321, 369 (1945–1946).
[96]*United States v. Darby*, 312 U.S. 100 (1941); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941).
[97]Interview with Carin A. Clauss, Professor Emeritus, University of Wisconsin Law School, and former Solicitor of Labor, by author in Madison, Wisconsin (June 21, 2010), at 21–23.
[98]*Id.* at 24.
[99]*Id.* at 25–26.
[100]*Id.* at 155–160.
[101]*Id.* at 160.
[102]Interview with Laurence H. Silberman, Judge, U.S. Court of Appeals for the D.C. Circuit by author, in Washington, D.C. (June 2005) (on file with author).
[103]350 U.S. 247 (1956). The author obtained audio recordings of all of Margolin's Supreme Court arguments (beginning with October Term 1955) from Special Media Archives Services, NACP.
[104]361 U.S. 388 (1960).
[105]Margolin Notes for Justice Warren, *supra* n. 65.
[106]361 U.S. 231 (1960) (cert. dism'd as improvidently granted).
[107]361 U.S. 288 (1960).
[108]Handwritten Note from Felix Frankfurter, Associate Justice, to Philip Elman, Assistant Solicitor General

(Nov. 18, 1959) (Available at Harvard Law School, Papers of Philip Elman 1925–1979, Box 3, Folder 91).

[109]Handwritten Note from Felix Frankfurter, Associate Justice, to Philip Elman, Assistant Solicitor ("May 9") (Elman Papers *supra* n. 108). Although Margolin did not argue before the Supreme Court on May 9, 1959, she argued the case of *Mitchell v. Kentucky Finance* on March 3, 1959 and the Court issued its opinion on April 20, 1959—authored by Justice Harlan.

[110]"Crisp" speech and "penetrating" analyses: William O. Douglas, **The Court Years** (New York: Random House, 1980), at 184–185. "Special gift, etc.": O'Brian interview, *supra* n. 40 at 8–9. Endless wordsmithing, exhaustive research: Clauss Interview, *supra* n. 97; Author Interviews with Donald Shire in Potomac, MD (Aug. 11, 2010); with Robert Nagle, in McLean, Va. (Oct. 25, 2011); with Anastasia Dunau, in Bethesda, MD (June 12, 2010), among others.

[111]Clauss Interview at 5–6.

[112]336 U.S. 187 (1949).

[113]Interview with Clifford J. Durr by James Sargent in Wetumpka, Alabama (April 17, 1974) at 160–164; Interview with Clifford J. Durr by Sally Fly Connell (Sept. 17, 1967) at 7–8 (both transcripts are available at Columbia University Oral History Research Office, James Lawrence Fly Project). For an account of the Cox investigation, see Susan L. Brinson, **The Red Scare, Politics, and the Federal Communications Commission, 1941–1960** (Westport CT: Praeger, 2004), at 84–85. The Cox investigation documents pertaining to Margolin are available at NAB, Center for Legislative Archives, Committee Investigations/James L. Fly, FCC Chair, Special Committee on Un-American Activities (Dies), Box 141.

[114]Interview with W. Ervin "Red" James by Michael L. Gillette in Houston Texas (Feb. 17, 1978) at 33, electronic copy, LBJ Library.

[115]The extent to which the allegations about Margolin's personal life during her time at the TVA may have affected her career is uncertain. However, similar information about Margolin's relationship with Fly resurfaced in a "Confidential Memorandum on James Lawrence Fly" apparently written in the 1950's (available at NAB, Center for Legislative Archives, Box 141, *supra* n. 113.

[116]Letter from William O. Douglas, Associate Justice, to Lyndon B. Johnson, President (April 4, 1964), "Bessie Margolin," Office Files of John W. Macy, Box 363, LBJ Library ("Macy File").

[117]Letter from Margolin to Katie Louchheim (March 4, 1964) (Margolin Papers).

[118]Tapes WH6403.14 (Citations #2607, 2608) and WH6403.18 (Citation #2696), Recordings of Telephone Conversations—White House Series, LBJ Library.

[119]Macy File.

[120]Memorandum from James C. Falcon to John Macy (January 9, 1967), (Macy File). Macy's file contains a copy of Falcon's memo, returned to Falcon with Macy's handwritten note, "Agree. JWM."

[121]Margolin argued appeals in the first and principal Equal Pay Act cases, *Shultz v. Wheaton Glass Company*, 421 F.2d 259 (3rd Cir. 1970), *Shultz v. American Can Co.—Dixie Products*, 424 F.2d 356 (8th Cir. 1970), *Shultz v. First Victoria National Bank*, 420 F. 2d 648 (5th Cir. 1969), and *Hodgson v. Square D Co.*, 459 F. 2d 805 (6th Circ. 1972). Margolin also argued the first appellate Age Discrimination case, *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818 (5th Cir. 1972). With regard to Title VII, Margolin actively opposed the view that the term "sex" was included in the statute as a joke, by fluke or in an attempt to overload the legislation. "It seems fair to say, therefore, that only ignorance or thoughtless oversight of the pertinent legislative background, if not simply 'entrenched prejudice' rooted in a psychological downgrading of women generally, can explain the view that the inclusion of sex discrimination in Title VII was no more than a fluke not to be taken seriously." Bessie Margolin, "Equal Pay and Equal Opportunities for Women," N.Y.U., 19th Conference on Labor, 1967, at 301 (Margolin Papers).

[122]*Shultz v. Wheaton Glass Company*, 421 F.2d 259, 265 (3rd Cir. 1970), *cert. denied* 90 S. Ct. 1696 (1970).

[123]Retirement Dinner Recording, *supra* n. 2.

[124]Margolin's receipt of the Federal Woman's Award in 1963 prompted a certain amount of ambivalence. "I must say that I have had some misgivings about this segregated recognition of women, but the experience was altogether a happy one. Perhaps discrimination against women has not disappeared to the extent of denying a little discriminatory recognition in favor of women (although I cannot claim to have suffered personally from any unfavorable discrimination." Letter from Margolin to James T. O'Connell (May 22, 1963) (Margolin Papers).

Herbert Brownell, Jr.: The "Hidden Hand"[1] in the Selection of Earl Warren and the Government's Role in *Brown v. Board of Education*

ALBERT LAWRENCE

There are, of course, many heroes behind the Supreme Court's most famous and, some would argue, most significant case of the 20th Century: *Brown v. Board of Education.*[2] Chief Justice Earl Warren wrote the decision and is credited with convincing the other Justices to make it unanimous. Thurgood Marshall and Robert L. Carter argued important aspects of the case for the NAACP and championed a legal strategy that brought it to the High Court. Few, however, would readily name Herbert Brownell, Jr. as one of the heroes. Yet, as Attorney General, Brownell was President Eisenhower's chief adviser on judicial appointments when he put Warren on the Court, and Brownell led the Justice Department in supporting the notion that segregation of public schools violated the Constitution.

Although Brownell, a Wall Street lawyer,[3] had managed Thomas E. Dewey's campaigns for President in 1944 and 1948 and had served as national Republican party chair from 1944 to 1946,[4] he played a lesser role in the Eisenhower campaign in 1952.[5] Nonetheless, after the election, Eisenhower first offered Brownell a job as his Chief of Staff and, when he declined, asked him to serve as Attorney General instead.[6] In his memoirs, Eisenhower insisted that it had been his intention all along to make Brownell head of the Justice Department, even though he was also on his list of "prospects" to head the White House staff.[7] Eisenhower also assigned Brownell to help select the remainder of the cabinet[8] and designated him as his chief adviser on federal judicial appointments.[9]

One of the first opportunities they had to name someone to the Bench turned out to be to fill the top job in the judiciary: Chief Justice of the United States. And the choice

Brownell managed Thomas Dewey's 1944 and 1948 campaigns for President and chaired the Republican Nominating Committee from 1944 to 1946, introducing modern polling and fundraising techniques.

Brownell (photographed addressing reporters) was instrumental in persuading General Eisenhower to run for President and worked on his 1952 campaign.

that Brownell and Eisenhower made foretold much of the rest of legal history through the 1950s and 1960s.

Brownell's Role in Warren's Nomination

Earl Warren, the three-term governor of California, supported Brownell's election as national chair of the Republican party in 1944.[10] In 1952, Warren went to the Republican convention as a candidate for President,[11] seeing himself as more than just a favorite son.[12] If Eisenhower and the progressive wing of the party and Ohio Senator Robert Taft and the conservatives deadlocked, Warren hoped he might emerge as a compromise candidate.[13] Yet, neither Dewey, who had viewed Warren as a potential running mate in his 1944 and 1948 campaigns, nor Brownell saw Warren as a contender for the top of the ticket in 1952. They supported Eisenhower, and they needed Warren to hold onto his seventy California delegates in order to deflect support for Taft.[14] General Lucius Clay, an Eisenhower confidant, later acknowledged that he promised Warren any job in an Eisenhower administration if he would remain in the race. The offer was "Clay's alone, not Eisenhower's," according to one chronicler of the administration, and Brownell professed to have no role in the offer.[15] At some point, Clay and Brownell offered the post of Secretary of the Interior to Governor Warren, but he declined.[16] After the first ballot, Eisenhower was still short a handful of the 604 votes that he needed to garner the nomination. Warren withheld his seventy votes. When Minnesota Governor Harold Stassen released his twelve delegates, it was enough to defeat Taft and give the nomination to Eisenhower.[17] But Eisenhower professed in his memoirs that he owed nothing to Warren.[18]

After the convention, Warren embarked on a cross-country speaking tour on behalf of Eisenhower.[19] At the outset of the campaign, he met with Eisenhower in Denver for two hours and travelled to Chicago to appear with the candidate on television. Then he campaigned in California as Brownell and Dewey (behind the scenes) managed the national contest.[20]

Eisenhower (pictured campaigning in 1952) appointed Brownell Attorney General on January 21, 1953. He served until November 8, 1957.

Brownell saw Warren as sharing his "moderate" Republican, internationalist agenda – one that advocated social reform and fiscal restraint.[21] Eisenhower also saw Warren as a "middle-of-the-roader."[22] Although he didn't know him well, Eisenhower had "long respected" Warren and felt his "basic principles" reflected "high ideals and a great deal of common sense." But no administration post was offered to Warren as Brownell and Clay assembled a cabinet.[23] Warren was consulted by the new Attorney General about who might run the criminal division in the Justice Department, and Warren suggested Warren Olney, III, the soft-spoken gentleman who had been one of Warren's closest political associates since his days in the District Attorney's Office in the 1930s.[24]

In early December, as they were discussing the selection of the new cabinet, Eisenhower remarked to Brownell that no place had been made for Warren. Although it was only about 7 a.m. California time, impetuously, the President-elect picked up the telephone and called the Governor of California. Eisenhower told Warren that he was not to have a cabinet position—that he had considered him for Attorney General but that he was giving the post to Brownell because he needed his legal and political advice. "But," Eisenhower affirmed, "I want you to know that I intend to offer you the first vacancy on the Supreme Court." He called it "my personal commitment."[25] Brownell apparently heard Eisenhower assure Warren that he planned to give him the "next vacancy" on the Court.[26] In his memoirs, however, Eisenhower said he told Warren only that he would be considered for a Court vacancy but that no commitment was made.[27] Ironically, this conversation took place in the same month that *Brown* was first argued in the high court.[28] Warren didn't give

the conversation much thought, though, "because I had often heard of newly elected officials who promised positions in the indefinite future, only to forget when the jobs actually became open for appointment."[29]

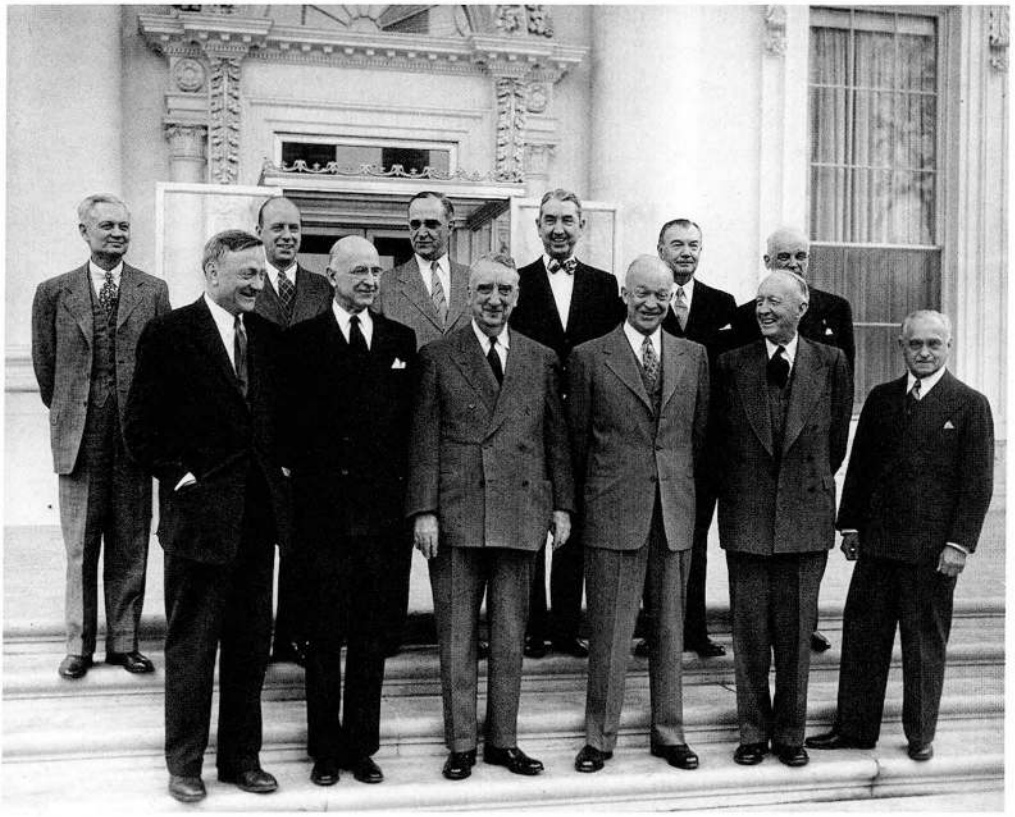
In June 1953, President Eisenhower named Warren as a delegate to the coronation of Queen Elizabeth II in London. Before Warren and his family left for the ceremony, Brownell called him and asked him to stop and see him in Washington en route.[30] Eisenhower and Brownell had decided to offer to Warren the post of Solicitor General, the Justice Department's chief advocate before the Supreme Court. Eisenhower had suggested the idea when Brownell reported that he was having trouble filling the post.[31] It would give Warren a chance to "brush up on the law" in preparation for going on the Supreme Court, the President felt.[32] Warren biographer G. Edward White emphasized the importance of Brownell championing Warren:

> Warren was also fortunate to have Herbert Brownell as Eisenhower's attorney general. In Brownell, Eisenhower had an attorney general who was also a partisan Republican and an experienced campaigner. Brownell knew Warren, knew of his support for the ticket in 1952, especially his assistance after the Nixon fund incident, and did not regard the fact that Warren was currently not practicing law and had not done so for ten years as disqualifying.[33]

Brownell offered Warren the job, and the governor promised to think about it while he was in Europe. They devised a code by which Warren would wire his decision to Brownell. Warren and his family also paid a social call on the President and his wife at the White House.[34] Governor Warren and Brownell both knew that the Solicitor General's post was a "warm-up" for the Supreme Court.[35] Touring Europe after the coronation, Warren cabled his acceptance from Stockholm.[36] Back in California on September 3, Warren announced that he would not run for a fourth term as governor. He did not say, however, that he had accepted the post of Solicitor General of the United States.[37]

Five days later, Chief Justice Fred Vinson, overweight and a heavy smoker, died unexpectedly at age sixty-three in his Washington apartment, a month before the opening of the Court's 1953 Term.[38] The center chair was not the vacancy that Eisenhower had in mind when he had made the promise to Warren the previous December.[39] He was especially concerned because Warren had not recently practiced law.[40] The President asked Brownell to compile a list of four or five likely candidates.[41] In his memoirs, Eisenhower said that he offered the post to his Secretary of State, John Foster Dulles, but Dulles declined.[42] But Brownell claimed to have no knowledge of this at the time either from Eisenhower or Dulles. On Brownell's short list were sitting Supreme Court Justice Robert H. Jackson and two circuit court judges, John Parker and Orie Phillips. Arthur Vanderbilt, chief justice of the New Jersey Supreme Court, was also considered, but his poor health was deemed a disqualification.[43] Thomas E. Dewey's name came up, but Eisenhower told Brownell he didn't think the former New York governor had the temperament for the job.[44]

Warren was alerted to Vinson's death and the Supreme Court vacancy on September 8 by Bartley Cavanaugh, a longtime close political associate. Wary of political promises, Warren authorized Cavanaugh to make discrete inquiries on his behalf. "One does not run for the Court, precisely. One pursues it by indirection. Friends lobby and beseech. The candidate himself is expected not to covet the job too openly. Warren knew that, and though he wanted a seat on the Court—wanted it badly, in fact—he knew better than to advertise his interest," notes Warren biographer Jim Newton.[45] The governor also made calls on his own behalf to politicians, influential law professors, and judges. "These were men who knew politics and the law, men with reach to



The Vinson Court called on President Eisenhower at the White House in February 1953. As Attorney General, Herbert Brownell (second from left in back row), advised Eisenhower on judicial appointments and, after Fred Vinson died of a heart attack the following September, encouraged the nomination of Governor Earl Warren to succeed him as Chief Justice. Back row from left to right: Sherman Adams (Asst. to President Eisenhower), Brownell, Justice Sherman Minton, Justice Tom C. Clark, Justice Robert H. Jackson, Justice Harold H. Burton. Front row from left to right: Justice William O. Douglas, Justice Stanley F. Reed, Chief Justice Fred Vinson, Eisenhower, Justice Hugo L. Black, and Justice Felix Frankfurter.

Washington. In those crucial days, as Brownell and Eisenhower contemplated their pick, Warren called in chits," Newton elaborates.[46]

With newspaper speculation that he might be a candidate for the High Court, Warren took his sons hunting on Santa Rosa Island in order to escape reporters.[47] Eisenhower asked Brownell to study Warren's record and to go to California to ascertain whether Warren would consider it a breach of the President's promise if he didn't get the job as Chief.[48] Brownell tracked the governor down and had the Coast Guard locate him.[49] He reached him by ship-to-shore radio. According to another Warren biographer, Ed Cray, one of Warren's sons heard the governor say, "Yes, the agreement was for the first vacancy," then, after a pause, "No, Herb. No. The first vacancy means the first vacancy."[50] Brownell arranged a private meeting at an air base in California.[51] On September 27, he flew to California for the secret meeting with Warren,[52] and a small plane was sent to bring Warren to the air base.[53] The governor was still in his hunting clothes. Brownell again broached the question of whether Warren felt he had a promise from the President. Warren was emphatic that he did.[54] Brownell later recalled that "Warren made it plain that he regarded the present vacancy as 'the next vacancy,' although he recognized that the president could fulfill his commitment if he took one of the sitting associate

justices as Chief and nominated him, Warren, to the resulting vacancy in an associate justiceship."[55] "He was quite cocky about the whole thing," Brownell told one confidant.[56] However, Warren was emphatic in his memoirs that Brownell only asked him whether he would accept an appointment to the Court:

> Here I would like to correct something I have seen in print to the effect that I was first offered a place on the Court other than that of Chief Justice, but that I refused and said I would accept nothing but the Chief Justice-ship. That is positively not the fact. The Attorney General... said the President was thinking of appointing me to the Court and would like to know if I would accept. Nothing was said about my becoming Chief Justice, and I said unequivocally that I would accept. If the President had chosen to appoint some existing member of the Court to be Chief Justice and had offered me the vacancy created thereby, I would have accepted as readily.[57]

Brownell eventually accepted Warren's position that they had a commitment to put him on the Court.[58] He said that Eisenhower would make the final decision but that they would have one condition: Warren must be in Washington in a week for the beginning of the Court's new term.[59] Brownell flew back to Washington and told the President that he had been unable to dissuade Warren from relinquishing them from the promise to give him the next Court vacancy. The President slept on the appointment,[60] then told Brownell to have an informal press conference at his home to "float" Warren's name. Brownell told the reporters that it was his opinion that Eisenhower was going to name Warren Chief Justice. The press reported the appointment as a done deal. This surprised Eisenhower, who did not think that he had authorized Brownell to announce the appointment.[61] Eisenhower later recalled only that Brownell had returned from California with "a helpful report."[62] On September 29, Warren got word from Brownell that he would be appointed Chief Justice,[63] the following day the President rousted Warren from the shower and offered him the nomination,[64] then the President made the formal announcement.[65] It was such a heady moment for Warren that, years later, he could not remember whether the call had come from Brownell or Eisenhower.[66]

Of course, Brownell knew at the time of his appointment that Warren would sit on reargument in *Brown* and that the government was working on a brief in the case.[67] Nonetheless, Brownell insists that he and Warren never discussed *Brown* during the appointment process.[68] He knew, though, of Warren's record as a progressive, that he was in favor of civil rights, and that he had recently proposed establishment of a Fair Employment Practices Commission in California.[69] Eisenhower also knew that Brownell would not recommend someone for the Court who favored school segregation, and he knew that the nomination would not be popular in the South.[70] In a letter to his brother, Milton, Eisenhower described Warren as "very definitely a liberal-conservative; he represents the kind of political, economic and social thinking that I believe we need on the Supreme Court."[71]

Warren flew to Washington immediately after learning that he would be nominated. Brownell picked him up the next morning and drove him to the Court.[72] His first order of business was to visit the Senior Associate Justice, Hugo L. Black, and to confess that he knew nothing about the Court's procedures. He asked Black to chair the Court's conferences until he could get up to speed on how they operated. Black administered the oath of office[73] at a ceremony so hastily arranged that Warren had to borrow a black robe for the occasion.[74] It was so long that Warren tripped over it.[75] Brownell was present, and the President and Mrs. Eisenhower made an uncustomary appearance. The first order

of business after Warren was sworn in was the presentation by Acting Solicitor General Robert L. Stern of Brownell to the Court. "According to ritual, I welcomed him to the Court in the performance of his important duties," Warren recalled. "I never knew why this was the first time he was formally presented, as he had been Attorney General for almost nine months before I became Chief Justice." But Warren was honored to have the opportunity because "I felt that, as close as he was to the President both politically and personally, he must have been a major factor in my appointment."[76]

Warren was a recess appointee, the first since the second Chief Justice, John Rutledge, was nominated in 1789.[77] It was a "bold and controversial action," according to historian David Nichols,[78]—one that had been proposed to the White House by Justice Felix Frankfurter, who was concerned about tied votes on controversial matters before the Court.[79] Warren was unanimously confirmed by voice vote in the full Senate five months later, on March 1.[80]

Re-argument in *Brown* and Brownell's Brief

But before the Senate could officially confirm Warren, the Court re-heard and was deliberating the fractious issue of state-mandated school segregation. The constitutionality of state laws that mandated the separation of blacks and whites in schools on the basis of race had already been argued once in the Supreme Court by the time Earl Warren came to Washington. Five cases from four states and the District of Columbia had been combined under the name of *Brown v. Board of Education*, the case from Topeka, Kansas. But the Court had rendered no decision after it first heard arguments in December 1952.

After three days of argument,[81] the Court, then led by Chief Justice Vinson, was divided. The Justices discussed the cases for several hours in conference on December 13, 1952, but no formal vote was taken.[82] It was feared that a recorded vote might be leaked to the press or the parties.[83] Justice Jackson's conference notes indicate that he may have come up with the idea, endorsed by Frankfurter and Justice Tom C. Clark, to delay a decision and ask for re-argument.[84] In any event, the Justices were eventually persuaded to put off an opinion until the following Term and to try to come up with some questions that the parties could address.[85] This would allow the incoming Eisenhower Administration to be heard on the question.[86]

One of the first outsiders to learn of the Court's decision to delay an opinion may have been Herbert Brownell. Although he later struck this language from a draft of an unpublished manuscript, Brownell apparently told would-be biographer Dori Dressander that Chief Justice Vinson had discussed the matter with Warren E. Burger at a reception for Burger and other new assistant attorneys general after the new administration came to power. Vinson said that he wanted the Court to hold segregation unconstitutional and that he wanted the government's help. Burger was "astounded" that Vinson would discuss a pending case with him, according to Dressander's draft.[87] In his memoirs, Brownell recalled that the subject came up a few days after Eisenhower's January inauguration. He noted only that, while he was out of the room taking a telephone call, Vinson had told Burger that he wanted the administration's views on the case, leaving out that Vinson had indicated what he wanted the result to be. Although Brownell didn't recognize it at the time, he said in his memoirs, he came to believe that Vinson's invitation was a sign that the Court was then divided on the segregation issue:

> It strikes me as plausible that Vinson was soliciting the new administration's legal views to tip the balance, either by encouraging the waverers on the Court to overturn *Plessy* if

> the Eisenhower administration was on that side of the issue or to dodge the question until public and political support were greater and the Court would not have to risk its prestige in such a controversial area. Furthermore, if a stronger majority, or even unanimity among all nine justices could be attained, the country might accept such a drastic change more willingly . . . and it is also entirely within the realm of reason—although I think less plausible—that Vinson might have anticipated a negative response from the administration, which in turn might have turned the Court the other way. [88]

Justice Frankfurter and his law clerk, Alexander Bickel, went to work and came up with five questions for the parties, which were approved by the full Court with only minor changes and released on June 8, 1953. The primary issue was whether the legislative history of the Fourteenth Amendment indicated that its ratification anticipated the abolition of segregated public schools. Six months after Vinson's discussion with Burger, the Attorney General was officially invited to submit a brief and participate in oral argument.[89] Eisenhower was surprised by the Court's invitation,[90] and he was initially opposed to the idea because he thought it a Court matter and that the participation of the executive branch would violate the separation of powers. "It seems to me that the rendering of an 'opinion' by the attorney general on this kind of question would constitute an invasion of the duties, responsibilities, and authority of the supreme court," he wrote in a diary on August 19, 1953. "As I understand it, the courts were established by the Constitution to interpret the laws; the responsibility of the Executive Department is to execute them."[91] His Attorney General felt otherwise. In approaching him about the matter, Brownell "knew I had my work cut out for me." He understood that Eisenhower was not opposed to civil rights but that he didn't want to be a crusader for them either.[92] The Court was not requiring the department to file a brief; there was precedent for declining. But Brownell felt that it was important to do so in order to advance his position and maintain good relations with the Court.[93] "Thus, Brownell was placed in the awkward position of disagreeing with his boss," one writer has noted.[94] Eisenhower ultimately deferred to his Attorney General's judgment, though, "as I expected he would."[95] Brownell was "well trained for the task of defusing the political explosive contained in *Brown*," in the words of one commentator. "Skilled in playing off different political constituencies, including both Northern blacks and Southern whites, Brownell approached the *Brown* brief with the political sagacity and caution that had marked his career."[96]

He assigned J. Lee Rankin to take the lead on the brief. He considered Rankin his most important assistant; he often took Rankin with him to meetings with the President in order to make sure he was correctly citing the law.[97] Brownell worked closely with Rankin in a dozen or so meetings over four months in which they planned and wrote the brief. A researcher on the team told Brownell that he was the only Attorney General ever to write a Supreme Court brief.[98] They did not consult those outside the department.[99] It appeared to some in the department that Brownell could not make up his mind as to what position to take.[100] However, Brownell countered that the Justice Department attorney who made this complaint was deliberately excluded from early discussions of the case because he was a close friend of Justice Frankfurter and the new administration thought, for that reason, that the attorney should be disqualified from participating.[101] Mark Tushnet has reported that the delay in the brief was not owing to Brownell's indecision, but to "[p]olitical operatives [who] were unhappy with the strong stand Brownell wanted to take, believing it might alienate the white Southerners they were trying to attract to the Republican party. Because of problems

Tallahassee Democrat

Court Bans Segregation In Public School Cases

Court Ruling Is Unanimous

Cases Directly Involve Only Five States But 17 Others May Be Affected

French Cancel Air Evacuation In Indochina

All Out Attack Will Be Resumed On Rebel Troops

Frank Costello Gets Five Year Prison Term

Paroled Man's Capture Ends Reign Of Terror

Citizens Relieved As Slayer Suspect Is Hustled Away

Court Questions Suit Challenging Second Primary

Secrecy Clamp Put On Talks

McCarthy Calls Order 'Cover Up'

New US Bomber Test Seen Near

AF Gives Priority To Fastest Plane

Sober, Careful Thought Urged By Tom Bailey

The Supreme Court asked the Justice Department to submit a brief in the *Brown* case. Although Eisenhower was wary of having the Justice Department declare that segregation was unconstitutional, Brownell forged ahead and submitted a sixty page brief, drafted by J. Lee Rankin.

within the administration, Brownell asked the Court to postpone argument from October to December."[102] Although, perhaps for reasons of diplomacy, Brownell crossed this out of a draft, he apparently told Dori Dressander at one point that White House appointments secretary Bernard Shanley and legal counsel Gerald Morgan were obstacles in the drafting of a strong brief.[103] Their reservations apparently resounded with the President. Eisenhower had taught constitutional law at West Point, and he felt that segregation was a state issue. He believed in federalism and wanted to avoid statements that might suggest that the federal government would enforce the integration of state schools.[104]

The big issue in preparing the brief was where the government would come down on the question of whether school segregation was unconstitutional. Brownell took the matter to Eisenhower. According to Brownell, the President only wanted to respond to the five questions and leave that issue unaddressed: "The Justice Department, the president initially told me, need not take a stand in the brief on the ultimate constitutional question since the federal government was not a formal party in the case and he feared interfering with the workings of the judicial branch."[105] Brownell told Eisenhower he thought the Court would ask for the government's position; the President wanted to know how his Attorney General felt. "I answered that in my professional opinion public school segregation was unconstitutional and that the old *Plessy* case had been wrongly decided." That's what the department should tell the Court then, Eisenhower concluded, but only if it asked at oral argument.[106]

In the final brief, the government's position was that the legislative history of the

Fourteenth Amendment was inconclusive concerning its intended impact on school desegregation.[107] This was also the finding of a sixty page, printed memorandum by Bickel that Frankfurter commissioned and shared with his colleagues before the second argument.[108] The Court ultimately adopted this conclusion in the *Brown* opinion. Education of whites in the South was largely private at the time of the amendment's adoption, and most blacks were not educated at all. There was little consideration of whether equal rights meant integration of public schools.[109] But the issue had served to delay a decision and to give Justices Frankfurter and Jackson more time to resolve their doubts about how desegregation could be legally justified as a matter of constitutional law.[110]

Brownell asked Rankin to argue the government's position before the Court. The Attorney General felt his personal appearance would be construed as political.[111] The cases were re-argued on December 7 and 8, 1953, almost exactly a year after the initial presentations, with Earl Warren now in the center chair.[112] "The most important presentation was made by J. Lee Rankin for the government," Tushnet has concluded.[113] As Brownell had anticipated, the Court did ask for the government's position on the constitutionality of segregation, although it came in an "oddly hostile" question from Justice William O. Douglas.[114] "The Department of Justice goes no further than to say that first we can decide this case, these cases, and second, we can decide them under what, on the basis of history?" Douglas asked Rankin. After some further colloquy, he pressed Rankin for a position on constitutionality. ". . . [I]t is the position of the Department of Justice that segregation in public schools cannot be maintained under the Fourteenth Amendment . . .," Rankin finally acknowledged.[115] Perhaps more significantly, it may have been Rankin who first introduced the idea of desegregation "with all deliberate speed" into the vernacular of the case. The schools should be required to present a plan for desegregation to the federal district courts, he argued. "We suggest a year for the presentation and consideration of the plan, not because that is an exact standard, but with the idea that it might involve the principle of handling the matter with deliberate speed."[116] The words may have sounded familiar to Justice Frankfurter, "who scribbled them down in one of his many notes to himself."[117] Later in the argument, Rankin favored a different term: "[T]he lower court can properly then determine how rapidly a plan can be achieved to come within the criteria established by this Court and the requirements of the Fourteenth Amendment, and that upon consideration of that, with all diligent speed, the lower court can enter a decree accordingly. . . ."[118]

The First *Brown* Decision

"Diligent" speed might have been a stronger standard, but it was the more-nebulous and perhaps oxymoronic "deliberate speed" that Justice Frankfurter picked up on as the Court deliberated.

In January, Frankfurter proposed yet another delay. The question of a decree enforcing desegregation should be put over to the following Term, he argued, and he suggested the idea of appointing a Master to craft decrees or delegating the appointment to the district courts. He also seized on the "deliberate speed" language that had been used by Rankin in oral argument:

> Not even a court can in a day change a deplorable situation into the ideal. It does its duty if it gets effectively under way the righting of a wrong. When the wrong is deeply rooted state policy the court does its duty if it decrees measures that reverse the direction of the unconstitutional policy so as to uproot it "with all deliberate speed."[119]

He cited a 1911 opinion using that language, *Virginia v. West Virginia.*[120]

In February, the Conference finally took a vote, and all but Justice Stanley F. Reed concurred that segregation should be declared unconstitutional.[121] Warren said that he would write the opinion; for security reasons, only his law clerks would help.[122] On May 5, 1954, he submitted a memorandum to the other Justices "as a starting point." He told the Brethren, "On the question of segregation, this should be the end of the line ... We must hold that the doctrine of 'separate but equal' as stated in *Plessy v. Ferguson* cannot apply to public education but we should not go beyond that. The applicability of the doctrine in other contexts must await further decision." He adopted Frankfurter's position that the question of enforcement be put over to the next Term and the parties and the government be asked to re-brief and re-argue. The opinion, Warren insisted, must be kept brief, "readable by the lay public, non-rhetorical, unemotional, above all, non-accusatory."[123] The drafting of the opinion in Warren's chambers took a relatively short time, considering that it was such a major decision. A law clerk worked on it without interruption for twenty-four hours.[124] Warren circulated a typewritten draft on May 7. The Chief Justice hand-delivered drafts to each Justice and discussed changes privately.[125] According to Justice William O. Douglas, the other Justices still expected a dissent from Reed, "but he finally agreed to leave his doubts unsaid and go along."[126] The opinion went to the printer on Friday, May 14.[127] The following night, Warren and Brownell met at a dinner. Without telling him the result, Warren suggested that Brownell be in Court for the announcement of cases the following Monday.[128]

On May 17, 1954, Warren announced the decision from the Bench. Herbert Brownell sat in the courtroom in the seat reserved for him.[129] It was Warren's first major opinion. He read it, by all accounts, in a firm, clear, unemotional voice,[130] noting that the schools had been or were in the process of being made equal in terms of buildings, curricula, qualifications, and salaries of teachers and other tangible criteria.[131] But "to separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," he read.[132]

> A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system ....
>
> We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[133]

In preparing his announcement for delivery from the Bench, Warren inserted "unanimously" after the words "We conclude."[134] The word startled Brownell,[135] and there was an audible reaction in the sedate courtroom.[136]

Another Delay and Another Brief

Of course, the opinion was also remarkable for what it didn't say. The issue of enforcement was put off another year, and the parties and the government were asked to re-brief and re-argue that issue.[137] Southern politicians put pressure on Eisenhower to keep the Justice Department from participating in the next round of Supreme Court arguments on enforcement. Brownell recalled,

> The president was bombarded during this period by southern friends who sought to have the federal government refuse to participate in *Brown II*. Gov. James Byrnes of South Carolina, a great Eisenhower supporter in the 1952 election and Truman's secretary of state for a time,

> was especially active in this effort.[138] Others who had politically supported Eisenhower in the South during the 1952 presidential campaign, such as Governors Allan Shivers of Texas and Robert Kennon of Louisiana, both Democrats, wrote the president in the same vein. They predicted a complete shutdown of public education in the South if segregation was outlawed.[139]

There is no indication that Eisenhower had to be persuaded again to participate, however. But he did have a hand in the preparation of the government's brief. Since the previous argument, Simon Sobeloff had been appointed Solicitor General, and he was the primary draftsman.[140] Before it was submitted to the Court, Brownell insisted that the brief be taken to the President: "Brownell personally favored the view of the Solicitor General and his staff that the Government should file a strong brief on relief. At the same time, the Attorney General could not overrule the President of the United States," Victor Kramer has written.[141] Sobeloff and Deputy Attorney General William P. Rogers met with Eisenhower and the secretary of the cabinet, Maxwell Rabb, on November 20, 1954.[142] Brownell was in South America at the time.[143] Eisenhower made handwritten changes that "demonstrate a desire to soften or mute the enthusiasm of the draft for desegregation," according to Kramer. For instance, he changed a sentence that originally argued that racial segregation should be terminated "as quickly as possible" to "as quickly as feasible."[144] He also added some language obviously meant as a salvo to the South:

> Moreover, the Court's finding that segregation is a denial of constitutional rights is recognition of the importance of emotional [factors]; it is recognition that the impact upon the emotions of children can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, emotions are involved in the alterations that must now take place in [difficult to read but looks like "considering that"] during the years [illegible] not only had the sanction of Supreme Court decisions but have been fervently supported by great numbers of people as both legal and moral.[145]

It also appears that Eisenhower struck these strong words supporting social integration from the original draft: "Experience has shown that normal contacts between people, in groups or as individuals, serve to diminish prejudice while enforced separation intensifies it. Race relations are improved when individuals without distinction as to race or color, serve in the armed forces together, work together, and go to schools together."[146]

The final brief cautioned the Court against ordering desegregation "forthwith" on the basis of choice, but suggested that it be done gradually. No Master should be appointed, but the Court should remand the cases to the lower courts with general directions. The right of black children to be integrated "is one which, if not enforced while the child is of school age, loses its value. Hence, any delay in granting relief is *pro tanto* an irretrievable loss of the right," noted the brief, filed under Brownell's name. "No unnecessary delay" should be countenanced. But taking Eisenhower's advice, the brief recognized that "practical difficulties" should be taken into account. "The Court's decision in these cases has outlawed a social institution which has existed for a long time in many areas throughout the country." Although community hostility cannot justify avoiding or postponing compliance, it must be determined locally how desegregation can best be achieved. Brownell's team recommended remanding to the lower courts and directing them to order the schools to come up with plans for desegregation within ninety days. If not, the district courts should order the admission of the plaintiff children "and other children similarly situated" at the beginning of

the following term. The courts should require periodic reports on the progress of desegregation until it is finally achieved, the government argued.[147]

Kramer posits that Brownell had scored another coup over Eisenhower's reluctance in matters of civil rights. He "gambled that Solicitor General Sobeloff would persuade the President to permit the brief to be filed without changes that would radically alter its tone of strong support for court-ordered desegregation. Brownell's gamble paid off," Kramer has concluded. "Thus, it appears that after the President made a few significant changes in the brief, combined with what must have been a soothing discussion with the Solicitor General, the brief survived presidential scrutiny relatively unscathed."[148] Nonetheless, as would later turn out to be his habit in other matters, Eisenhower attempted publicly to distance himself from his own Justice Department's brief.[149]

Brown II and "Deliberate Speed"

In Conference, there was little sentiment among the Justices for firm deadlines. Caution seemed to be the word of the day. Justice Harold H. Burton wanted to enjoin segregation as rapidly as possible, but even he did not want the Court to issue a decree that would turn out to be futile: "It is better to get limited results which are ordered and let them serve as examples than to order something that will not be carried out," he felt.[150] Justices Black and Sherman Minton also cautioned against issuing a decree that could not be enforced. "Nothing could hurt the Court more . . . ," Black said. "The less we say, the better." Even Justice Douglas argued against setting a firm date for desegregation. Reed wanted no date and no requirement that districts submit plans, as the government had argued.[151] Reed, Douglas, and Clark favored language like the Court had used in a previous case in which it "remanded to the District Court to enter such orders and decrees as are necessary and proper. . . ."[152]

It appears that Frankfurter, while indicating that the process of desegregation would be slow, did not renew his suggestion at this point that the Court use the expression "with all deliberate speed."[153] In a memo to Warren on April 14, 1955, Frankfurter, instead, used the words "as soon as practicable":

> [I]t would be desirable to charge the lower courts with the duty of assessing local conditions so as to require desegregation as soon as practicable, and perhaps put a fair terminal date with the requirements of progress reports within that period (setting the first such report rather early).[154]

Warren adopted that construct in a handwritten draft of May 23, 1955.[155] But Frankfurter apparently revived the "deliberate speed" idea in a conversation with the Chief a few days later. On May 27, 1955, he wrote Warren, "In our talk the other day two suggestions seemed to commend themselves to you . . . ," the first of which was to substitute "with all deliberate speed" for "the earliest practicable date."

> I still strongly believe that "with all deliberate speed" conveys more effectively the process of time for the effectuation of our decision. And the reference to *Virginia v. West Virginia*, I deem desirable in that it is the nearest experience this Court has had in trying to get obedience from a state for a decision highly unpalatable to it. I think it is highly desirable to educate public opinion—the parties themselves and the general public—to an understanding that we are at the beginning of a process of enforcement and not concluding it.[156]

By the time he received this memo, Warren had already made the change, apparently as a result of their earlier conversation. On May 24, he changed the language but did not cite *Virginia v. West Virginia*.[157] In the final version, the decision noted that implementation might require the solution of local problems and

Brownell drafted the legislative proposal that ultimately became the Civil Rights Act of 1957 (above, Eisenhower greets civil rights leaders after signing the legislation). Although Eisenhower wished to appoint Brownell to the Supreme Court when vacancies opened in 1957 and 1958, he knew that segregationists in the Senate would defeat the nomination.

remanded the cases to the district courts "to take such procedures and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[158] It did not require that plans for desegregation be submitted within ninety days, as Brownell's brief had suggested. "The Supreme Court adopted our first suggestion [that the cases be remanded to the district courts] but rejected our second one [requiring plans in 90 days]," Brownell later recalled. He saw the "deliberate speed" language as problematic: "Although the intent of this phrase may have been otherwise for the members of the Court, it was interpreted by political leaders in the South as being so ambiguous as to mean 'at some indefinite date in the future.' No direct enforcement powers existed for the executive branch because no federal statute conferred such power and no congressional appropriation was available for enforcement."[159] Brownell also came to feel that the Court's reluctance to establish a deadline for desegregation "unwittingly sowed the seeds for the violence that [later] ensued at Little Rock and the violence that occurred during the administrations of Presidents Kennedy and Johnson."[160]

Eisenhower resisted entreaties to express his personal opinion about the *Brown* decisions and to lend the weight of his office to their enforcement.[161] At a press conference after *Brown II*, he said only, "The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I

will obey."[162] Even Brownell claimed that he never heard the President express an opinion. Eisenhower did believe that it would take a long time to change attitudes in the South, but he realized that, once the decision was made, it was his obligation to enforce the law.[163] It disappointed Warren that the President never expressly endorsed the decision.[164] Eisenhower could have prevented much of the resistance to desegregation that followed the decision. "But he never stated that he thought the decision was right until after he left the White House," Warren later complained.[165] Brownell also wished that Eisenhower had endorsed the decision, but the President didn't feel it was his job to tell the states how to run the schools. Had Dewey been President, "it would have made a big difference because he was the leading civil rights advocate in the country of either party," Brownell said years later.[166]

Warren said in his memoirs that *Brown* ended his cordial relations with the President. After the decision, they only exchanged a few polite words.[167] Eisenhower has been widely quoted as saying that Warren's appointment "was the biggest damn fool mistake I ever made."[168] Brownell gave slightly varying accounts of his knowledge of such a remark. In 1977, he denied ever hearing the President refer to the appointment as a mistake. "But I'm sure that if it had been anything but an offhand statement, that I would have heard about it because I was consulted regularly by him when it came to the question of judicial appointments or judicial conduct."[169] But, in a 1968 interview, Brownell was not so definite. Asked whether he had ever heard Eisenhower comment about his appointment of Warren, Brownell replied, "Yes, I have, but I think I'll leave those remarks to him."[170] For Brownell, the crucial fact was that he and Eisenhower had put Warren on the Bench. Brownell was confident "that the decision might have come down differently, perhaps as a divided vote, and that the struggle for civil rights might have taken a different, more divisive course had Warren not taken his seat on the Court in October."[171]

In the words of Richard Kluger, who wrote an exhaustive study of the history of the *Brown* litigation, Warren was—wittingly or not—"Eisenhower's principal contribution to the civil rights of Americans... ."[172] Herbert Brownell, Jr.—although not a hero of the civil rights movement—had played a pivotal role in placing Warren on the Court. He should also be lauded for persuading a reluctant President to file a brief in the second *Brown I* oral argument and, for the first time, to take the position on behalf of the United States government that the segregation of children in public schools was unconstitutional.

ENDNOTES

[1]The expression "hidden hand" comes from Fred I. Greenstein's account of the role that Brownell and others played behind the scenes in the Eisenhower Administration, **The Hidden Hand Presidency** (1982).

[2]*Brown v. Board of Education*, 347 U.S. 483, 489–90 (1954).

[3]Herbert Brownell with John P. Burke, **Advising Ike: The Memoirs of Attorney General Herbert Brownell**, 13 (1993) hereinafter **Brownell Memoirs**.

[4]Richard Norton Smith, **Thomas E. Dewey and His Times**, 405, 407–08; **Brownell Memoirs**, 49, 51–52, 62, 79; Leo F. Mc Cue Jr., **Thomas E. Dewey and the Politics of Accommodation**, 159–60 (1987).

[5]**Brownell Memoirs**, 121, 127.

[6]*Id.* at 131–32; Peter Lyon, **Portrait of the Hero**, 416 (1974).

[7]Dwight D. Eisenhower, **Mandate for Change: The White House Years, 1953–1956**, 88–89 (1963).

[8]**Brownell Memoirs**, 133–36.

[9]**Brownell Memoirs**, 176–77.

[10]**Brownell Memoirs**, 163, 164; Earl Warren, **The Memoirs of Chief Justice Earl Warren**, 249–56 (1977) hereinafter **Warren Memoirs**; Smith, *supra* note 4, 396.

[11]G. Edward White, **Earl Warren: A Public Life**, 137 (1982).

[12]Jim Newton, **Justice for All: Earl Warren and the Nation He Made**, 239 (2006).

[13]Herbert S. Parmet, **Eisenhower and the American Crusades**, 85 (1972).

[14]Chester J. Pach, Jr., and Elmo Richardson, **The Presidency of Dwight D. Eisenhower** (Rev.Ed.), 141 (1991);

Ed Cray, **Chief Justice: A Biography of Earl Warren**, 240 (1997).

[15]William Bragg Ewald, Jr., **Eisenhower the President: Crucial Days: 1951–1960**, 78 (1981). Georgia delegate Elbert Tuttle remembered that he was told by Minnesota's Warren E. Burger, a Harold Stassen delegate, that Brownell had relayed a promise to Warren that, if he would not release his delegates "He could have the first appointment that he wanted under the new administration." (John Luter, Columbia University Oral History Interview with Elbert Tuttle 71–72 [June 26, 1970], on file at The Eisenhower Library, Abilene, Kan.) Burger denied this in a letter to Tuttle, dated May 17, 1983, claiming he had no relationship with Dewey and Brownell at the time and that Brownell would not have used "an obscure lawyer from St. Paul as his messenger." Even if Brownell had made such a suggestion, Burger would have declined, he insisted, and, if he had declined, Brownell surely would not have subsequently made him an assistant attorney general, Burger wrote to Tuttle. (Letter from Warren E. Burger to Elbert Tuttle, additional papers of Herbert Brownell, Jr., *infra* note 46, box 26.) For his part, Brownell declared, "I would have been out of my mind to select Warren Burger, who was then a chief advocate of the nomination of Harold Stassen, to be a messenger on behalf of Eisenhower or of my representing Eisenhower." (Letter from Herbert Brownell to Dori Dressander, May 23, 1983, additional papers of Herbert Brownell, Jr.) On the other hand, historian Herbert S. Parmet has claimed that Stassen's campaign in 1952 was only a sham, designed by Brownell to deflect support from Taft (*supra* note 13, 53).

[16]Cray, *supra* note 14, 246–47.

[17]**Warren Memoirs**, 253.

[18]Eisenhower, *supra* note 7, 228.

[19]White, *supra* note 11, 143.

[20]**Warren Memoirs**, 256; **Brownell Memoirs**, 92.

[21]*Id.*, 12, 165.

[22]Parmet, *supra* note 13, 88.

[23]Eisenhower, *supra* note 7, 228; **Brownell Memoirs**, 165.

[24]**Warren Memoirs**, 159–60; White, *supra* note 11, 97–98; Cray, *supra* note 14, 104.

[25]**Brownell Memoirs**, 164–65; **Warren Memoirs**, 260.

[26]*Id.*

[27]Eisenhower, *supra* note 7.

[28]Herbert Brownell, "Civil Rights in the 1950s," 69 *Tulane Law Review* 781, 781–82 (Fall 1995).

[29]**Warren Memoirs**, 261.

[30]*Id.*, 262, 268.

[31]**Brownell Memoirs**, 165–66.

[32]Ewald, *supra* note 15, 79.

[33]White, *supra note* 11, 145.

[34]**Warren Memoirs**, 268–69.

[35]Newton, *supra* note 12, 256.

[36]**Warren Memoirs**, 269; **Brownell Memoirs**, 165–66.

[37]Cray, *supra* note 14, 250.

[38]*Id.*

[39]**Brownell Memoirs**, 166.

[40]Cray, *supra* note 14, 252.

[41]**Brownell Memoirs**, 166.

[42]Eisenhower, *supra* note 7, 227.

[43]**Brownell Memoirs**, 166.

[44]Dori Dressander, "The Law and Politics of Civil Rights in the Eisenhower Administration" (Draft of an Unpublished Manuscript), at 60 of chapter iii, Additional Papers of Herbert Brownell, Jr., Box 24 (on File at the Eisenhower Library, Abilene, Kan.)

[45]Jim Newton, **Justice for All: Earl Warren and the Nation He Made**, 1–2 (2006).

[46]*Id.* at 8.

[47]*Id.* at 9; Cray, *supra* note 14, 251.

[48]**Brownell Memoirs,** 167.

[49]Newton, *supra* note 46, 9; G. Edward White, **Earl Warren: A Public Life** 149 (1982).

[50]Cray, *supra* note 14, 251.

[51]**Warren Memoirs**, 270.

[52]Newton, *supra* note 46, 9.

[53]White, *supra note* 11, 149.

[54]Dressander, *supra* note 44, Brownell crossed this out of Dressander's draft.

[55]**Brownell Memoirs**, 167.

[56]Ewald, *supra* note 15, 80–81.

[57]**Warren Memoirs**, 270.

[58]Newton, *supra* note 46, 9.

[59]Cray, *supra* note 14, 252.

[60]*Id.* at 252–53.

[61]Dressander, *supra* note 44, 61 of chapter iii.

[62]Eisenhower, *supra* note 7, 229.

[63]John D. Weaver, **Warren: The Man, the Court, the Era** 193 (1967).

[64]Cray, *supra* note 14, 253.

[65]Newton, *supra* note 46, 10.

[66]**Warren Memoirs**, 271.

[67]**Brownell Memoirs**, 189.

[68]*Id.*167.

[69]*Id.* 165.

[70]David A. Nichols, **A Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution**, 56–57 (2007).

[71]Quoted in Peter Lyon, **Portrait of the Hero**, 596 (1974).

[72]Weaver, *supra* note 63, 198.

[73]Roger K. Newman, **Hugo Black: A Biography**, 427 (1994).

[74]Newton, *supra* note 46, 277.

[75]Nichols, *supra* note 70, 58.

[76]**Warren Memoirs**, 280; Theodore M. Vestal, **The Eisenhower Court and Civil Liberties**, 23 (2002).

[77]**Brownell Memoirs**,170. Brownell's published memoirs incorrectly indicate that it was the first Chief Justice, John Jay, who was given a recess appointment. He corrected

the error in a note to his file. (Note, Additional Papers of Herbert Brownell, Jr., *supra* note 44, Box 26).

[78]Nichols, *supra* note 70, 57.

[79]**Brownell Memoirs**, 171.

[80]Lyon, *supra* note 71, 597.

[81]***Brown v. Board*: The Landmark Oral Argument before the Supreme Court** (Leon Friedman, Ed.), 11, 53, 121 (1969) Hereinafter "Friedman."

[82]Diary of 12/13/52, Papers of Harold H. Burton, Box 2, Reel 3 (on file at The Manuscript Division of the Library of Congress, Washington, D.C.).

[83]Melvin I. Urofsky, ed., **The Douglas Letters**, (165 (1987). Hereinafter "Urofsky."

[84]Notes of Dec. 12, 1952, Segregation Cases, Papers of Robert H. Jackson, Box 184 (on file at The Manuscript Division of the Library of Congress, Washington, D.C.).

[85]Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle For Equality**, 618 (2004).

[86]Newman, *supra* note 73, 431–32.

[87]Dressander, *supra* note 44, at 2, of chapter iv. Brownell's deletion of this language does not necessarily indicate that it wasn't true—only that he didn't wish to accuse a Chief Justice of the United States—even a dead one—of judicial impropriety.

[88]**Brownell Memoirs**, 189.

[89]Kluger, *supra* note 85, 618–19.

[90]Herbert Brownell, "*Brown v. Board of Education* Revisited," In Clare Cushman and Melvin I. Urofsky, eds., **Black, White, and *Brown*: The Landmark School Desegregation Case in Retrospect**, 195 (2004).

[91]Robert H. Ferrell, ed., **The Eisenhower Diaries**, 254 (1981).

[92]**Brownell Memoirs**, 190.

[93]Dressander, *supra* note 44, at 6 of chapter iv.

[94]Victor H. Kramer, "President Eisenhower's Handwritten Changes in the Brief on Relief in the School Segregation Cases: Minding the Whys and Wherefores," 9 *Constitutional Commentary* 223, 224 (Summer 1992).

[95]**Brownell Memoirs**, 190.

[96]Robert Fredrick Burk, **The Eisenhower Administration and Black Civil Rights**, 134 (1984).

[97]Dressander, *supra* note 44, at 7 of chapter iv, 49 of chapter iii.

[98]*Id.* at 7 of chapter IV; **Brownell Memoirs**, 191.

[99]Dressander, *id.* at 9 of chapter iv.

[100]Kluger, *supra* note 85, 653–54.

[101]**Brownell Memoirs**, 191–92. Brownell himself had been the subject of Frankfurter's "blatant flatteries," part of an agenda of ingratiating himself with the powerful in Washington. But the attorney general tried to keep a purely professional relationship with the Justice, (*id.* at 192). Frankfurter, Brownell later said, "was active in politics in the years before I went to Washington and he tried to be in the Eisenhower Administration. He fancied himself an adviser to the president, whoever the president might be." But Brownell "didn't get along with him" because he tried to influence Justice Department policy, the Attorney General insisted, without specifically saying that he tried to influence the government's position in *Brown*. (Dressander, *supra* note 44, at 8 of chapter iv.)

[102]Mark Tushnet, **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1956–1961**, 201 (1994) Hereinafter "Tushnet."

[103]Dressander, *supra* note 44, at 169 of chapter v.

[104]*Id.* at 19 of chapter iv.

[105]**Brownell Memoirs**, at 193.

[106]*Id.*

[107]*Id.* at 192–93.

[108]Memo for the Conference from Justice Frankfurter, Dec. 3, 1953, Papers of Earl Warren, Box 571 (on file at The Manuscript Division of the Library of Congress, Washington, D.C.).

[109]*Brown v. Board of Education*, 347 U.S. 483, 489–90 (1954)(known as *Brown I*).

[110]Tushnet, 203, 215.

[111]Dressander, *supra* note 44, at 13 of chapter iv.

[112]Friedman, 179, 223.

[113]Tushnet, 207.

[114]*Id.*, 208.

[115]Friedman, 249–50.

[116]*Id.*, 253.

[117]Peter Irons, **Jim Crow's Children: The Broken Promise of the *Brown* Decision**, 159 (2002).

[118]Friedman, 256–57.

[119]Memorandum to "Dear Brethren," Jan. 15, 1954, Papers of Earl Warren, *supra note* 108.

[120]222 U.S. 17. Justice Oliver Wendell Holmes, Jr. had stated, "a question like the present should be disposed of without undue delay. but a state cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English chancery, with all deliberate speed." (*Virginia* at 19–20). Frankfurter had cited the language in five of his opinions before *Brown*. (Charles J. Ogletree, Jr., **All Deliberate Speed: Reflections on the First Half Century of *Brown v. Board of Education***, 10–11 [2004]).

[121]**Warren Memoirs**, 285; Kluger, *supra* note 85, 698.

[122]**Warren Memoirs**, 285.

[123]Memorandum to "Brethren," Papers of Earl Warren, *supra* note 108.

[124]Bernard Schwartz with Stephan Lesher, **Inside The Warren Court**, 88 (1983).

[125]Urofsky, *supra* note 83, 67, 166.

[126]*Id.* at 167.

[127]*Id.*

[128]Newton, *supra* note 46, 323; Cray, *supra* note 14, 286.

[129]**Brownell Memoirs,** 195. He later heard that Douglas and Black thought his presence inappropriate, confirming his suspicion that it would have been considered "political" for him to argue the case. (Dressander, *supra* note 44, at 13 of chapter iv.)

[130]Kluger, *supra* note 85, 705.

[131]*Brown,* 347 U.S., 492.

[132]*Id.* at 494. in his original draft, Warren had written, "to separate them from others of their age in school solely because of their *color puts the mark* of inferiority not only upon their status in the community but also upon their *little* hearts and minds in a *form* that is unlikely ever to be *erased."* (emphasis added). It seems that he ultimately changed "color" to "race" and struck the word "little." Frankfurter was responsible for changing "puts the mark" to "generates a feeling" of inferiority and for substituting "undone" for "erased" as the final word. (Drafts of May 4 and May 14, 1954, Papers of Earl Warren, *supra* note 108.)

[133]*Brown,* 347 U.S., 494–95.

[134]Papers of Earl Warren, 110.

[135]**Brownell Memoirs,** 195.

[136]Kluger, *supra* note 87, 710.

[137]*Brown,* 347 U.S. at 495–96.

[138]Byrnes had also served for a year on the Supreme Court and was "friends for years" of Justice Frankfurter. After *Brown I*, He also communicated with Frankfurter about the timing of the decree. (Letter to "Dear Chief" from Justice Frankfurter [July 8, 1954], Papers of Robert H. Jackson, *supra note* 84).

[139]Brownell Memoirs, 196.

[140]*Id.;* Nichols, *supra* note 70, 70.

[141]Victor H. Kramer, "President Eisenhower's Handwritten Changes in the Brief on Relief in the School Segregation Cases: Minding the Whys and Wherefores," 9 *Constitutional Commentary* 223, 224 (Summer 1992).

[142]*Id.,* 226.

[143]Letter From Herbert Brownell to Victor H. Kramer (Dec. 5, 1991), Additional Papers of Herbert Brownell, Jr., *supra* note 44, Box 7.

[144]Kramer, 227.

[145]From a photocopy of a page of the brief in *id.* at 230. Kramer sent Brownell a copy of his manuscript prior to publication, and asked for his comments. (Letter from Victor H. Kramer to Herbert Brownell [Nov. 6, 1991], Additional Papers of Herbert Brownell, Jr., Box 7). Brownell refused comment, noting that he was writing his memoirs and would tell the story there. (Letter from Herbert Brownell to Victor H. Kramer [Nov. 21, 1991], Additional Papers of Herbert Brownell, Jr., Box 7). However, in his memoirs, Brownell only says, "we again consulted the president on the policies to be advocated in the brief." (**Brownell Memoirs,** 196). The original draft of the brief with Eisenhower's changes has been lost. (Nichols, *supra* note 70).

[146]Kramer, 234.

[147]Brief for the United States on the Further Argument of the Question of Relief, Papers of Harold H. Burton, *supra* note 82, Box 257.

[148]Kramer, 231–32. Kramer also notes "so far as I can discover, Eisenhower is the only president who personally changed words and added paragraphs in a draft of a Supreme Court brief." (232–33).

[149]Nichols, *supra* note 70, 71.

[150]Memorandum as to the Segregation Cases for the Conference of April 16, 1955, Papers of Harold H. Burton, *supra* note 82, Box 257.

[151]Chief Justice's Conference Notes, Papers of Earl Warren, *supra* note 108, Box 574.

[152]*Id.; Terry v. Adams,* 345 U.S. 461, 470 (1953).

[153]Chief Justice's Conference Notes, Papers of Earl Warren, *supra* note 108, Box 574.

[154]Memo on the Segregation Decree, Papers of Earl Warren, *Id.*

[155]"Memo," Papers of Earl Warren, *Id.*

[156]Letter to "Dear Chief," Papers of Earl Warren, *Id.*

[157]Memorandum, Papers of Earl Warren, *Id.*

[158]*Brown v. Board of Education,* 349 U.S. 294, 299, 301 (1955)(Known as *Brown* II).

[159]**Brownell Memoirs,** 197.

[160]Brownell, *supra* note 28, 787.

[161]Public Papers of the President: Dwight D. Eisenhower, 1956 732, 737 (1958).

[162]Quoted in Lyon, *supra* note 6, 598.

[163]Thomas Soapes, Columbia University Oral History Interview with Herbert Brownell (Feb. 24, 1977) 32 (on file at the Eisenhower Library, Abilene, Kan.).

[164]Cray, *supra* note 14, 337.

[165]**Warren Memoirs,** 291.

[166]Dressander, *supra* note 44, at 22 of chapter iv.

[167]**Warren Memoirs,** 292.

[168]*See, e.g.,* Lyon, *supra* note 6, 598; Schwartz and Lesher, *supra* note 124, 92.

[169]Soapes, *supra* note 163, 29.

[170]Ed Edwin, Columbia University Oral History Interview with Herbert Brownell (Jan. 31, 1968) 224 (on file at the Eisenhower Library, Abilene, Kan.).

[171]Brownell Memoirs, 171.

[172]Kramer, 668.

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