Introduction

Melvin I. Urofsky

This issue of the *Journal* is of particular satisfaction to me. Those who have read my introductions over the last two decades know how much I celebrate the diversity that has developed in the study of the Court's history, and while there is a theme in the issue that carries the previous year's lecture series, regular issues present articles that range across the landscape, from case studies to biographical entries to features about the "Marble Temple" (it doesn't seem right to just call it a "courthouse") to pieces about what the Justices do when they take off their black robes.

When Louis Brandeis received a copy of Charles Warren's monumental three-volume **The Supreme Court in United States History** (1922), he wrote back congratulating Warren on having "performed an important public service," and praising the book's content and style. Then he said, "Much having makes me hunger more," and suggested that Warren now undertake a history of the lower federal courts. (Brandeis to Warren, 23 June 1922).

For me, "much having" also makes me hunger for more, and like many scholars working on the Court's history, I spend (too much) time lamenting that no one has done this study, or that an important case or Justice has not received the attention they deserve. In this issue, some (but far from all) of that hunger is slaked.

Among that group of Justices whom scholars generally agree are in the "first tier"—people like John Marshall, Brandeis, Oliver Wendell Holmes, Jr., and Hugo L. Black—all have had one or more solid scholarly biographies written about them. The one exception is Robert H. Jackson, who served on the Court from 1941 until his untimely death in 1954. Jackson has, of course, figured prominently in books about the Court during his tenure, such as Noah Feldman's **Scorpions** (2010). So the news that University of Virginia professor David M. O'Brien, who is a noted Court scholar as well as a member of the *Journal*'s editorial advisory committee, is at work on a study of Jackson is welcome news indeed, and we can look at his piece in this issue as a harbinger of things to come.

You will receive this issue in the midst of the presidential election campaign, and so

William Ross's article on the Court as an issue in prior elections will be relevant indeed. When I teach my courses in constitutional history, I emphasize to my students that the Court is a political institution, not in a partisan sense, but because the Framers designed it to be one of three coordinate branches of government. While the Justices of the Court deal in jurisprudence, the results of their labor have consequences, and so it should come as no surprise that their decisions—or even their personal behavior—becomes fodder during election periods. While we are certainly aware of how this has played out in recent campaigns, Ross, a Professor of Law at Samford University's Cumberland School of Law in Birmingham, Alabama, shows that it has been going on far longer than many of us imagined.

Many years ago, I became converted to the idea that, in order to truly understand a case, one had to know not just the legal issues involved, but the parties as well. Over the past thirty years we have had a number of books, articles, and collections that have taught us a great deal about the men and women whose cases have made our law. But, "much having" only makes us want more.

Helen Knowles helps satisfy some of that hunger in her article about Elsie Parrish, the Washington State chambermaid who sued her employer under the state's minimum wage law, a case that eventually became one of the key decisions in the constitutional crisis of 1937. This is Ms. Knowles's second appearance in the *Journal*. In 2006 her article on the role of Solicitor General Archibald Cox and the Reapportionment Cases won the Society's Hughes-Gossett Award for an essay written by a student. She wrote this piece while teaching at Whitman College in Washington State, returning, if you will, to the scene of the crime. Knowles is now teaching at Grinnell College in Iowa.

Every now and then we get documents that help shed light on an important facet of the Court's history. In our last issue we featured an exchange of correspondence between former President Thomas Jefferson and Justice William Johnson. This time we look at a letter written by Lincoln's Attorney General, Edward Bates, during the Civil War. It helps us better understand the tensions that the Lincoln Administration labored under during the conflict, beset on all sides by new conditions and old foes that could not be dealt with as one might have done in peacetime. Jonathan White, who teaches American Studies at Christopher Newport University, uncovered the letter in the Edwin Stanton Papers in the Library of Congress, and we are happy to publish it.

I met Andrew Porwancher last winter when I served as the Feaver-McMinn Scholar at the University of Oklahoma. Andrew had written his dissertation on John Henry Wigmore, whom many of us may recall from our law school class in Evidence, and I asked him if there was anything in it that related to the Court. (As editor, I ask this question a lot!) He told me about the long-term relationship between Wigmore and Holmes, and I urged him to turn that material into an article, which happily he did.

Finally, if there is any doubt about the great diversity that now exists in Supreme Court history, turn to our regular feature, Grier Stephenson's "Judicial Bookshelf." There we have a case study, the impact of one President on the Court and an epic battle between another President and a Chief Justice, as well as more stories about Justices and clerks.

As always, a feast. Enjoy!

The Lincoln Administration and the Supreme Court during the Civil War: A Letter by Attorney General Edward Bates

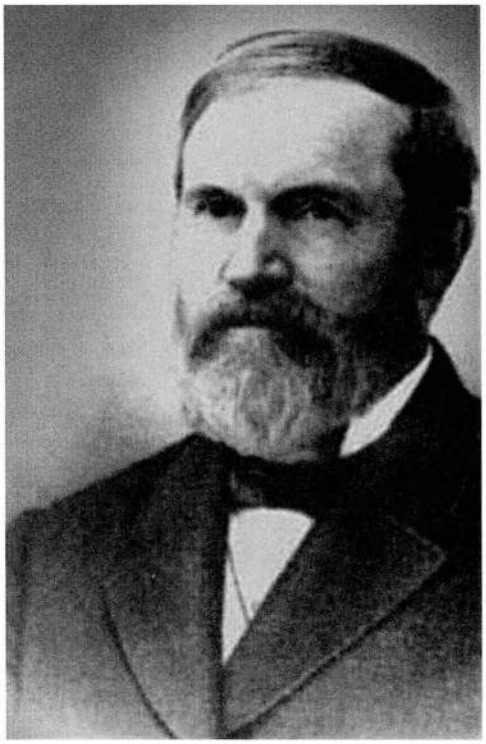
JONATHAN W. WHITE

The Lincoln administration fought the Civil War on numerous fronts. Most obvious were the physical battlefields scattered throughout the nation. Of near-equal importance were the legal battles waged in state and federal courthouses in nearly every state of the Union.

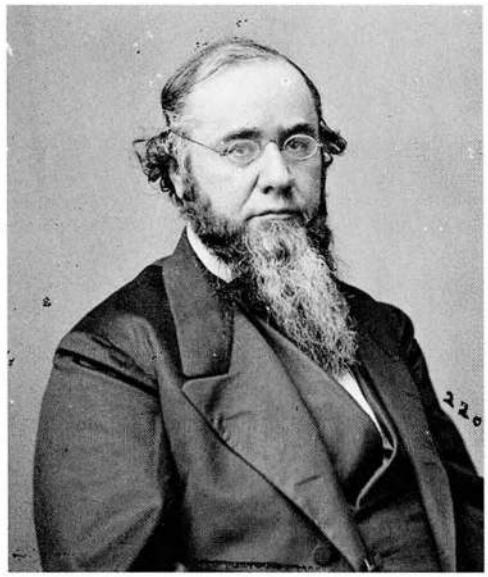
Many of Lincoln's wartime policies engendered strong opposition and ultimately found their way into the courtroom. The issue that led to the most notable litigation was Lincoln's decision to suspend the privilege of the writ of habeas corpus and to use the military to arrest and try civilians. Historian Mark E. Neely, Jr., has estimated that at least 14,000 civilians were arrested by the Union military during the Civil War; at least 4,271 civilians were tried in military tribunals.[1]

Dozens of civilians challenged their detentions in the state and federal courts.[2] In one of the first cases, *Ex parte Merryman* (1861), Chief Justice Roger B. Taney ruled that the President did not possess the authority to suspend the writ of habeas corpus. Other state and federal judges made similar pronouncements both during and after the war. While some of these opinions, such as the Supreme Court's ruling in *Ex parte Milligan* (1866), are now hailed as standard maxims of civil liberty, when they were rendered they were often viewed as disloyal attempts to aid the Southern rebellion. The *New York Times*, for example, accused Chief Justice Taney of wanting "to throw the weight of the judiciary against the United States and in favor of the rebels," for Taney was "at heart a rebel himself."[3] In response to these judicial challenges, Lincoln adopted an unofficial policy of ignoring the courts when he believed that their rulings would undermine the Union war effort.[4]

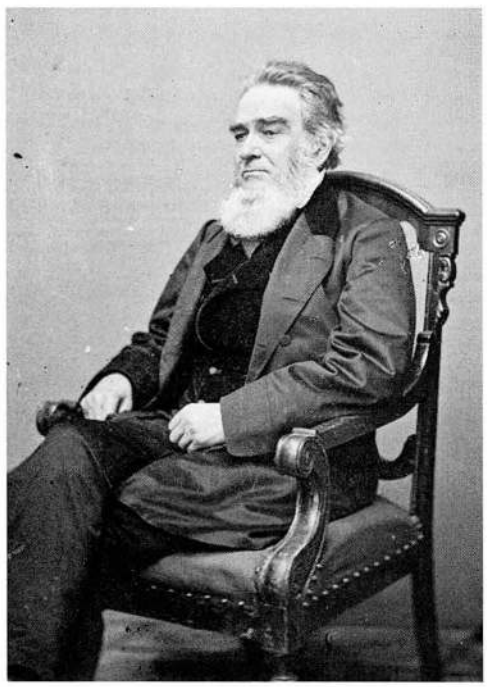
One important case, *In re Kemp*, came before the Supreme Court of Wisconsin after



The Supreme Court of Wisconsin handed down a decision in a case arising out of an instance of draft resistance under the militia draft of 1862, holding that the power to suspend the privilege of the writ of habeas corpus was a legislative power, not an executive one. Luther S. Dixon (above), the chief justice of the Wisconsin court, based his opinion on Chief Justice Roger B. Taney's 1861 decision in *Merryman* ruling that President Lincoln had exceeded his authority.



Secretary of War Edwin M. Stanton (above) wanted the Wisconsin court's *Kemp* decision to be overturned and agreed with Chief Justice Dixon that it should be reviewed by the U.S. Supreme Court.



Once apprised of Stanton's plan, Attorney General Edward Bates (above) immediately sent him a letter urging that it would be imprudent to appeal the *Kemp* decision to the U.S. Supreme Court because a favorable outcome was highly improbable. There is no record of the case being appealed.

several men were arrested by the military during a draft riot at Port Washington on November 10, 1862. Nicholas Kemp and other detainees petitioned their state's highest court for a writ of habeas corpus in December 1862, but Union military authorities refused to bring prisoners before the court, claiming that Lincoln's September 1862 proclamation suspending the writ of habeas corpus authorized them to detain prisoners without charges. On January 13, 1863, the Supreme Court of Wisconsin handed down its decision in the case. Relying on Taney's "unanswerable" opinion in *Merryman*, the court held that suspending the privilege of the

writ of habeas corpus was a legislative power, not an executive one. As such, President Lincoln exceeded his authority when he suspended the writ. Moreover, the court held that civilians could not be detained and tried by military authorities in "remote districts" far away from the contending armies—in places where "the civil authorities were able, by the ordinary legal process, to preserve order, punish offenders, and compel obedience to the laws." Chief Justice Luther S. Dixon conceded that Lincoln's actions were prompted "by the highest motives of patriotism, public honor, and fidelity to the constitution and laws" during the "gloomiest period of our public misfortunes." Nevertheless, Dixon believed that he was bound to judge Lincoln by his "acts, not by his intentions." The court concluded that Lincoln had acted unconstitutionally.[5]

In an important part of the opinion, Chief Justice Dixon argued that the civil liberties issue should not be decided by his court but rather by the nation's highest court: "These are emphatically questions of federal cognizance, which must, in the last resort, be determined by the supreme court of the United States," he wrote, "and I repeat my regret that it has become my duty to decide upon them at all." Dixon found "encouragement" in knowing that his "errors" could be corrected by the higher tribunal. "And this consideration, that our decision is preliminary and not final—that we merely prepare the way for the determination of the court which can alone settle the law, will relieve me from that extended discussion of the questions which their gravity and importance would otherwise seem to demand."[6]

Secretary of War Edwin M. Stanton was worried by the decision and hoped to have it overturned by the U.S. Supreme Court. Stanton discussed an appeal with War Department solicitor William Whiting. Whiting, in turn, informed Attorney General Edward Bates of Stanton's plan, but Bates was alarmed by the proposal. The Attorney General immediately sent Stanton a letter urging that it would be imprudent to appeal the *Kemp* decision to the U.S. Supreme Court because a favorable outcome was highly improbable. The letter, which is reproduced below, reveals some of the tensions and difficulties that the Lincoln administration faced in dealing with the Supreme Court, and the very real problems Lincoln would encounter should the Court strike down one of his most important internal security measures.[7] Bates was wise to caution Stanton against the appeal, for even some of Lincoln's appointees to the Court had reservations about the administration's approach to civil liberties.[8]

No record of appeal appears in the official records of the Supreme Court at the National Archives, nor have I been able to locate a reply from Secretary of War Stanton.[9] I have kept spelling and grammar as close to the originals as possible.

* * * * * * * *

Confidential[10]

Attorney General's Office,
31 January 1863.

Sir,

I learned yesterday from Mr. Whiting, who called to converse with me on the subject, that you have it in contemplation to bring before the Supreme Court of the United States for review, at its present term, certain proceedings of the Supreme Court of Wisconsin involving the question of the power of the President, or of his subordinates in the military service to suspend the privilege of the Writ of Habeas Corpus.

Entertaining as I do, a very strong conviction that it will be extremely impolitic for the government at this time to bring the question stated before the Supreme Court of the United States, I deem it my duty respectfully to suggest for your consideration some of the reasons which impel me to that conviction.

It will be conceded that in the present condition of parties and of public opinion in the loyal states, a decision of that court against the power of the President to arrest and hold without trial, disloyal persons, would inflict upon the Administration a serious injury. Already we have seen a successful political party make these arrests a ground of partisan outcry, and, inspired by either secret or open hostility to the efforts we are making to suppress the rebellion, they are using that cry to divide and weaken the loyalty of the country. Thus far they have failed to destroy the popular confidence in the President, because the people have regarded these efforts as of partisan or disloyal origin. But suppose that the Supreme Court, *invoked by the Executive* to sustain these arrests should pronounce them illegal. You will readily agree with me that such a decision at this time would do more to paralyse the Executive arm and to animate the enemies of the Union than the worst defeat our armies have yet sustained.

Surely this peril ought not to be invoked *by us*, unless there be in the action of the Court of Wisconsin some evil which we can less easily endure. I venture to presume that nothing in the special case before that court involves such extreme necessity.

But if it be thought that the action of the Executive in the class of cases referred to needs to be vindicated by the Supreme Court, it is all-important to know first that it will receive that vindication. I confess to you frankly, that, knowing as we do, the antecedents and present proclivities of the majority of that Court (and I speak of them with entire respect,) I can anticipate no such result. The Opinion of the Chief Justice and, I believe, of Mr. Justice Clifford, has already been announced judicially.[11] We know that the party of political thinkers with whom the majority of the Court affiliate are entirely or very nearly unanimous in the expression of their opinion against the power assumed by the President, and so far as I am informed, we have no evidence that any one of that majority dissents from that party on this question. Many loyal men deny this power to the President, and, however confident *we* may be that he possesses it, it is no imputation on the loyalty of the majority of the Court to presume that on this point they agree with their political school.

If then, we have reason to fear that their decision will be against the power, or if we do not know that it will sustain it, ought we *now* to incur the risk of an adverse decision. If we can better conduct the government through its present peril without the aid of such a decision from the Supreme Court, than we can with that decision *against* the power assumed by the President, surely it is the part of wisdom to bear our present ills rather than to seek relief in what may be greater ones.

I beg you to observe that the question I am considering is not whether we shall meet in the Supreme Court some person who has asked that Court for the Writ of Habeas Corpus to relieve him from military arrest, but whether *the Executive shall ask that Court to sustain him in such arrest.* If, as I do not believe, the Court should sustain the arrest, all would be well. But if they should refuse to do so, in what position does it place the Executive? Can he disregard the decision he has himself invoked? Must he not then abandon the position he has taken on this subject, and conform thenceforth to the law as pronounced by the Court? For how can he reject the rule of the arbitrator to whom he has submitted? And if he does conform to that rule, he will be compelled to pronounce a large number of the acts by which he has aimed to suppress the rebellion, illegal and unwarranted, and so confound his friends and justify his enemies and the enemies of the Union. To this hard alternative, I trust the President may not be subjected by the action of his friends.

For these and other reasons, I therefore pray you, sir, with all respect to reconsider your purpose, if indeed you have already

decided to bring before the Supreme Court, the action of the Court in Wisconsin.

I am, sir, very respectfully,
Your obedient servant,
Edw. Bates
Attorney General.

Hon. E. M. Stanton,
Secretary of War.

ENDNOTES

[1] Mark E. Neely, Jr., **The Fate of Liberty: Abraham Lincoln and Civil Liberties** (New York: Oxford University Press, 1991), 168, 233-34.

[2] Mark E. Neely, Jr., **Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War** (Chapel Hill: University of North Carolina Press, 2011), 161-234; Neely, **Fate of Liberty**, 87-90.

[3] *New York Times*, May 29, 1861.

[4] Jonathan W. White, **Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman** (Baton Rouge: Louisiana State University Press, 2011), ch. 2 and 4. For another instance of conflict between the Lincoln administration and a federal court, see Jonathan W. White, "'Sweltering with Treason': The Civil War Trials of William Matthew Merrick," *Prologue* 39 (Summer 2007), 26-36.

[5] *In re Kemp*, 16 Wisc. 382 (1863), at 391, 394. The two associate justices on the court, Orsamus Cole and Byron Paine, filed separate opinions.

[6] *Ibid.*, 389.

[7] The letter is in the Edwin M. Stanton Papers, Container 10, Manuscript Division, Library of Congress, Washington, D.C.

[8] For Justice David Davis's views, see Peter J. Barry, "'I'll Keep Them in Prison Awhile . . .': Abraham Lincoln and David Davis on Civil Liberties in Wartime," *Journal of the Abraham Lincoln Association* 28 (Winter 2007), 20-29.

[9] I searched Record Group 267 (Records of the Supreme Court of the United States), Entry 24 (Papers in Undocketed Appellate Cases, 1791-1920) and microfilm M408 (Index to the Appellate Case Files of the Supreme Court of the United States, 1792-1909), reel 9, at the National Archives in Washington, D.C. I also searched the War Department boxes in RG 60 (General Records of the Department of Justice), Entry 9-A (Letters Received, 1809-1870), at the National Archives at College Park, as well as the outgoing correspondence in the Edwin M. Stanton Papers at the Library of Congress.

[10] This word and the signature are in Bates's hand; the rest of the letter was written by a clerk.

[11] For Justice Nathan Clifford's opinion, see *In re Winder*, 30 Fed. Cases 228 (1862).

The Justice and the Dean: Oliver Wendell Holmes, Jr. and John Henry Wigmore

ANDREW PORWANCHER

The differences between Oliver Wendell Holmes, Jr. and John Henry Wigmore were many. Holmes was a son of the Boston Brahmins; Wigmore was a Californian born to immigrants. Holmes sat on the Bench for fifty years; Wigmore spent a half-century in the academy. Holmes belonged to that generation who came of age amid the bloodshed of the Civil War; Wigmore had not yet been born when Holmes suffered his first battlefield wound.

Yet these two shared much else in common. Both were Harvard-trained protégés of the lawyer and scholar James Bradley Thayer. Both helped develop a new jurisprudence—usually described as realist, progressive, or modernist—that sought to recalibrate law to the novel exigencies of a rapidly modernizing society. And both dedicated themselves to a mentor-protégé relationship that spanned six decades and facilitated an extraordinarily rich intellectual exchange.

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Oliver Wendell Holmes, Jr. was the father of modern legal thought. Generations of jurists looked to Holmes as a lodestar, his body of scholarship and dicta a rich repository of wisdom to guide them in their reformation of American law. After John Marshall, Holmes was, perhaps, the greatest legal thinker in American history.

He was born in Boston on March 8, 1841. His father, Oliver Wendell Holmes, Sr., was the superlative well-rounded New England gentleman. A gifted orator, novelist, Harvard anatomy professor, founder of the *Atlantic Monthly*, and poet, the elder Holmes towered over his ambitious son. Holmes, Jr., following in the tradition of his father and grandfathers, enrolled in Harvard in 1857. As domestic political strife degenerated into civil war, Holmes found himself drawn to the abolitionist cause and enlisted in the Union military while he was still an undergraduate. He sustained a near-fatal shot to the chest at Ball's Bluff and narrowly escaped death once

again when a bullet pierced his neck at Antietam.[1]

Disabused of his romantic perception of war, Holmes returned to Boston in 1864 and entered Harvard Law School. He joined a local law firm two years later where he drafted contracts and developed a specialty in admiralty law. Unfulfilled by legal practice, Holmes secured intellectual engagement as a contributor to and then editor of the *American Law Review*. He continued to practice law and publish academic work throughout the 1870s. Holmes' scholarly development culminated in 1881 in a book that would achieve canonical status—**The Common Law**. After accepting a full-time professorship at Harvard Law School in 1882, Holmes resigned only three months later when Massachusetts Governor John Lang offered him a seat on the state's Supreme Judicial Court.[2]

Holmes served on the Massachusetts high court for twenty years, the final three as Chief Justice. Life on the bench failed to enthrall the cerebral Holmes, so he continued to lecture and produce scholarship in search of an intellectual outlet that the courthouse failed to provide him. At Boston University in 1897, Holmes delivered his best-known address, "The Path of the Law," which became famous for its contention that law was merely politics, an exercise in the balance of competing social interests. When a vacancy opened on the United States Supreme Court in 1902, President Theodore Roosevelt heeded the recommendation of Senator Henry Cabot Lodge, a childhood friend of Holmes, and nominated the Massachusetts Chief Justice (all three men were alumni of the Porcellian Club at Harvard).[3]

Holmes served for another thirty years as a Supreme Court justice. He possessed a remarkable ability to analyze a complex case quickly and formulate a pithy decision, and his writing evinced the same literary flair that had earned him the title of Class Poet at Harvard. Known as "The Great Dissenter," Holmes became the darling of young progressives for minority opinions that recognized the rights of organized labor and state legislatures to attenuate the effects of capitalism. Ironically, Holmes sided with the capitalists in his personal views, but he also believed that the Constitution failed to endow him with the authority to invalidate social welfare legislation. On the platform of the nation's highest court and with the vocal support of loyal acolytes, Holmes earned a national reputation in his final decades that exceeded even that of his celebrated father. The ninety-one-year-old Holmes retired in 1932 as the oldest Justice in the Court's history. When he died three years later, the Justices of the Supreme Court carried the coffin of the Civil War veteran. He was laid to rest in Arlington National Cemetery.[4]

John Henry Wigmore was among the most prominent legal figures of his era. The long-time dean of the Northwestern University School of Law, Wigmore entertained an impressive breadth of interests ranging from tort law and legal history to comparative law and legal novels. His signal contribution, however, was his 1904-5 publication of **A Treatise on the System of Evidence in Trials at Common Law**, a reference work that would dominate the law of evidence well past Wigmore's death nearly four decades later.[5]

Born on March 4, 1863, in San Francisco, John Henry Wigmore was named for both his father, John, a self-made Irishman in the lumber business, and his mother, Harriet, a genteel woman of English origin. After a stellar tenure at a local private high school, Wigmore planned to attend nearby Berkeley but, his sister Beatrice recalled, "Mother was under the spell of the New England men and women of letters of the time, and nothing would do but that Harry [i.e. John Henry] must go to Harvard." Unsettled at the thought of her first-born so far from home, Harriet moved the Wigmore family to Massachusetts in 1879 to join her sixteen-year-old son in this new stage of his life. Only Alphonso,

Wigmore's older half-brother, remained in San Francisco to manage the family's lumberyard.[6]

At Harvard, Wigmore performed with distinction and the experience galvanized his confidence in his own intellect. He reappeared in Cambridge a year after completing his bachelor's degree to attend Harvard Law. This time, Wigmore came alone. At the end of his first year of graduate study, he ranked first in a class of sixty-one students and soon helped found the *Harvard Law Review*. Receiving his LL.B. in 1887, Wigmore then worked in private practice in the Boston-area before accepting a visiting professorship in Anglo-American law at Tokyo's Keio University in 1889.[7]

Wigmore returned to the United States after a three-year stint in Japan and soon took on a new position in 1893 at the Northwestern University School of Law, an institution that he would serve for the rest of his life. Assuming the deanship of the law school in 1901, Wigmore watched his status in legal academe steadily rise, and rival institutions such as Yale and Columbia eagerly recruited him. He was, however, intent on staying in Evanston and leveraged competing offers to secure higher faculty salaries, expand the law library, and increase facility funding. In 1929, Wigmore stepped down as dean and officially retired from the faculty five years later, although he continued to teach at Northwestern and retained the title "Dean Emeritus."[8]

Wigmore enjoyed considerable renown in his lifetime. Woodrow Wilson solicited his advice concerning judicial nominations.[9] Franklin D. Roosevelt consulted Wigmore about the emerging field of air travel law. A student of Wigmore's who later taught at Northwestern Law, Fred Fagg Jr., came to appreciate the extent of the dean's fame when the two attended a hearing of the United States Supreme Court in the 1930s. "It was interesting to note," Fagg reflected, "how quickly the justices spotted the visitor from Northwestern and with what dispatch the pages were sent down to invite him to tea or dinner. Six invitations arrived within the first five minutes after the court convened."[10]

Perhaps Wigmore's most salient characteristic was his remarkable productivity. He wrote forty-six original volumes, edited thirty-eight, and organized the translation and editing of another nine volumes on the Tokugawa Shogunate of Japan—nearly 100 books in all. In 1902, Holmes expressed concern that the young dean was overworked. "Nothing I am sure will stop your continued success except the possibility that you run your machine too hard," warned the recent nominee to the U.S. Supreme Court. "Don't do it—have fixed hours—*don't work at night.*" Suspecting that Wigmore's wife, Emma, shared his misgivings, Holmes added, "I wish that I could reinforce and make you feel what I doubt not your wife says to you. I am most serious in my feeling and thought about it."[11] Holmes' letter arrived just as Wigmore was in the midst of crafting the most enduring indication of his work ethic—his exhaustive treatise on evidence. The **Treatise** spanned four volumes, filled 4,000 pages, and cited 40,000 cases.

The end came abruptly for John Henry Wigmore. On April 20, 1943, the still active eighty-year-old attended an editorial meeting for the *Journal of Criminal Law and Criminology* in Chicago. Afterward, Wigmore climbed into a taxicab that soon collided with another vehicle. He sustained a fracture in his skull and died within a few hours. Having earned the rank of colonel in the Judge Advocate General's office during the First World War, Wigmore joined his mentor at Arlington National Cemetery.[12]

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Holmes' impact on Wigmore took place in the context of a close personal connection that spanned nearly fifty years across six decades. The two began exchanging letters in 1887, when Holmes informed the twenty-

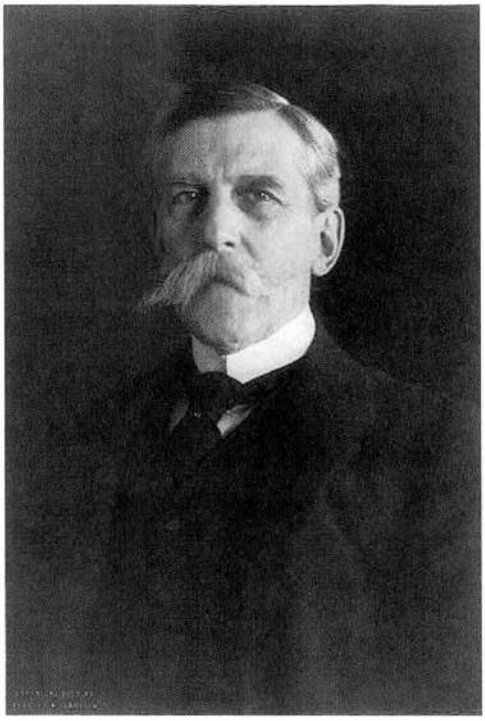
four-year-old Wigmore, "I have read your articles on Boycotting and Interference with Social Relations with much interest and hope that as soon as I get through sitting with the full court you will give me an opportunity to talk with you about them." Holmes went on to praise Wigmore's "historical examination" as "a first rate piece of work."[13] No doubt, such a compliment from a justice on the Massachusetts Supreme Judicial Court was a great source of encouragement and pride for the young Wigmore.

Holmes continued to read Wigmore's academic work and encouraged the aspiring scholar throughout the latter's earliest years in academia. In 1891, Holmes wrote Wigmore, "All I can say is to thank you, to express my belief in the value of your publication .... I shall always hear with interest of your work and shall hope for and anticipate your success."[14] Wigmore, in turn, thrived on Holmes' support. When Holmes expressed enthusiasm for Wigmore's work on Japanese law the following year, the young law professor responded, "It gave me great pleasure to hear that the subject attracted your notice." Wigmore lamented that "the science of comparative law arouses no interest except among a very few scholars like yourself," and so he was "glad for every trifle of encouragement."[15] In 1893, Holmes caught Wigmore near Young's Hotel in Boston and asked the budding academic to join him for lunch at his window table in the hotel restaurant. Wigmore was distressed over his own career but Holmes' reassurance fortified Wigmore's faith in himself. Nearly four decades afterward, Wigmore recalled the meal in a birthday letter to Holmes. "Other utterances of yours have had national influence," Wigmore observed, "But your words on that day have been like apples of silver to *me*; and on this your anniversary I like to repeat to you this acknowledgement of your influence upon your admiring disciple."[16]

John Henry Wigmore graduated first in his class from Harvard Law School in 1887, having helped found the *Harvard Law Review*. He worked in private practice in the Boston area before accepting a three-year visiting professorship in Anglo-American law at Tokyo's Keio University in 1889.

Holmes and Wigmore appear to have finally grasped the father-son relationship that they despaired of finding in their own lives. It is a matter of speculation for historians why Holmes never had children. Shortly after his marriage in 1872, his wife, Fanny, suffered a bout of rheumatic fever that may have rendered her infertile. She was also past the peak of her childbearing years by the time of their wedding. Holmes himself may have been sterile. While it is possible that the couple simply chose not to have children—Holmes and Fanny offered inconsistent statements on this front—that they seized the opportunity to take in the orphaned daughter of Holmes' cousin suggests the couple had an interest in parenting after all.[17]

For his part, Wigmore's pursuit of law caused tension between John Henry and his family. John and Harriet wanted their son to settle permanently in San Francisco and join the family business, but it became increasingly clear that he had set his own course. The very professional passion that catalyzed



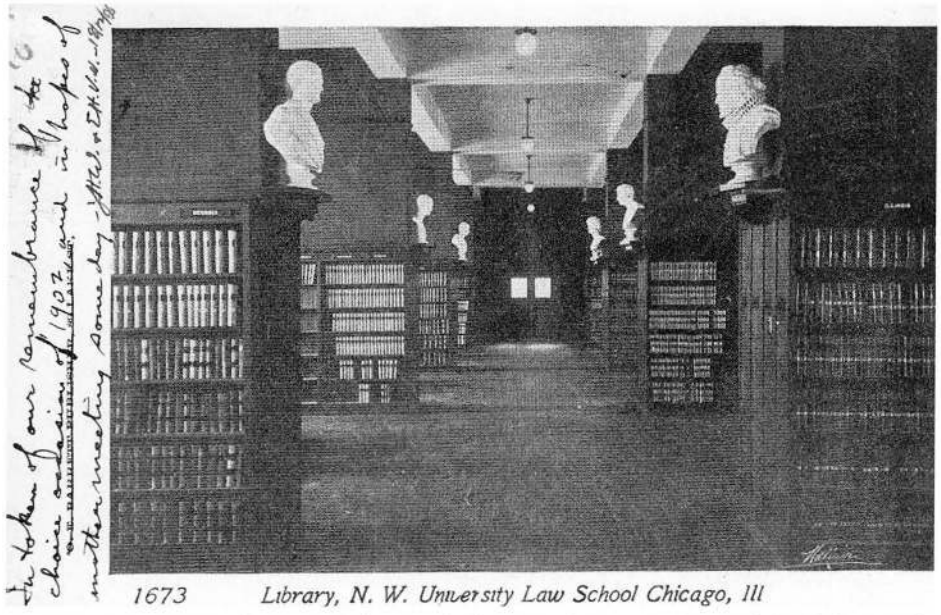
Oliver Wendell Holmes, Jr. began exchanging letters with Wigmore in 1887 while Holmes sat on the Massachusetts Supreme Judicial Court. Holmes (above) encouraged Wigmore in his early years of academia.

Wigmore's relationship with Holmes left the former estranged from his parents, who were also piqued that their son rejected the Episcopalian denomination to which they were so devoted. John and Harriet's absence from Wigmore's wedding was one indication of a widening breach.[18] The Wigmore family always kept John Henry's room, with a view of the Golden Gate, just as he had left it as a boy[19]—perhaps a comforting reminder of an earlier day when the parents still had some control over their son.

Holmes' visit to Northwestern Law School in 1902 is the most illustrative example of both Holmes' deep investment in Wigmore and Wigmore's acute veneration of Holmes. Northwestern Law was set to move into the Tremont House, where Abraham Lincoln had challenged Stephen Douglas to their famous debates.[20] Holmes acceded to Wigmore's request to serve as the guest of honor. It was the first and only time that Holmes traveled west of the Allegheny Mountains.[21] Eager to impress the Supreme Court's latest nominee, Wigmore had hung up a portrait of Holmes in the law school. "It will be an inspiration to our young men," Wigmore relayed to Holmes, "as they look up from the perusal of good Massachusetts opinions."[22]

Wigmore prepared an elaborate ceremony to honor Holmes' appearance at the dedication of the new law building. On October 20, 1902, the University trustees headed a procession, followed by the faculty, then federal and state judges, alumni, and finally, Holmes, flanked by Wigmore and Judge O. H. Horton, vice-president of the board of trustees. Colonel Frank O. Lowden, president of the alumni, asked that Holmes sign and date a glass panel with a diamond pencil to commemorate his visit.[23] Lowden presented the pencil as a gift to Holmes, but Wigmore had intended to keep the memento and even asked Holmes to return it. "Possessing as yet but few traditions, yet keenly appreciating their helpfulness, we were determined to preserve all that pertains to the Holmes tradition," Wigmore explained to Holmes.[24] For his part, Holmes was happy to indulge his fervent admirer: "I am glad that you sent for it as I would much rather the College should have it than I."[25]

It is little surprise that Wigmore would take pains to secure a seemingly trivial keepsake—Holmes had effusively praised Wigmore in his keynote address at the ceremony. Originally, Holmes expressed reluctance to speak much, but Wigmore was keen for the Massachusetts Chief Justice to say something to commemorate the occasion. Referring to the elder Holmes' prolific reputation for oratory, Wigmore aimed to flatter the younger Holmes and observed, "Truly, the father's gift of utterance has descended."[26] Holmes acquiesced and delivered two speeches, one that had a lasting impact on Wigmore. "I never have had an



The back of a postcard from Wigmore to Holmes reads: "In token of our remembrance of the choice occasion of 1902 and in hopes of another meeting some day. J.H.W. and E.H.V.W." (i.e., John Henry Wigmore and his wife Emma Hunt Vogl Wigmore). Wigmore was referring to Holmes' 1902 visit to Northwestern Law School, where Wigmore served as dean from 1901 to 1929, for the dedication of its new building. It was the first and only time that the Justice traveled west of the Allegheny Mountains.

opportunity to give public expression to my sense of the value of the work of your accomplished dean," Holmes announced to the gathering. "I wish now to express my respect for his great learning and originality and for the volume and delicacy of his production."[27] In a letter to the wife of the English jurisprudent Sir Frederick Pollock, Holmes revealed that his generous comments were more than just polite. "As I soaped the Dean I was sure of having one nearer in my favor," he recalled. "But I said no more than I meant. The next pleasantest thing to be intelligently cracked up oneself is to give a boost to a younger man who seems to deserve it, and who has not yet had much public recognition."[28] As an indication of the enduring pride that Wigmore felt, he had Holmes' speech reprinted thirty years later, upon the Justice's retirement from the Supreme Court, for Northwestern Law students and alumni.[29]

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In the midst of this genial and nurturing relationship, Holmes greatly influenced Wigmore's conception of the law and, indirectly, his treatment of evidence doctrine. In particular, Holmes' seminal book, **The Common Law**, was profoundly important in directing Wigmore (as well as the broader legal fraternity) in a modernist direction. Its opening passage is perhaps the most famous in any American book on law and set the terms for progressive jurisprudence for the next sixty years.[30] Here appeared Holmes' timeless maxim: "The life of the law has not been logic: it has been experience." Wigmore's approach to evidence law demonstrated both a rejection of abstract logic and an embrace of lived experience. Holmes continued, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should

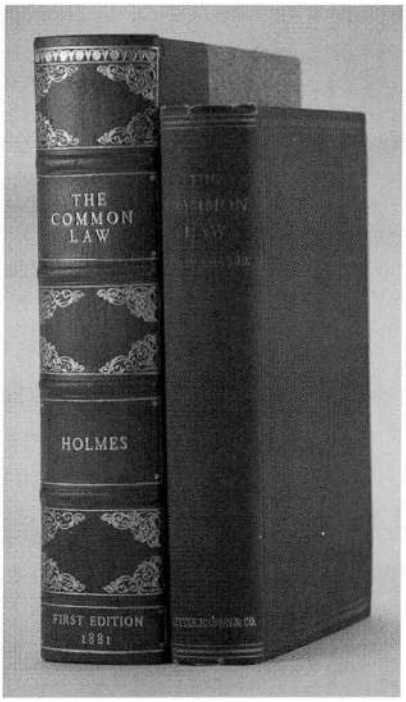
be governed." In other words, Holmes called for analysis that penetrated past the veneer of logic expressed in judicial decisions to the substratum of practicalities, policies, and prejudices that truly informed legal doctrine —all key elements in Wigmore's evidentiary analyses. Holmes stressed the importance of understanding law in a broad social context because "the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[31] In fact, Wigmore would do much more than Holmes to contextualize legal history.

Any mention of **The Common Law** requires some qualification. Despite Holmes' bold and sweeping introductory remarks, reviews of the book indicate that his ideas were not truly iconoclastic at the time but indicative of a nascent movement. Moreover, the remainder of the book—which covered topics as varied as torts, contracts, and criminal law—did not rigorously apply modernist philosophy. For instance, Holmes focused on the substance of legal doctrine with little concern for external factors. **The Common Law**, then, was more important for the later influence of its opening paragraphs than for the details of its legal analyses.[32]

Wigmore was photographed in 1904 after writing his *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, which spanned four volumes, filled 4,000 pages, and cited 40,000 cases. The reference work would dominate the law of evidence well past his death nearly four decades later.

Wigmore distinguished himself from other students of **The Common Law** in two ways. First, he appreciated the full significance of Holmes' contribution well before most other jurists. While the legal community came to consider **The Common Law** one of the classic texts in American law only by the 1920s, Wigmore grew enamored of the book when Holmes was a little-known state judge and Wigmore still a law student.[33] Decades later, he relayed to Holmes, "I do not forget the thrill with which I first read The Common Law in 1886."[34] After finishing the book, Wigmore fell ill and his classmate Joe Beale lent Wigmore his lecture notes. To express his gratitude, Wigmore presented Beale with a copy of **The Common Law**.[35] When Holmes retired from the U.S. Supreme Court, Wigmore indicated to Holmes that "your standard of learning in 'The Common Law' gave the first push to my latent urgings."[36] The second noteworthy aspect of Wigmore's interest in **The Common Law** is that he internalized not only the broad modernist precepts articulated in its first lines but also saw in the midst of its dense body the tools he needed to reform evidence law.

Wigmore's application to evidence law of Holmes' tort principle exemplifies how *The Common Law* helped cultivate the dean's modernism. Tort law determines if one party is legally responsible for harm done to another in circumstances not involving contracts. In the latter half of the nineteenth century, the explosive growth of factories, railroads, and new technologies created novel kinds of injuries, and older conceptions of torts proved



While the legal community did not consider *The Common Law* as one of the classic texts in American law until the 1920s, Wigmore grew enamored of the book when Holmes was a little-known state judge and Wigmore still a law student.

increasingly inadequate.[37] In **The Common Law**, Holmes argued that courts should employ a flexible reasonableness standard in assessing the liability of defendants—if "the ideal average prudent man" could not have foreseen the injury, then the tribunal should not hold him liable.[38]

Wigmore seized on Holmes' tort analysis and teased out its normative implications for evidence law. Consider the former's approach to the dilemma of reconciling the internal standard of intent with the external standard of action in the domain of legal acts. In formulating a solution, Wigmore advised that "the general doctrine of legal acts" use "the test of *negligence*, i.e. responsibility resting on a volition having consequences which ought reasonably to have been foreseen."[39] Wigmore afforded Holmes full credit: "For tortious responsibility, its phrasing was first broadly given in the epoch-making book of Mr. Justice Holmes, The Common Law."[40]

It is little wonder that Wigmore found Holmes' negligence standard fruitful for his own treatment of evidence doctrine—the former had long expressed interest in and enthusiasm for the latter's approach to torts. In 1894, Wigmore sent Holmes a lengthy letter praising the Justice's recent article on the subject.[41] "I write this now," Wigmore related, "in the ardor of pleasure at finding in the current Law Review that your great support can now be claimed for what has been for two or three years a solid conviction of mine, what I may call the tripartite division of tort-questions." "I have groaned in spirit at the difficulty of persuading the profession to accept this" position, Wigmore continued, "but now that you have said it, it must 'go,' and other men will be listened to where you have sanctioned the thesis they are advancing." Describing in some detail his own approach to torts, Wigmore referenced **The Common Law** as a source of his understanding.[42] Holmes, for his part, warmly welcomed the admiration of the young Wigmore: "As far as I see we agree in our views substantially, and your kind expressions give me great pleasure."[43] Wigmore had recently cited **The Common Law** in his own article on torts in the *Harvard Law Review*, and soon produced two more articles on torts that also drew heavily from Holmes' book.[44] Not surprisingly, they quickly met with Holmes' approval: "In my turn I have been much pleased with your two last articles. They seem to me very sound and suggestive. If you ever come this way let me know it, I beg."[45]

A signature element of Holmes' jurisprudence was his emphasis on real world outcomes—and Wigmore readily internalized this aspect of his mentor's approach to law. In an 1899 contribution to the *Harvard Law Review*, "The Theory of Legal Interpretation," Holmes advanced the position that when two parties disagreed on the meaning of the terms of contract, a "judge's interpretation of the

words" must stand. Otherwise, simply invalidating the contract "would greatly enhance the difficulty of enforcing contracts against losing parties."[46] Holmes' results-oriented approach resonated with Wigmore, who quoted this "acute essay" by "the learned justice" in the **Treatise**.[47] The Justice's classic article, "The Path of the Law," further impressed upon Wigmore the merits of consequentialism. "A body of law," announced Holmes, "is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[48] Wigmore chose this very quotation for the epigram of his **Treatise**.[49]

Wigmore wanted the Bench to balance competing interests on a case-by-case basis—a modernist stance informed by Holmes. In his 1894 article, "Privilege, Malice, and Intent," Holmes rejected syllogistic reasoning and insisted on balancing tests. Judicial decisions, the Justice claimed, were merely social policy formulations, even if the Bench was loathe to admit it. "Questions of policy are legislative questions, and judges are shy of reasoning from such grounds." As a result, explained Holmes, decisions "often are presented as hollow deductions from empty general propositions." In reality, "the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair."[50] In the words of one historian, Holmes' reasoning here constituted a revolutionary conceptual leap and "perhaps it is the moment we should identify as the beginning of modernism in American legal thought."[51]

That "Privilege, Malice, and Intent" had an immediate and profound effect upon Wigmore is evident in his effusive letter to Holmes praising the article just days after its publication. "This is to express to you," wrote Wigmore, "my thankfulness at feeling that we have always with us a jurist—almost the only one—who can always be relied upon to penetrate to the innermost essentials of legal reasoning." He thanked Holmes for clearing away "the arid waste of precedent by the higher criticism of careful analysis" and exalted him as "our greatest American or English analyst and jurisprudent."[52] While it is difficult to draw a direct line between Holmes and any specific balancing test advocated by Wigmore, given Holmes seminal status in this domain and Wigmore's gushing admiration of Holmes' article, it is reasonable to infer Wigmore's intellectual debt on this count.

The Northwestern dean consistently brought to bear on evidence law an approach that eschewed the quixotic search for universal principles, a disposition likely inspired by Holmes' own rejection of absolutes. On the battlefields of Ball's Bluff and Antietam, Holmes experienced first-hand how an unmitigated faith in one's own worldview made the violent enforcement of that view upon others inevitable.[53] As with balancing tests, there were no explicit causal links between Holmes' anti-universalist declarations and Wigmore's revision of specific evidence rules because the former wrote very little about evidence. However, Holmes' speech at the Northwestern Law dedication in 1902 indicates that Wigmore had direct exposure to the Justice's anti-universalist ethic at the very time in which the young dean was crafting his evidence treatise. Aside from offering accolades for Wigmore, Holmes' address concerned the idea of certainty. The law, Holmes reasoned, "would seem commonplace to a mind that understood everything. But that is the weakness of all truth. If instead of the joy of eternal pursuit you imagine yourself to have mastered it as a complete whole, you would find yourself reduced to the alternative of either finding" the "whole frame of the universe ... a bore, or of dilating with undying joy over the proposition that twice two is four."[54] Holmes' insight was that certainty

was not only unobtainable but also undesirable. Wigmore would echo this repudiation of universality time and again in his formulation of evidence law.

Despite Wigmore's reverence for Holmes, he was nevertheless willing to challenge the reasoning of his most important living mentor. In an example that hardly indicates a great philosophical divide, Wigmore took issue with **The Common Law**'s distinction between voidable and void contracts (a party has the option of invalidating a voidable contract, whereas void contracts have no legal force).[55] Holmes was well aware of Wigmore's critiques and took them in stride. In the former's Northwestern address, he acknowledged that, while "I have come in for my share of criticism from" the young dean, "also I have had from him words which have given me new courage on a lonely road."[56] Holmes expressed a similarly appreciative attitude in a letter to Lady Pollock when he mentioned that Wigmore "generally has pitched into me—the young fellows are apt to try their swords in that way—but his implications are flattering and his work good."[57] Embracing diversity of opinion was an agreeable chore for the Justice who would famously declare in 1915 (in an article that Wigmore had solicited for Northwestern's law review): "To have doubted one's own first principles is the mark of a civilized man."[58]

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After the appearance of Wigmore's exhaustive exposition on evidence, the mentor-protégé relationship between the Supreme Court Justice and Northwestern scholar began to mature into a friendship between equals. In 1905, Holmes relayed to Wigmore, "I wish I could talk with you sometimes. There is a good deal of loneliness in the midst of much society here" in Washington.[59] When Wigmore sent a birthday message to Holmes in 1911, the seventy-six-year-old Justice responded, "I purr like a cat at the kind things you say but inwardly glow at the kind feeling that I know lies behind. My living friends grow fewer." Referring then to Wigmore and Emma, Holmes continued, "I trust that the two in Evanston may last until I come up to the last post, as I suppose I have turned the last corner."[60] Holmes would live for another twenty-four years.

A subsequent birthday letter from Wigmore prompted Holmes to inform his old friend that there was "no pleasure that is not made keener by your taking part in it" and "such messages give one courage on the home stretch."[61] The following year, Wigmore published an article in the *Harvard Law Review* that described Holmes as the only Justice in the history of the Supreme Court "who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed."[62] Holmes soon shared with Wigmore, "The Law Review has come—and all that I can say is that your kindness brought tears to my eyes. I never expected such a reward and you have given me unmixed joy."[63] In 1916, Holmes related to Wigmore "what a constant joy your friendship has been to me and with what pleasure I follow each of your achievements. It has made life happier and easier to me to know you."[64] For a man who would survive his wife, bore no children, and had witnessed his friends bleed on the battlefields of Ball's Bluff and Antietam, Wigmore was the rare intimate whom Holmes did not outlive.[65]

In these decades after the premiere of the **Treatise**, Holmes frequently acknowledged Wigmore's enduring contribution to legal theory and practice. The former viewed the latter's work as an extension of his own. Crowning Wigmore "the first law writer in the country," Holmes observed in 1911, "No one seems to twig my effort as you do."[66] As Holmes entered his fifth decade on the Bench, he reflected in a letter to Wigmore, "While a man really lives he can't repose on his past,

but when he has behind him what you have he has a right to do things by a self regarding serenity."[67] In 1925, Holmes marveled at "the ever growing appreciation of your work, which assures you that your efforts have not been in vain."[68] Never slowing in scholarly production, Wigmore "amaze[d]" Holmes with his "fertile activity" in 1929. "You have done a wonderful lot for the law," the Justice added.[69]

Not surprisingly, Holmes embraced the **Treatise** that so conspicuously reflected his influence on its author. The Justice was particularly impressed with Wigmore's use of history in his refinement of evidence doctrine. Consider Holmes' warm reception to the dean's history of the privilege against self-incrimination in the fourth volume of the **Treatise**. Wigmore's treatment of the subject embodied the modernist view that law was deeply woven into the fabric of society. He noted that the "long story" of the privilege "is woven across a tangled warp" of "the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts."[70] Some months after the appearance of this volume, Holmes reported to its author, "I just have been thinking of you as I had been reading in connection with a case your admirable history of the privilege for self criminatory facts." Holmes wished "to show that I read with a certain care, as with very certain delights."[71] Wigmore responded predictably: "I was thrilled to hear that *you* were reading my History-chapter."[72] The jurist that had famously declared in **The Common Law** that "the law embodies the story of a nation's development through many centuries" recognized that Wigmore's work reflected a contextual understanding of law.[73] Holmes' introduction to Wigmore's **Continental Legal History** series—in which the Justice commented that "the law might be regarded as a great anthropological document"—stands as further indication of their common conception of the law as an integral component of society.[74]

Holmes' judicial decisions underscore his endorsement of Wigmore's **Treatise**. For instance, the Justice's dissent in *Donnelly v. United States* (1913) exemplifies a shared ethic that privileged real-world outcomes and impugned universal rules. In this case, Charles Donnelly was tried for a murder to which another man, Joe Dick, had confessed out of court. A lower court had excluded Dick's confession because he had passed away and therefore any testimony establishing his confession would constitute hearsay. The Supreme Court here refused to ease the prohibition against hearsay because, in the words of Justice Mahlon Pitney, any such "relaxation of the ordinary safeguards must very greatly multiply the probabilities of error" and prove "an unsafe reliance in a court of justice."[75] In the **Treatise**, Wigmore derided the English precedents for Pitney's ruling as "barbarous." "The practical consequences of this unreasoning limitation," he seethed, "are shocking to the sense of justice" because "it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person" who "has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent."[76] This emphasis on actual consequences and rebuke of unbending doctrine found favor with Holmes. In his dissent in *Donnelly*, Holmes offered curtly, "The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length" and he referred readers to the relevant sections of the **Treatise**.[77]

Among the most compelling parallels between these two jurisprudents is a common deference to legislative majorities. Legal historians have long depicted Holmes' dissent in *Lochner v. New York* (1905) as *the* consummate expression of judicial restraint. In this case, the Supreme Court invalidated a New York law intended to protect the health of bakers by limiting their working hours to

sixty per week. Writing for the majority, Rufus Peckham conceded that "a fair, reasonable and appropriate exercise of the police power of the State" to enact health regulations would pass constitutional muster. In this instance, however, he concluded that "the limitation of the hours of labor as provided for in" the New York labor law bore "no direct relation to, and [had] no such substantial effect upon, the health of the employee as to justify us in regarding the section as really a health law."[78] So while the High Court may have been unconvinced of the dangers posed to bakers, neither did it sanctify the free market as inviolable.

Nevertheless, Holmes blasted the majority for arbitrarily reading *laissez-faire* into the Constitution. In one of the most celebrated dissents in American legal history, he announced, "This case is decided upon an economic theory which a large part of the country does not entertain." For Holmes, a judge's personal economic views ought have no bearing on the law: "I strongly believe that my agreement or disagreement [with *laissez-faire*] has nothing to do with the right of a majority to embody their opinions in law."[79] By arguing that the Bench had no authority to substitute its idiosyncratic beliefs for the judgment of the legislature, Holmes articulated a vision of judicial restraint that made his *Lochner* dissent a staple of the progressive legal canon.

In fact, Wigmore had anticipated Holmes's reasoning in the **Treatise** the previous year.[80] Attributing to the Bench "a righteous desire to check at any cost the misdoings of Legislatures," Wigmore indicted efforts to make the judiciary "a second and higher Legislature." He felt that a democracy thrived by electing good representatives rather than "trusting a faithful Judiciary to check an evil Legislature." "The sensible solution is not to patch and mend casual errors by asking the Judiciary to violate legal principle and to do impossibilities with the Constitution," argued Wigmore, "but to represent ourselves with competent, careful, and honest legislators, the work of whose hands on the statute-roll may come to reflect credit upon the name of popular government."[81]

When Wigmore revisited the subject of judicial review later in the **Treatise**, he turned his attention specifically to the relationship between "economic science" and the Constitution. In a discussion of presumption (i.e., the burden of proof), Wigmore argued that the Bench could not strike down even an irrational law. "If the Legislature can make a rule of evidence at all," he proffered, "it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth. Apart from the Constitution, the Legislature is not obliged to obey either the axioms of rational evidence or the axioms of economic science."[82] In his general deference to the legislature and in his specific view that the law sanctions no particular economic theory, Wigmore articulated the analysis that would soon achieve lasting fame with Holmes.

It should come as little surprise that Wigmore and Holmes shared common ground here—both were protégés of the father of judicial restraint, James Bradley Thayer. Holmes came under the tutelage of Thayer early in life. Thayer was a partner at the law firm where Holmes worked in the years just after the Civil War. During this time, James Kent, the grandson of the esteemed American jurist of the same name, asked Thayer to prepare a new edition of his grandfather's classic work, **Commentaries on American Law**. Thayer solicited Holmes' assistance and thus provided the young lawyer with his first major publishing opportunity. A decade later, Thayer, now a professor at Harvard Law, was in the audience for Holmes's acclaimed Lowell Lectures, which he delivered without notes to a packed audience and formed the basis for **The Common Law**. Impressed with Holmes' performance, Thayer recommended him to

Governor Long for the judiciary. After Long initially passed over Holmes, Thayer, with the help of Louis Brandeis, raised the funds for a new professorship for Holmes at Harvard Law. In other words, no one did more than Thayer to facilitate Holmes' early ascension in the legal community.[83]

Wigmore was even more obliged to Thayer than was Holmes. The future Northwestern dean studied under Thayer at Harvard and continued informally under his tutelage until Thayer's death in 1902. Shortly thereafter, Wigmore penned a condolence letter to his widow and described his connection to her late husband in religious terms—he referred to Thayer as his "master and father-confessor" and himself as a faithful "disciple." "It was a good word of his," Wigmore related, "which helped me at almost every stage in the profession; and to him, more than to any one man, I was indebted for action which brought me advancement."[84]

Indeed, Thayer had continually encouraged Wigmore from the earliest years of his career. When Wigmore was only twenty-five and embarking on scholarly endeavors in the late 1880s, Thayer wrote, "I am truly glad that you are making yourself favorably known."[85] In another letter dated 1889, Thayer asked Wigmore to "remember that I shall always be glad to hear from you and of you and always ready to say or do anything which may help you."[86] And Thayer offered a few years later, "Let me know if I can help you in any exigency."[87] These words of support from such an eminent scholar meant a great deal to the young Wigmore, who never considered an evidentiary issue "without imagining what *he* would think of it."[88]

In an 1893 *Harvard Law Review* article that endures as his best-known contribution to American law, Thayer first delineated the quintessential modernist argument that judges should abstain from striking down social welfare legislation in the name of judicial review.[89] His principle of judicial restraint "recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations." According to Thayer, the Bench cannot invalidate legislation "merely because it is concluded that upon a just and true construction the law is unconstitutional." A judge can only disallow a legislative act "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[90] In other words, a law was valid not if the judge personally believed in its constitutionality but if *anyone* rationally could. Here was the core of the argument that Wigmore would adopt in his **Treatise** in 1904 and Holmes would enshrine as a cardinal tenet of progressive jurisprudence the following year in *Lochner*.

As a caveat, Wigmore's **Treatise** was more a reflection of Holmes' thought than an agent that shaped the Justice's jurisprudence. That Wigmore dedicated his **Pocket Code** of evidence to Holmes bespeaks the heavy debt that the dean felt toward his mentor in reforming evidence doctrine.[91] In the course of Wigmore's preparation for the code, he told Holmes, "I want to have on the motto-page: 'The law has got to be stated over again,' which I will remind you is your own remark."[92] Indeed, Holmes had issued this challenge at an address at Harvard Law School in 1886 when Wigmore was a student there.[93] After Holmes received a copy of the **Pocket Code**, complete with a dedication praising his "lofty ideals" and "tokens of kindness," he relayed to the author that he was "much touched and moved by the dedication and am proud that you should feel able to use such kind words."[94] The passage of time brought only increased interest in Holmes' work from Wigmore. In 1932, as Wigmore was coming "down to date on 'Evidence,'" he informed Holmes, "I expect lots of entertainment in catching up with your opinions,—

which I read (but no others/*regardless* of their subject!)."[95] Although Holmes was much more of a formative influence on Wigmore than the reverse, still, the former's warm embrace of the latter's **Treatise** underscores the consonance of their jurisprudential views. As Holmes once remarked to his old friend in Evanston, "If I cited you as often as I appreciate you I should put you in every case."[96]

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The story of Holmes and Wigmore bespeaks the centrality of personal relationships to intellectual exchange. Indeed, their bonds with each other and with Thayer were part of a broader but still extraordinarily tight-knit clique of elite jurists. Louis D. Brandeis also studied under Thayer,[97] reviewed proofs of Wigmore's **Treatise**,[98] and served as Holmes' progressive ally on an otherwise conservative High Court later in life.[99] Learned Hand was yet another Thayer acolyte[100] turned prominent judge whose contributions to modern legal thought included influencing Holmes to adopt a more permissive approach to free speech.[101] Legal academia's high priest of progressive jurisprudence, Roscoe Pound, also attended Harvard Law during Thayer's twenty-eight-year tenure on faculty.[102] After Wigmore lured a young Pound to Northwestern Law, the former eagerly introduced his rising star to the celebrated author of the *Lochner* dissent over dinner in Washington. Pound, who would become a highly influential dean of Harvard Law, gushed to Wigmore after meeting Holmes, "It would not be possible to express my indebtedness to you for the opportunity of meeting him which you gave me."[103] This was, perhaps, the most important lesson that the dean had gleaned from the Justice—the value of cultivating the next generation.

ENDNOTES

[1] G. Edward White, **Oliver Wendell Holmes, Jr.**, 2d ed. (New York: Oxford University Press, 2006), 6-23. Note that this biography is distinct from G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (New York: Oxford University Press, 1993).

[2] White, **Oliver Wendell Holmes, Jr.**, 27-43.

[3] White, **Oliver Wendell Holmes, Jr.**, 50, 63; Morton J. Horwitz, **The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy** (Oxford: Oxford University Press, 1992), 140; William M. Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937** (New York: Oxford University Press, 1998), 181. Holmes published "The Path of the Law" in the *Harvard Law Review* shortly after his speech; *see* O. W. Holmes, "The Path of the Law," *Harvard Law Review* 10 (March 1897): 457-78.

[4] White, **Oliver Wendell Holmes, Jr.**, 75-7, 113-18, 125-29; Louis Menand, **The Metaphysical Club** (New York: Farrar, Straus and Giroux, 2001), 65-67. On Holmes's role as Class Poet, *see* White, **Law and the Inner Self**, 182. Full citation of the revised **Commentaries**: James Kent, **Commentaries on American Law**, 12th ed., ed. O.W. Holmes Jr. (Boston: Little, Brown, 1873).

[5] John Henry Wigmore, **A Treatise on the System of Evidence in Trials at Common Law**, 4 vols. (Boston: Little, Brown, 1904-1905). Hereafter referred to as **Treatise**. The second edition appeared in 1923 and the third in 1940. On the dominance of the Treatise, see William Twining, **Rethinking Evidence: Exploratory Essays**, 2d ed. (Cambridge: Cambridge University Press, 2006), 72

[6] Recollections, Beatrice Wigmore Hunter, 2-3, Box 17, Folder 11, John Henry Wigmore (1863-1943) Papers, 1868-2006, Series 17/20, Northwestern University Archives, Evanston, Illinois.

[7] William R. Roalfe, **John Henry Wigmore: Scholar and Reformer** (Evanston, IL: Northwestern University Press, 1977), 8-17; Recollections, Francis Marion Wigmore, 3, Box 18, Folder 2, Wigmore Papers.

[8] Roalfe, **Wigmore**, 35-7, 45, 60-70, 187-8, 196.

[9] *Ibid.*, 113.

[10] Recollections, Fred D. Fagg, Jr., 1, Box 17, Folder 11, Wigmore Papers.

[11] Holmes to Wigmore, October 24, 1902, Box 65, Folder 25, Wigmore Papers.

[12] Recollections, Association of American Law Schools, 1, Box 18, Folder 3, Wigmore Papers; Roalfe, **Wigmore**, 275-77.

[13] Holmes to Wigmore, November 3, 1887, Box 65, Folder 25, Wigmore Papers. For Wigmore's articles see, John H. Wigmore, "The Boycott and Kindred Practices as Ground for Damages," *American Law Review* 21 (July-August 1887): 509-32; John H. Wigmore, "Interference with Social Relations," *American Law Review* 21 (September-October 1887): 764-78.

[14] Holmes to Wigmore, December 19, 1891, Box 65, Folder 25, Wigmore Papers.

[15] Wigmore to Holmes, November 1, 1892, Box 65, Folder 25, Wigmore Papers.

[16] Wigmore to Holmes, March 6, 1931, Reel 39, Frames 203 & 204, Holmes Papers. See also Wigmore to Holmes, March 7, 1934, Reel 39, Frames 211 & 212, Holmes Papers.

[17] White, **Law and the Inner Self**, 105-106; Sheldon M. Novick, **Honorable Justice: The Life of Oliver Wendell Holmes** (Little, Brown: Boston, 1989), 264.

[18] Roalfe, **Wigmore**, 19-20, 71.

[19] Recollections, Beatrice Wigmore Hunter, 3, Box 17, Folder 11, Wigmore Papers.

[20] Recollections, Nathan William MacChesney, 29, Box 18, Folder 1, Wigmore Papers.

[21] Wigmore's preface to Address of Mr. Justice Oliver Wendell Holmes, October 20, 1902, Northwestern University School of Law, Chicago, IL [Reprinted version—January 12, 1932], Box 65, Folder 25, Wigmore Papers.

[22] Wigmore to Holmes, August 19, 1902, Box 65, Folder 25, Wigmore Papers.

[23] *Chicago Legal News*, Vol. XXXV, October 25, 1902, No. 10, "The Northwestern University Law School Building Dedicated—Address by Oliver Wendell Holmes, Chief Justice of the Supreme [Judicial] Court of Massachusetts," Box 65, Folder 25, Wigmore Papers.

[24] Wigmore to Holmes, November 9, 1902, Box 65, Folder 25, Wigmore Papers.

[25] Holmes to Wigmore, October 31, 1902, Box 65, Folder 25, Wigmore Papers.

[26] Wigmore to Holmes, June 14, 1902, Box 65, Folder 25, Wigmore Papers. Menand writes that "Holmes was a famously brilliant talker on any subject—it was a gift he inherited from his father," **Metaphysical Club**, 204.

[27] Address of Mr. Justice Oliver Wendell Holmes, October 20, 1902, Northwestern University School of Law, Chicago, IL [Reprinted version—January 12, 1932], Box 65 Folder 25, Wigmore Papers.

[28] Holmes to Lady Pollock, October 24, 1902, **Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1923**, ed. Mark DeWolfe Howe (Cambridge, MA: Harvard University Press, 1942), 1:108.

[29] Address of Mr. Justice Oliver Wendell Holmes, October 20, 1902, Northwestern University School of Law, Chicago, IL [Reprinted version—January 12, 1932], Box 65, Folder 25, Wigmore Papers.

[30] Holmes lifted the opening from a book review he had published earlier; *see* "Book Notices," *American Law Review* 14 (March 1880): 234.

[31] Holmes, **Common Law**, 1.

[32] White, **Law and the Inner Self**, 148-53, 170, 183-85; Brian Z. Tamanaha, "Understanding Legal Realism," *Texas Law Review* 87 (March 2009): 748; James E. Herget, **American Jurisprudence, 1870-1970: A History** (Houston, TX: Rice University Press, 1990), 46.

[33] White, **Law and the Inner Self**, 149; Wiecek, **Lost World**, 182.

[34] Wigmore to Holmes, June 7, 1924, Box 65, Folder 27, Wigmore Papers.

[35] Wigmore to Holmes, March, 18, 1909, Reel 39, Frame 121, Holmes Papers.

[36] Wigmore to Holmes, January 12, 1932, Reel 39, Frame 202, Holmes Papers. For Wigmore's comment on the enduring value of **The Common Law**, *see* Wigmore to Holmes, December 23, 1910, Reel 39, Frame 126, Holmes Papers.

[37] David Rosenburg, **The Hidden Holmes: His Theory of Torts in History** (Cambridge, MA: Harvard University Press, 1995), 2-3.

[38] Holmes, **Common Law**, 111.

[39] Wigmore, **Treatise**, 4:3389-90.

[40] *Ibid.*, 4:3390n2.

[41] See Oliver Wendell Holmes Jr., "Privilege, Malice, and Intent," *Harvard Law Review* 8 (April 1984): 1-14.

[42] Wigmore to Holmes, April 29, 1894, Box 65, Folder 25, Wigmore Papers.

[43] Holmes to Wigmore, May 3, 1894, Box 65, Folder 25, Wigmore Papers.

[44] See John H. Wigmore, "Responsibility for Tortious Acts: Its History," *Harvard Law Review* 7 (March 1894): 315-37; John H. Wigmore, "The Tripartite Division of Torts," *Harvard Law Review* 8 (November 1894): 200-10; John H. Wigmore, "A General Analysis of Tort Relations," *Harvard Law Review* 8 (February 1895): 377-95.

[45] Holmes to Wigmore, March 25, 1895, Box 65, Folder 25. For a discussion of the exchange between Holmes and Wigmore concerning torts, see Rosenburg, **Hidden Holmes**, 147-49.

[46] Holmes, "The Theory of Legal Interpretation," 417, 419.

[47] Wigmore, **Treatise**, 4:3475n1, 4:3479n13.

[48] Holmes, "The Path of the Law," 469

[49] Wigmore, **Treatise**, 1:vi. See also Wigmore to Holmes, April 1, 1921, Reel 39, Frame 186, Holmes Papers.

[50] Holmes, "Privilege, Malice, and Intent," 3. Holmes reiterated these ideas in "The Path of the Law": "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds .... There is a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong," 466-67.

[51] Horwitz, **Transformation of American Law**, 131.

[52] Wigmore to Holmes, April 29, 1894, Box 65, Folder 25, Wigmore Papers.

[53] Menand, **Metaphysical Club**, 61.

[54] Address of Mr. Justice Oliver Wendell Holmes, October 20, 1902, Northwestern University School of Law, Chicago, IL [Reprinted version—January 12, 1932], p. 7, Box 65, Folder 25,Wigmore Papers.

[55] Holmes, **Common Law**, 310-11; Wigmore, **Treatise**, 4:3407n3; *see* also 4:3382n2. For another example of Wigmore's criticism of Holmes, *see* John H. Wigmore, "Abrams *v.* U. S.: Freedom of Speech and Freedom of Thuggery in War-time and Peace-time," *Illinois Law Review* 14 (March 1920): 539-61.

[56] Address of Mr. Justice Oliver Wendell Holmes, October 20, 1902, Northwestern University School of Law, Chicago, IL [Reprinted version—January 12, 1932], Box 65, Folder 25, Wigmore Papers.

[57] Holmes to Lady Pollock, October 24, 1902, **Holmes-Pollock Letters**, 1:108.

[58] Oliver Wendell Holmes Jr., "Ideals and Doubts," *Illinois Law Review* 10 (1915-1916): 3. Note that *Northwestern University Law Review* was titled *Illinois Law Review* from 1906-1952. For Wigmore's solicitation of the article, see Wigmore to Holmes, March 25, 1915, Reel 39, Frames 169 & 170, Holmes Papers.

[59] Holmes to Wigmore, December 21, 1905, Reel 39, Frame 14, Holmes Papers.

[60] Wigmore to Holmes, March 6, 1911, Reel 39, Frame 130, Holmes Papers; Holmes to Wigmore, March 8, 1911, Reel 39, Frame 26, Holmes Papers.

[61] Wigmore to Holmes, March 6, 1911, Reel 39, Frame 130, Holmes Papers; Holmes to Wigmore, March 8, 1911, Reel 39, Frame 26, Holmes Papers.

[62] Wigmore, "Justice Holmes and the Law of Torts," *Harvard Law Review* 29 (April 1916): 601.

[63] Holmes to Wigmore, April 13, 1916, Reel 39, Frame 49, Holmes Papers.

[64] Holmes to Wigmore, March 16, 1917, Reel 39, Frame 54, Holmes Papers.

[65] In 1910, Holmes lamented to Wigmore that he had "been broken in by importune death who has been busy with my friends ... If I had seen you I should have realized that not all my friends have departed"; *see* Holmes to Wigmore, October 6, 1910, Reel 39, Frame 21, Holmes Papers.

[66] Holmes to Wigmore, March 12, 1911, Reel 39, Frame 27, Holmes Papers.

[67] Holmes to Wigmore, March 14, 1920, Reel 39, Frame 58, Holmes Papers.

[68] Holmes to Wigmore, March 9, 1925, Reel 39, Frame 65, Holmes Papers.

[69] Holmes to Wigmore, February 27, 1929, Reel 39, Frame 73, Holmes Papers.

[70] Wigmore, **Treatise**, 4:3070.

[71] Holmes to Wigmore, December 21, 1905, Reel 39, Frame 14, Holmes Papers.

[72] Wigmore to Holmes, December 31, 1905, Reel 39, Frame 108, Holmes Papers.

[73] Oliver Wendell Holmes, Jr., **The Common Law** (Boston: Little, Brown, 1881), 1. For Holmes' praise of another historical analysis from Wigmore, but one unrelated to evidence law, *see* Holmes to Wigmore, August 15, 1915, Reel 39, Frame 41, Holmes Papers.

[74] Oliver Wendell Holmes, Jr., "Introduction," in **A General Survey of Events, Sources, Persons and Movements in Continental Legal History**, ed. John H. Wigmore (Boston: Little, Brown, 1912), xxxii.

[75] *Donnelly v. United States*, 228 U.S. 243 (1913).

[76] Wigmore, **Treatise**, 2:1838-39.

[77] *Donnelly v. United States*, 228 U.S. 243 (1913).

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

[79] *Ibid.*

[80] White, **Law and the Inner Self**, 348, 353.

[81] Wigmore, **Treatise**, 2:1657.

[82] *Ibid.*, 2:1672

[83] White, **Law and the Inner Self**, 95, 125-26, 197, 200, 205-207; Menand, **Metaphysical Club**, 338; White, **Oliver Wendell Holmes**, Jr., 41.

[84] Wigmore to Mrs. Thayer, February 16, 1902, Box 25, Folder 9, Thayer Papers.

[85] Thayer to Wigmore, January 3, 1889, Box 108, Folder 27, Wigmore Papers.

[86] Thayer to Wigmore, August 2, 1889, Box 108, Folder 27, Wigmore Papers.

[87] Thayer to Wigmore, September 3, 1893, Box 108, Folder 27, Wigmore Papers.

[88] Wigmore to Mrs. Thayer, February 16, 1902, Box 25, Folder 9, Thayer Papers.

[89] G. Edward White, "Revisiting James Bradley Thayer," *Northwestern University Law Review* 88 (1993-1994): 48-49.

[90] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 144.

[91] John Henry Wigmore, **A Pocket Code of the Rules of Evidence in Trials at Law** (Boston: Little, Brown, 1910), v.

[92] Wigmore to Holmes, August 15, 1909, Reel 39, Frame 125, Holmes Papers.

[93] Wigmore, **Pocket Code**, vi.

[94] Holmes to Wigmore, January 14, 1910, Reel 39, Frame 20, Holmes Papers.

[95] Wigmore to Holmes, February 2, 1930, Reel 39, Frame 197, Holmes Papers.

[96] Holmes to Wigmore, February 5, 1913, Reel 39, Frame 32, Holmes Papers.

[97] Jay Hook, "A Brief Life of James Bradley Thayer," *Northwestern University Law Review* 88 (1993): 5.

[98] Brandeis to Wigmore, August 1, 1904, Box 38, Folder 33, Wigmore Papers.

[99] *See*, for instance, Melvin I. Urofsky, **Louis D. Brandeis: A Life** (New York: Pantheon Books, 2009), 545-70.

[100] Menand, **Metaphysical Club**, 425.

[101] Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27 (February 1975): 741-42.

[102] David Wigdor, **Roscoe Pound: Philosopher of Law** (Westport, CT: Greenwood Press, 1974), 44-47.

[103] Pound to Wigmore, April 11, 1907, Box 98, Folder 7, Wigmore Papers.

"Omak's Minimum Pay Law Joan D'Arc": Telling the Local Story of *West Coast Hotel v. Parrish* (1937)

HELEN J. KNOWLES

For three months during the late summer and early fall of 1933, Elsie Lee (née Murray) worked as a part-time employee of the Cascadian Hotel in Wenatchee, a city of 11,000 nestled within the heart of the North Central region of Washington State. Born in Kansas in 1899, Elsie moved to the Evergreen State in approximately 1930, by which time she was divorced from Roy Lee (whom she had married when she was fifteen) and had six children.[1] Working as a chambermaid to support her large family, in 1933 Elsie (who was already a grandmother) initially received 22½ cents per hour—with lunch provided; a raise later brought this up to 25 cents per hour (although, Elsie was now expected to provide her own lunch). The following year, when she married Ernest Parrish, she became a full-time member of the hotel's staff, working regularly until May 11, 1935.[2]

When she was discharged from her position, Ray W. Clark, the then-manager of the Cascadian, presented Elsie with a check for $17–the balance of wages owed; she refused to accept the money. Believing she was instead legally entitled to $216.19, she sought the legal services of Charles Burnham "C.B." Conner. Working pro bono, this respected Wenatchee attorney and local justice of the peace initiated a lawsuit on June 10, 1935 seeking to recover the amount of back wages his client was owed under the Washington State minimum wage law.[3]

The decision to seek legal aid was a bold and brave move by the former chambermaid. Built at a cost of $500,000, the ten-story hotel, an impressive mixture of Art Moderne and Beaux Art styles, was the tallest building in town. And in the short time since its completion (construction, which proceeded rapidly, began in 1929) it had quickly become a landmark institution in the area, and an important part of the social life of Wenatcheeites.[4] And the law of the land was not on her side; the U.S. Supreme Court had repeatedly struck down minimum wage laws, holding

Born in Kansas in 1899, Elsie Parrish married at age fifteen and worked as a chambermaid to support her six children. A thirty-seven-year-old grandmother at the time her case reached the Supreme Court, Parrish posed for the photographer of the *Wenatchee Daily World*, who captured her in 1937 at work as a chambermaid at the Jim Hill hotel in Omak, Washington.

that they violated the freedom of employers and employees to dictate their own contractual terms. Consequently, upon receipt of a summons from Conner, the West Coast Hotel Company—the operators of the Cascadian—responded by challenging the constitutionality of the Washington minimum wage law, certain that the precedents would lead to a judgment in its favor. However, seventy-five years ago, on March 29, 1937, when the Justices of the nation's highest court announced their final decision in the case, a bare majority voted to uphold the Washington law.

This decision in *West Coast Hotel v. Parrish* has been the subject of an immense scholarly outpouring—it is, as Julie Novkov observes, "the case that launched a thousand law review articles."[5] However, much of that literature focuses on "the switch in time that saved nine" label that commentators affixed to the Court's judgment. Implicit in that erroneous appellation was a belief that, when confronted with President Roosevelt's threat to attempt to reform the judiciary with the Judicial Reorganization Act, packing the Court with Justices more sympathetic to his New Deal agenda, Justice Owen J. Roberts reversed course and voted, with his more liberal colleagues, to uphold a law that was very similar to the New York statute that a majority (that included Roberts) of the Court struck down the previous summer.[6] Numerous scholars have demonstrated the shortcomings of the "switch in time" argument, but the label has stuck; it has become part of the historical folklore of the U.S. Supreme Court.

By contrast, the *local* actors in this case, most notably Elsie Parrish, have been "nearly forgotten in the shadow" of the *Parrish* decision's "monumental implications" for national politics.[7] Some scholars have sought to tell the local story of the case, but rarely in any substantive detail.[8] To a certain extent this reflects a larger trend within legal scholarship—far more is written about the legal outcomes and doctrinal implications of the U.S. Supreme Court's decisions than about the implications of those actions for the parties in the cases. In the Foreword to Peter Irons' **A People's History of the Supreme Court**, Howard Zinn lamented the fact that "[a]lthough the Preamble to the United States Constitution begins with the words 'We the People ... ,' the volumes upon volumes that deal with constitutional law are remarkably devoid of human beings."[9] He was referring to the pages of the U.S. Reports, but his observation can just as easily be applied to scholarly commentary about the decisions that appear in those volumes. "How many Americans, of the huge number who have heard of *Brown v. Board of Education*," he asked, "know that 'Brown' refers to Oliver Brown and his eight-year-old daughter Linda in Topeka, or know anything about the long struggle of their family to bring the case before the highest court in the land?"[10] Recent years

have seen great advancements in the telling of the stories of constitutional law cases—including *Brown*, but Elsie Parrish's story remains untold.[11] If Americans have heard anything about her case, they know it for its relationship to the supposed "switch in time."

The extent to which the traditional account of *Parrish* is incomplete becomes clear when one examines the coverage that the case received in the newspapers published in Chelan County, where the Parrish litigation began. There has been an assumption that all we need to know about media coverage of this important case is encapsulated in the observation that, "news of the momentous [Supreme Court] decision, [was] relayed swiftly to every part of the nation over press association wires."[12] However, analysis of the local newspaper coverage of *Parrish* shows that there is much more to be learned about the ways in which the media reported this landmark case—from the trial court Judgment to the decision of the nine justices in Washington, D.C.

Local newspaper coverage of *Parrish* was influenced by the standard factors identified by previous scholars.[13] However, those factors were almost always trumped by considerations of geographical proximity. Traditionally, newspapers devote minimal space to covering court cases until such time that those cases reach the U.S. Supreme Court; and, even then, not until the Justices announce their final decision is that coverage likely to be substantive and detailed. For the newspapers published in Chelan County, particularly the *Wenatchee Daily World*, the stage of the judicial process was irrelevant. Above all else, it was the local interest nature of the *Parrish* case that determined the type of coverage that the case received.

Creating a Legal "no-[wo]man's land"[14]

The Washington Minimum Wages for Women law passed with the overwhelming support of the state legislature in 1913. Members of

Operated by the West Coast Hotel Company, the Cascadian Hotel, which Parrish sued for not paying her the minimum wage required by Washington State law, was a beautiful ten-story hotel and the pride of the city. It was the social hub of Wenatchee, a city of 11,000 in the north central part of the state.

the state House voted for it 81–12; in the Senate the final vote was 36–2.[15] It sought to protect women and minors from the "conditions of labor which have a pernicious effect on their health and morals," namely "inadequate wages and unsanitary conditions."[16] To this end, it established the Washington State Industrial Welfare Commission, which was primarily responsible for determining the appropriate rates of minimum wages for women and minor workers in different industries. For women employed as hotel chambermaids, the minimum weekly wage was set at $14.50.

In its report of the U.S. Supreme Court's decision in *Parrish*, *Time Magazine* was right to point out that this Washington law "was no New Deal upstart."[17] It was the second of seventeen minimum wage laws enacted in the United States between 1912 and 1923. These laws were a Progressive Era socio-legal development that resulted from intensive lobbying efforts by a number of different groups, prominently the National Consumers'

League, the Women's Trade Union League, and the American Association for Labor Legislation. All of these groups sought to improve working conditions for women and children. The laws followed on the heels of numerous studies (by both the federal government and the states) detailing the problems that confronted this segment of the nation's workforce.[18] However, the obvious exploitation of these workers in no way guaranteed that the laws' intended improvements would actually materialize. Changes were short-lived, extremely limited in nature, or simply nonexistent. Not until the 1930s, when the Great Depression hit, did the nation again turn its attention to the plight of overworked and underpaid women. Such inattention partly resulted from the decidedly hostile treatment that the first round of laws received at the U.S. Supreme Court.

In *Lochner v. New York* (1905), the Court struck down the 1897 New York State Bakeshop Act, which prohibited bakers from working in excess of sixty hours a week, or for more than ten hours each day. A five-Justice majority concluded that the law ran afoul of the due process clause of the Fourteenth Amendment, which protects individuals from State deprivations of their "life, liberty, or property, without due process of law." It interpreted this "liberty" as including contractual freedom; employers and employees had a constitutional right to enter into labor contracts free of "interfering" state regulations such as those imposed by the New York law. The Court emphasized the importance of identifying limits to the police power of states to regulate in pursuance of citizens' health, safety, and welfare. Defining where the limits lay required the Justices to ask whether the state action in question was "fair, reasonable, and appropriate" or "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty." In concluding that the New York law was the latter, the Court held that the police power does not extend to bargaining relationships between employers and employees, which were portrayed as matters of private rather than public concern, and that there was no relationship between the number of hours that bakers worked and the health and safety of the public consumers of the goods produced by the bakeries.[19]

Although the relationship between the legacy of *Lochner* and wage regulation was first addressed in three cases in 1917, on each occasion the Court found ways to avoid confronting the question of whether wage laws were constitutional.[20] It did not address the issue head on until 1923 when, in *Adkins v. Children's Hospital*, it struck down a 1918 federal law establishing minimum wages for women and children in the District of Columbia. The Court acknowledged that there were limits to the contractual liberty that the Constitution protected, but restrictions on that liberty could be "justified only by the existence of exceptional circumstances"—most notably a "reasonable basis" for a legislative decision that the regulatory means furnished by a law was clearly related to a goal of protecting the health and welfare of employees.[21] Just as in *Lochner*, that relationship was found wanting. During the 1920s the Court held fast to the precedent of *Adkins* to strike down other minimum wage laws.[22]

The economic woes of the 1930s brought renewed legislative efforts to enact minimum wage laws. The Court, however, took a dim view of the argument that times had changed. Nowhere was this more evident than in Justice Butler's opinion for the majority in *Morehead v. New York ex rel. Tipaldo* (1936), an opinion that critics of the Justices' pre-1937 New Deal decisions have described as "one of the Court's biggest mistakes" because of its "stringent and uncompromising tone in the midst of the Great Depression."[23] Butler adopted this intransigent tone in his opinion for the five-Justice majority that voted to strike down a New York State law prescribing minimum wages for women and children. The State did not ask for *Adkins* to be

overruled; rather, it argued that its statute was distinguishable from the 1918 District of Columbia law because its minimum wages standards were to be determined using considerations of health and welfare *and* the economic "'value of the service or class of service rendered"' by the worker.[24] Whatever one made of this argument, Butler explained, the fact remained that New York had sought to do exactly what the Court had said in *Adkins*: that the Constitution prohibited a legislature from "subject[ing] to state-made wages all adult women employed in trade, industry or business, other than house and farm work."[25]

The decision in *Parrish*, handed down on March 29, 1937, overruled *Adkins* and repudiated *Tipaldo*. In doing so, it effected a momentous change in the direction of the Court's jurisprudence. This largely accounts for why March 29, 1937 has since become known as "White Monday." It is contrasted with "Black Monday," the label commentators gave to May 27, 1935—a date when the Court struck down three important New Deal laws.[26] Two months before the decision in *Parrish*, an editorial in the East Wenatchee *Journal* proclaimed, "Any way you look at it, the decision in this state's minimum wage law for women, is destined to rank along with the famous *Dred Scott* decision ... in shaping this nation's future."[27] *Parrish* did "shape the nation's future," but, unlike the 1857 decision to which it was compared in the editorial, it became famous for positive jurisprudential reasons. Chief Justice Charles Evans Hughes described *Dred Scott* as the Supreme Court's "self-inflicted wound." By contrast, the decision in *Parrish* inflicted a fatal blow to the Judicial Reorganization Act.[28]

On March 29, 1937, it was Hughes who announced the decision and read from the Court's opinion in *Parrish* upholding the Washington law and overturning *Adkins*. Writing for the five-Justice majority, Hughes concluded that the nation's "recent economic experience" made it "not only appropriate, but we think imperative" that the constitutionality of minimum wage laws "should receive fresh consideration."[29] He agreed that "the health of women and their protection from unscrupulous and overreaching employers" was clearly a matter of "public interest," and then pointed to "an additional and compelling consideration," which the Great Depression "has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power ... is not only detrimental to their health and well being, but casts a direct burden for their support upon the community."[30]

Future Supreme Court Justice Robert H. Jackson, who at the time was working in the Justice Department as an assistant attorney general, described March 29, 1937 as one of the most "dramatic ... days in the story of the Court":

> The room was crowded with spectators, and a long double line of those who could not get in extended through the majestic corridors to the outer portals of the building. The distinguished visitors' seats were filled with important personages. The wives of most of the Justices betrayed by their presence and gravity that something unusual was to happen.[31]

As so many commentators have since done, Jackson focused upon the "gravity" and "drama" of the *Parrish* decision as it pertained to the fate of the Judicial Reorganization Act.

When news of the decision in *Parrish* reached Elsie Parrish's home state, the focus of the newspaper coverage told a very different story of the case. Only two of the ten largest circulating newspapers published in Washington State led with headlines that focused on the decision's implications for the Court-packing plan. And, the closer one got to Wenatchee (where the litigation began) and Omak (the town to which the Parrish family

moved in the fall of 1936), the more the local newspapers decided to lead with the local story rather the national narrative of *Parrish*.

Parrish and the *Wenatchee Daily World*

Of all the newspapers published in Chelan County (of which Wenatchee is the county seat), the *Wenatchee Daily World* provided by far the most extensive coverage of the *Parrish* case. This is unsurprising because it was the only local daily for the area, and enjoyed a large circulation covering an extensive area beyond Wenatchee itself. The average circulation for this daily newspaper between 1935 and 1937 was 10,781 and, in addition to Chelan County, it was distributed to every town in Douglas County, most of Okanogan County (which includes the town of Omak), and the northern section of Grant County—mostly by mail.[32] What is surprising, however, is the fact that the newspaper provided extensive and detailed coverage of the case at *every* stage of the litigation, and even when the case reached the U.S. Supreme Court the local story trumped the national narrative.

October 1935: Chelan County Superior Court

The first judicial ruling in *Parrish* came on October 17, 1935. Ruling for the operators of the Cascadian Hotel, Judge William O. "Billy" Parr concluded that "any attempt to fix the minimum wage for adult women, as fixed by the Industrial Welfare Commission of the State of Washington, is unsound, is not sustained by the evidence, and ... [is] as to the defendant in this case a violation of its Constitutional rights."[33] Like Elsie, Judge Parr had relocated to Washington State from Kansas (he was, however, not born in Kansas; he was instead a native of Iowa). He came to Wenatchee as one of the town's earliest settlers, arriving with the Great Northern Railway in 1892. Initially working as a barber, he taught himself the law in his spare time. He subsequently embarked upon a long and distinguished legal career in Wenatchee, occupying various positions—including serving as a Judge at the Chelan County Superior Court.[34] Although Parr made no mention of any precedent in his judgment in *Parrish*, the *Wenatchee Daily World* reported that he "bas[ed] his opinion" on the U.S. Supreme Court's decision in *Adkins*—which had been cited in support of the arguments by the attorneys for the West Coast Hotel Company.[35]

This observation appeared in an article published on October 19, 1935, an article that represented the newspaper's first reporting of Elsie Parrish's case. The article, penned by a member of the paper's news staff, was longer and more detailed than the literature leads us to expect from local newspaper coverage of state and local trial court decisions. It conveyed information about the case under the headline "Judge W.O. Parr Upholds Constitution," and devoted extensive space—twice as much as most of the State's largest newspapers—to discussing the case. In the article, which was accompanied by a photograph of Judge Parr, the newspaper described the ruling "as one of the most momentous decisions ever handed down" by the Chelan County court. In a way, any decision by this small court declaring a State law unconstitutional deserves to be labeled as "momentous," and perhaps this explains the hometown reporter's choice of word. However, there are two reasons why the content of the article counsels a more skeptical view of the veracity of this description of Parr's decision. First, there is the poor quality of the article's writing (which sets it apart from the average story in the *Wenatchee Daily World*), and the presence of factual errors (for example, the Washington Supreme Court had upheld the 1913 law in two previous cases, not three, as the article indicates). Second, instead of providing justifications for the label, the paragraphs that followed actually demonstrated that

there was nothing particularly unexpected or unusual about the decision. Neither the article's detailed recitation of the facts nor its discussion of the precedential strength of *Adkins* provided the readers with any significant reason to believe that Parr had made a historic ruling.[36]

The *Wenatchee Daily World* was right to say that Parr's ruling was the immediate subject of statewide and national interest. As Fred M. Crollard—the attorney for the West Coast Hotel Company—reported to his son, who was studying law at Notre Dame, he had newspaper clippings to send him about his victorious argument before Judge Parr. "I argued for about two and half hours and finally won ... I guess that 2 ½ hours oration wore the other fellows out." This victory, he went on to say, was a decision that the "Associated Press wanted to make special mention of... because it in effect is important in many other States that have the same law."[37] Like Elsie Parrish, Fred Crollard was a native of Kansas. He moved, with his mother, to Wenatchee on October 16, 1904 (three uncles had already relocated to the town). After receiving his law degree from the University of Washington (he studied law at night, working during the daytime as the private secretary to the University's president, Thomas Franklin Kane), Crollard returned to Wenatchee in 1910 to practice law at the same firm as his brother Louis. Upon Louis's death in the flu epidemic of 1918, Fred entered into partnership first with R.S. Steiner, a retired judge, and then with A.J. O'Connor in 1927.[38] It was appropriate that it was this firm—Crollard & O'Connor—to which the West Coast Hotel Company turned for legal defense when it was served with the summons in *Parrish*. For, in 1929, in his capacity as president of the Wenatchee Chamber of Commerce, Crollard participated in the groundbreaking ceremony for the Cascadian Hotel.[39]

Additional evidence of the considerable interest in Judge Parr's ruling could be found in the highest-circulating newspapers published in Washington State. Five of the top ten newspapers ran stories about the ruling (although, with the exception of the Spokane *Spokesman-Review*, these publications relied upon almost identical, short, four-paragraph wire service reports).[40] The article in the *Spokesman-Review* serves as an interesting comparison to both these reports and the coverage in the Wenatchee newspaper. First, the *Spokesman-Review* piece is the only article about any aspect of *Parrish* that was not compiled from a wire service report or a nationally syndicated column. Second, the "interest" of which it spoke—the "interest" it perceived to have been generated by Parr's decision—was "widespread," but was not simply described as statewide and national. Instead, readers of the *Spokesman-Review* were provided with more specific and human-interest details: "The case held the interest of hotel men and their women employees over the state as the so-called minimum wage of $14.50 a week is paid at few, if any places ..."[41]

Together, the coverage of Parr's decision by the *Wenatchee Daily World* and the *Spokesman-Review* offers strong support for the importance of geographical proximity in determining local newspaper coverage of court cases. As the local nature of a story increases, the importance of the type or locale of a judicial proceeding declines precipitously to the point of irrelevance. This finding suggests that, when presented with a story about a court case that they consider to be of local interest to their readers, newspaper editors will run substantively meaningful stories about any relevant part of the case, regardless of whether events are occurring at the trial or appellate court level, at the local courthouse or the U.S. Supreme Court.

This conclusion is further supported by the coverage of Judge Parr's dismissal of C. B. Conner's motion for a new trial, and his entering of the final judgment in *Parrish* in November 1935. The only newspaper

included in this study that reported on these developments was the *Wenatchee Daily World*—in an article by the paper's news staff.[42]

April 1936: Washington State Supreme Court

The *Wenatchee Daily World*'s coverage of the April 1936 reversal of Judge Parr's decision by the Washington Supreme Court stands in stark contrast to its reporting on the trial court judgment in *Parrish*. The coverage of the decision by the justices in Olympia is consistent with previous studies showing that newspapers devote limited attention to state supreme court decisions. There is a geographical explanation for the decline in coverage, as *Parrish* had now moved 200 miles from Wenatchee to the State capital. However, as we will see, when *Parrish* moved to Washington D.C., the local newspaper coverage of the case increased yet again. This therefore suggests that, even when a case holds considerable local and human interest for a newspaper's readers and involves the fate of a significant State law, coverage of the adjudication of that case by a state supreme court is considered to be of minimal importance.

The Washington Supreme Court reversed Parr's ruling in a sweeping opinion written by Chief Justice William J. Millard. It was an opinion that made it very clear that the justices neither considered *Adkins* good law, nor considered themselves bound by the U.S. Supreme Court's decision in that case.[43] In Section 1 of the 1913 law, the State observed that its police power authorized it to act to ameliorate the conditions under which women and minors labored, conditions "'which have a pernicious effect on their health and morals.'" Quoting extensively from the *Adkins* dissents of Chief Justice Taft and Justice Holmes, Millard and his colleagues agreed that the state had a lawful "duty" to exert this power.[44]

Millard used the penultimate paragraph of his opinion to issue a challenge to the U.S. Supreme Court. On two previous occasions the Washington State Supreme Court had upheld the 1913 law,[45] in part because of a conclusion that its subject matter "was not wholly a private concern. It was affected with a public interest, the state having declared the minimum wage of a certain amount to be necessary."[46] Although the U.S. Supreme Court had upheld economic laws because they addressed matters "affected with a public interest"—the threshold it had identified in *Munn v. Illinois*—it had never done so in a wage regulation case. It was now time to remedy this situation that protected the "more secure and powerful economic position" of employers.[47] "Unless the Supreme Court of the United States can find beyond question that [the 1913 Washington law] is a plain, palpable invasion of rights secured by the fundamental law and has no real and substantial relation to the public morals or public welfare," wrote Millard, "then the law must be sustained." In the meantime, the justices in Olympia would adhere to the principles and justifications of the two minimum wage law decisions of their predecessors rather than to what they considered a wrongfully decided *Adkins*.[48] As Millard stated later that year during his reelection campaign, "'[t]he law should be used to further progress, not to block it. As long as I'm on the bench I'll continue to give my decisions along the lines that I think will be for the betterment and the greater happiness of the people of Washington.'"[49]

Fred Crollard was stunned by the Washington Supreme Court's decision. He had twice written to his son in February 1936, just before and after arguing before the panel of five justices assigned to the *Parrish* case. In those letters he expressed complete confidence that he would prevail because *Adkins* was the controlling precedent. The decision had "practically settled" the case in favor of the West Coast Hotel Company.[50] When he

Fred M. Crollard (pictured), the attorney for the West Coast Hotel Company, was surprised and shocked when he lost his appeal before the Washington State Supreme Court in 1936. "Even the labor department of the state had ceased to enforce the minimum wage scale since the U.S. Supreme Court's ruling [in *Adkins*], because it was conceded by everyone that our law was clearly unconstitutional," he wrote his son. He was replaced by E.L. Skeel for the U.S. Supreme Court argument.

wrote again six weeks later, on April 6, it was to convey his utter disbelief at the ruling handed down four days earlier by the justices in Olympia:

> Well, we received the shock of our lives the other day when the Supreme Court handed down its decision on the Minimum Wage case by holding that it was valid ... We were so sure of winning that it was a great surprise. Even the labor department of the state had ceased to enforce the minimum wage scale since the U.S. Supreme Court's ruling [in *Adkins*], because it was conceded by everyone that our law was clearly unconstitutional.[51]

The Washington Supreme Court's decision brought shock to Fred Crollard, and elation to C.B. Conner and Elsie Parrish, but it went almost unnoticed by the *Wenatchee Daily World*. Confirming the scholarly consensus of opinion that decisions by state supreme courts typically receive very limited media coverage, the newspaper merely used one Associated Press (AP) report to inform its readers of the decision from Olympia.[52] The article published by the *Wenatchee Daily World* was devoid of the details that a hometown reporter might have used to continue to emphasize the local-interest aspects of the case.[53]

December 1936: U.S. Supreme Court Oral Arguments

Scholarly literature leads us to expect that local newspaper coverage of *Parrish* increased once the case was in the hands of the nine Justices in Washington, D.C. This is indeed what happened. However, *every* stage of the U.S. Supreme Court's decision-making process—from the granting of certiorari to the announcement of the final decision—received extensive coverage (particularly in the pages of the *Wenatchee Daily World*).

One week before the announcement of the U.S. Supreme Court's decision in *Tipaldo*, the Washington Supreme Court denied a petition for a rehearing in *Parrish*. This set the stage for an appeal by the West Coast Hotel Company to the U.S. Supreme Court. Four months later, the U.S. Supreme Court denied the petition for a rehearing in *Tipaldo*, a decision that would have gone largely unnoticed but for the fact that the Justices also granted certiorari in *Parrish*.[54] Newspaper coverage of these developments was limited, but this can only be understood by looking at the treatment of a judicial development that took place four months earlier. On June 1, the *Wenatchee Daily World* printed *two* wire service reports about the decision in *Tipaldo*. In four brief paragraphs, the AP reported the facts, the majority reasoning, and the way in which the Justices voted in the case. From Olympia, the United Press (UP) focused on

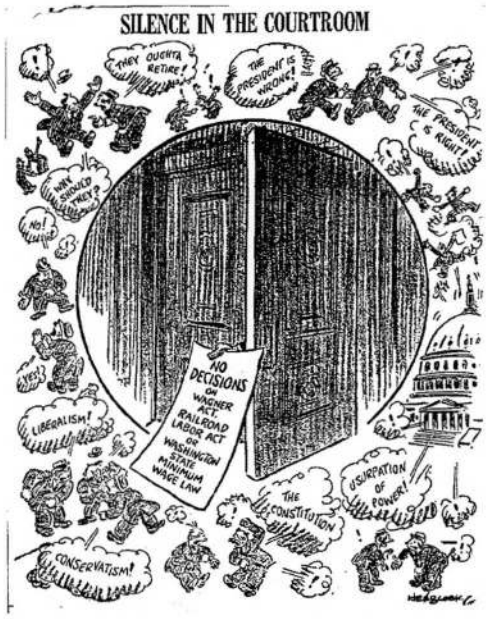
the relationship between *Tipaldo* and *Parrish*.[55] When the Supreme Court granted certiorari in *Parrish*, the newspaper's coverage was similarly minimal but effective. The newspaper was content to let the headline above its front-page AP report tell readers what they needed to know: "High Court to Hear Wage Case: Local Minimum Wage Decision May Be Upheld by Supreme Court; Reversed by State." What followed were a few short paragraphs summarizing the procedural history of *Parrish*.[56]

Standing in complete contrast to its coverage of the granting of certiorari is the *Wenatchee Daily World*'s extensive reporting about the U.S. Supreme Court's December 1936 oral arguments in *Parrish*. This was the fourth case to come before the Justices on December 16, 1936, consequently time constraints dictated that oral arguments be divided over two days. For this oral argument, E. L. Skeel, a Seattle-based attorney, replaced Fred Crollard. Representing the West Coast Hotel Company, Skeel began arguing on December 16, concluding the next day. Wilbur A. Toner, a well-respected attorney who spent the majority of his legal career working in Walla Walla, Washington, followed him to the lectern.[57] Serving in his official capacity as the Washington State assistant attorney general, Toner filed an amicus curiae brief in the case. Because it was not possible for Conner to make the long and expensive trip to Washington, D.C. and Toner already had plans to be in the nation's capital, Toner also assumed the duty of arguing on behalf of Elsie Parrish in Conner's place. Sam M. Driver, another Wenatchee attorney (who went on to become a justice on the Washington State Supreme Court, and then a federal district court judge for eastern Washington State as a Truman appointee), is also listed on the U.S. Supreme Court documents for the *Parrish* case; however, he took no formal part in the case and merely lent the use of his name because he had been admitted to the U.S. Supreme Court Bar.[58]

Toner was reluctant to argue that *Adkins* and *Tipaldo* had been wrongly decided. In the brief that was submitted to the Court by Conner, the argument was made that the Washington law represented a clear use of the State's police power (unlike the *federal* law struck down in *Adkins*), that the Washington Supreme Court had agreed that this use was reasonable, and that this state judicial decision was entitled to the same deference that was shown by the Court to the decision of New York's Supreme Court in *Tipaldo*.[59] During oral argument Toner again sought to distinguish *Adkins*. Like Millard, he invoked the *Munn* doctrine, arguing that the case before the Court involved a matter "affected with a public interest"; however, he defended this approach by highlighting the specific facts of the *Parrish* case rather than discussing the overall goals of the Washington law. Toner contended that, "the business of an innkeeper was affected with a public interest." This "effort at distinction" was, in the words of Chief Justice Hughes, "obviously futile" since one of the challenges in *Adkins* was brought by a hotel employee.[60]

Newspapers generally devote minimal space to analysis of oral arguments because the structure and substance of these judicial proceedings do not lend themselves to summarizing and contextualizing in an easy and engaging way.[61] Therefore, the Wenatchee publication's coverage of the *Parrish* oral arguments is truly remarkable. That coverage began on December 4—two weeks before the oral arguments—exemplifies the newspaper's belief in the importance of the local and human-interest aspects of *Parrish* to its readers. It reported:

> C.B. Conner, counsel for Mrs. Elsie Parrish, 37 year old grandmother, today was informed by the clerk of the Supreme Court of the United States that the wage case of the former local chambermaid against the West Coast Hotel company will



The Washington State Minimum Wage Case loomed large on the list of New Deal cases coming before the Court in 1936. This cartoon reflects the political climate of the time, in which the Court had been striking down New Deal legislation much to the frustration of President Roosevelt.

> not be argued before the week beginning December 14 or possibly later. It was to have been argued some time next week.[62]

Readers were then reminded about the basic facts of the case, but only the facts that related to why Elsie had initiated the lawsuit. It was important to tell Elsie's story—which included mentioning that, upon relocating to Omak, she and her husband gained employment at the Jim Hill hotel and the Biles-Coleman mill respectively.

Ten days later, on Monday, December 14, the newspaper informed its readers that the oral arguments in *Parrish* would take place later that week. This time, however, the front-page report was noticeably shorter and far more concerned with the New Deal implications of the case. To be sure, Elsie was identified as a party to the lawsuit, and mention was made of the fact that she was "a hotel chambermaid." But this time, in part because of the details contained in the December 4 article and also because the report came from Washington D.C. via the AP rather than from Wenatchee via the *Daily World*'s staff, no reference was made to the local nature of the case beyond noting that at issue was the constitutionality of a Washington State law.[63] The following day, the *Wenatchee Daily World* made no mention of the fact that oral arguments in *Parrish* had begun. However, this was not for lack of interest, but rather because, as noted above, the Court only heard a small portion of the arguments on December 16—too late in the day for even a West Coast newspaper to cover. Therefore, the newspaper recommenced its coverage the next day, when the arguments resumed.

The December 17 AP article the newspaper ran addressed a human-interest aspect of the oral arguments, but its focus was on one of the Justices rather than the parties to the case. As evidenced by the first two paragraphs, the wire service was of the opinion that the most noteworthy aspect of that morning's proceedings was the absence of Justice Stone. Although Stone did participate in the decision of the case, at the time his vacant seat at oral arguments was widely interpreted as meaning that only eight Justices would take part in the judgment of *Parrish*. To be sure, the article included some brief commentary on the substance of the arguments made by E. L. Skeel on behalf of the West Coast Hotel Company. However, this paled in comparison to the references to Justice Stone's absence.[64]

The further one got from Wenatchee, the more Stone's absence was emphasized in newspaper coverage of the oral arguments in *Parrish*. The AP article that ran in the *Wenatchee Daily World* also appeared in the *Seattle Post-Intelligencer* and the *Tacoma News-Tribune*.[65] And the *Everett Herald*, *Spokane Press*, and *Seattle Star* all printed a UP report for which the focus of the day's proceedings in *Parrish* was the incomplete Bench of Justices.[66] The UP article is,

however, of particular interest because it identifies a detail that has been completely overlooked by the literature on the case. It states that *two* members of the Court—Justices Stone and McReynolds—were absent from the oral arguments, which "caused fresh speculation today on the outcome of the long debated question which has repeatedly split the court into liberal and conservative ranks." For the Washington law to survive, "a switch of one vote" would have to take place, and the article speculated that this would most likely have to be the action of Justice Roberts. As a "Situation Complicated" subheading indicated, however, this was idle and unnecessary speculation. It was reported that Chief Justice Hughes "'vouched' McReynolds into the case" which, as the article explained, involved announcing (presumably in open Court, although this was not stated) that McReynolds would participate in *Parrish*, his "temporary" absence notwithstanding (in another version of the wire service article, he was described as away "on personal business"). The ailing Stone, by contrast, had been kept away from oral arguments since the beginning of the Term in October, and there was genuine doubt that he would be "physically able to participate" in *Parrish*. Whatever one makes of the fact that McReynolds absence from oral arguments on this day has gone unnoticed by the literature on *Parrish*, the fact remains that this particular article demonstrates an unusually high level of understanding of the Court's legal procedures. This is confirmed by its closing sentences, in which the potential fate of the Washington law is discussed in light of the possible absence from deliberations of only Justice Stone. Were "a switch by one conservative member" of the Court to take place, the article observed, the Court "could uphold the Washington law in this one test case and could influence no future decisions because the alignment would be four to four."[67]

This wire service report notwithstanding, it is fair to say that, in general, the AP and UP articles about the oral arguments in *Parrish* were marked by considerable clarity and explanation of the legal issues in layman's language. The same could not be said of the piece that appeared on page twelve of the December 18 edition of the *Wenatchee Daily World*. Readers had every reason to be confused by this article, which ran with the perplexing subtitle: "Constitutionality Of Minimum Wage Law Not Involved, State Attorney Claims." The first paragraphs repeated this claim, and provided additional commentary that did nothing to alleviate the confusion:

> WASHINGTON, Dec. 18. (AP)—Counsel for Washington state acknowledged before the supreme court yesterday the Washington law establishing minimum wages for women workers would be held unconstitutional if a "proper" case were presented to the high tribunal.
>
> W. A. Toner, assistant state attorney general, made this statement while defending the law against an attack by the West Coast Hotel Company.
>
> He contended, however, that the question of constitutionality was not involved in the present case.[68]

In the middle of this article, the AP's speculation about the timeline for a judgment in *Parrish* further supports the conclusion that this article was not written by a reporter familiar with the workings of the Supreme Court. The article suggested that a judgment could come within a matter of days—if "dispose[d] of ... by a tersely worded order." Were the Justices to conclude that the case required a fuller decision, with a written opinion, that opinion "may be read January 4."[69] A "fuller decision" was "required," but was not handed down by the Justices until Easter Monday.

Two members of the Court—Justices Harlan Fiske Stone and James C. McReynolds—were absent from the oral arguments in *Parrish*. A wire service reported that Chief Justice Hughes "'vouched' McReynolds into the case," by announcing that McReynolds, who was reportedly away "on personal business," would participate in *Parrish*. Justice Stone had been kept away from oral arguments all Term due to illness, and the writing of the *Parrish* opinion and the inclusion of his vote would be delayed untill his return to the Bench early in 1937. But since Stone voted to uphold the New York minimum wage law his vote was a foregone conclusion. It was Justice Owen J. Roberts who was the deciding factor in overruling the minimum wage decision in *Adkins*.

March 29, 1937 ... "a decision that astonished the country"[70]

The precise timeline for the Justices' decision in *Parrish*, and the relationship of that timeline to the Court-packing plan, remain subjects of considerable scholarly discussion. Ever since 1937, much ink has been spilled in an effort to identify the precise causal and correlational elements of this particular episode in American Constitutional history.[71] What is clear is that Chief Justice Hughes and his authorized biographer Merlo Pusey both overstated their cases when concluding that the Court-packing plan "had not the slightest effect" or "bearing whatever on the outcome" in *Parrish*.[72] It is true that the vote in the case took place before the President's announcement of his plans to reorganize the judiciary. However, it is difficult to imagine that the Justices were completely immune to the enormity of the public's negative reaction to their decision in *Tipaldo* and the endorsement of New Deal policies that was implicit in the landslide reelection of President Roosevelt in November 1936.

Pusey later wrote that it was in his biography that the "true facts" of the *Parrish* timeline first became public.[73] However, in the immediate aftermath of the Court's decision any reader of "Denies Roosevelt Bill Swayed Supreme Court," an article penned by the nationally syndicated journalist David Lawrence, would have been informed of many of the same "facts." Of the largest newspapers published in Washington State, the Lawrence story ran in both the *Seattle Times* and the *Spokane Daily Chronicle*. "[I]nformation, derived from a study of the sequence of events from the time the case was first submitted to the supreme court until the opinion was handed down," wrote Lawrence, "refutes charges made by various partisans that the president's attack on the court was 'beginning to have some effect.'" Lawrence did not divulge his sources. However, the "information" he proceeds to provide surely came from a source inside the Court, a conclusion that it is plausible to arrive at given the fact that Lawrence was, at the time, one of the country's most prominent political columnists.

> To all intents and purposes the supreme court made its decision in December, but, due to the illness of Justice Stone, the writing of the opinion and the inclusion of his vote was delayed till his return to the bench early in 1937. But since Justice Stone voted in June, 1936, to uphold the New York minimum wage law, his vote was a foregone

> conclusion. In other words, Justice Roberts, who really was the deciding factor in overruling the minimum wage decision of 1923, came to his conclusion in December, 1936, on the basis of the case as presented then.[74]

We will never know exactly what became the "deciding factor" for Justice Roberts in *Parrish* and, as Michael Ariens rightly observes, interpretations of the behind the scenes events related to the case are likely to be shaped by the "particular instructional manual from which one reads."[75] What is clear from the analysis detailed in the pages that follow, however, is that the closer one got to Chelan County, the less the newspapers reported the *Parrish* decision for its *national narrative* and the more they emphasized the *local story*.

On March 29, 1937, the *Wenatchee Daily World* published five articles about the U.S. Supreme Court's decision in *Parrish*. The time difference between Washington, D.C. and Wenatchee enabled the newspaper to cover the case within hours of the Justices' announcement of their decision.[76] However, pragmatic considerations of expediency compelled it to rely upon wire service reports. It is therefore remarkable that the five articles paid hardly any attention to the Court-packing implications of the decision. The AP article that ran on the front page was positioned below a banner proclamation that the "Minimum Wage Law Is Upheld." It detailed the outcome of *Parrish* within a larger discussion of all decisions issued by the Court that day, but without reference to the political implications of *Parrish*.[77] It did not emphasize the local nature of the decision, but the newspaper's intent to do so was evident from the

Elsie Parrish (left) was photographed at a family reunion in 1938 with her relatives Gladys, Elmo, Lucille, Jessie and Pearl.

two photos—of Elsie and her lawyer C.B. Conner—that shared the front page with the article. In what remains the iconographic picture of her, Elsie is posing for the photographer who, sometime during the winter of 1936, came to capture her working (making a bed) as a chambermaid at the Jim Hill hotel in Omak. It was printed beneath the headline "Her Wage Suit Brought Decision." The label "Wins Important Case" headlines the article that accompanied the smaller but similarly conspicuous picture of Conner, who is quoted saying: "'It has always been my opinion that the state reserves its right to pass such legislation as should be found necessary to protect its citizens and that is just what was done in this case. I am delighted with the findings of the United States Supreme Court. The decision couldn't have been wiser.' C.B. Conner local attorney who fought the case for Mrs. Parrish said today."[78]

The other three March 29 articles came from AP correspondents reporting out of Seattle and Olympia, helping to explain their focus on the various local interest aspects of *Parrish*. A short article emphasized that the Supreme Court had upheld a Washington State law; it made the observation that the twenty-four-year-old law had received bipartisan legislative support; and it included quotations from the lower court opinions of Judge Parr and Chief Justice Millard.[79] Two longer articles, both reported from Olympia, examined the immediate local and state influence and impact of the decision. The first consisted almost entirely of quotations from an "elated" Millard, who declared the Supreme Court's decision a "'great victory for states' rights.'" "'It is,'" he observed, "'a recognition of the sovereignty of the states and likewise a recognition of human rights.'"[80] The second reported the reaction of E.Pat Kelly, the Washington State director of labor and industries, who pledged to use the State's "'force of field deputies to see that the [1913] law is enforced.'" No longer, he said, would employers be permitted to "'beat down, chisel and pay the women as little as they could possibly get away with.'" Several of the newspapers in this study consolidated the AP reports contained in these two articles into one long piece about Washington State officials' reactions to the decision in *Parrish*. When they did, they devoted far greater attention to the comments of Director Kelly than to the remarks by Justice Millard.[81]

The following day, the *Omak Chronicle* (a twice-weekly publication that appeared every Tuesday and Friday) also reported the U.S. Supreme Court's decision in *Parrish*. It ran an article that placed even greater emphasis on the local and human-interests elements of the story. In so doing, it provided even greater support for the argument that geographical proximity was the most important factor influencing local newspaper coverage of this case. That article, written by one of the newspaper's reporters, ran under the headline "Omak Woman Wins Back Wages Case In Supreme Court." It was a local interest headline whose subheading emphasized the *human*-interest nature of the story: "Mrs. Elsie Parrish Notified Yesterday By United Press Of Her Victory." On March 29, when a reporter from the *Omak Chronicle* reached her at the Model Laundry & Cleaners and conveyed to her the UP report of the Supreme Court's decision, Elsie said "'I am so glad, not only for myself, but for all the women of the state who have been working for just whatever they could get.'" While the article also devoted a few paragraphs to summarizing the facts and judicial history of the case, the focus was undeniably upon "the local girl made good." From this article we learn about when the Parrishes moved to Omak and about this thirty-seven-year-old grandmother's place of employment in that town. In other words, the *Omak Chronicle* chose to devote its *first* report of the Supreme Court's decision to Elsie's story (even if the banner headline that day was reserved for informing readers that a "Record Crowd Will Attend Clam Bake").[82]

Many of these details were subsequently conveyed to the readers of the *Wenatchee Daily World*, but not until April 6—a delay seemingly attributable, in part, to the somewhat perplexing difficulty that the newspaper's reporter encountered in locating Elsie. The April 6 article ran under a startling and hyperbolic headline, which declared that, "Omak's Minimum Pay Law Joan D'Arc Would Lecture." Elsie was, it stated, "[t]hankful her fight to test the state minimum wage law will now make it possible for the nation's millions of hard-working women to receive just payment for the labor they do." The first paragraph of the article concluded by observing that the former chambermaid was also determined to "continue doing everything in her power to further the cause." However, when one turns to the subsequent and extensive quotations from the reporter's interview with Elsie, a very different picture of her reaction emerges—a picture that, ironically, the article made clear to its readers with the subheading "Not Seeking Notoriety." To be sure, Elsie was very proud of her lawyer's accomplishment and she accepted that her name would forever be linked to an important legal decision favoring workers' rights. But she was uncomfortable with all the publicity, in no small part because she feared that during an earlier stage of the case it had negatively affected her employment opportunities.[83]

For the time periods covered by this study, three newspapers included a picture of Elsie in articles they ran about *Parrish*. Upon reflection, Elsie was not sure whether the publicity—visual and textual—from her lawsuit affected her efforts to find work upon moving to Omak, but it was clearly something she had considered. The photograph that appeared on the front page of the *Wenatchee Daily World* (and the *Tacoma News-Tribune*) on March 29 seems to have been taken during the later stages of the case, probably after the Court granted certiorari in October 1936.[84] The image that appeared on the front page of the *Seattle Post-Intelligencer* the day after the Court's ruling is, by contrast, a formal head and shoulders portrait; it is printed above an identically composed image of Willard Abel, the manager of the Cascadian Hotel. Both were published courtesy of Simmer Photo in Wenatchee. In the April 6 article in the *Wenatchee Daily World*, Elsie references an article that included a photograph of her and appeared in that newspaper some time during the fall of 1936. The identity of this article and photograph remain unclear, but it is to this aspect of the publicity that Elsie pointed as possibly affecting her ability to find work in Omak. Perhaps this explained why Elsie was "'going to continue working as if nothing had happened. I'm happier that way."'[85]

The *Wenatchee Daily World* rounded out its substantive coverage of *Parrish* with several articles detailing additional aspects of the decision's local impact. On April 6 and 7, there was widespread coverage of the delivery, to Congress, of U.S. Attorney General Cummings's opinion on the post-*Parrish* legal status of the District of Columbia minimum wage law that had remained on the books after *Adkins*. However, in the *Wenatchee Daily World*, this story fell into the shadows of coverage that focused upon the impact of the Supreme Court's decision for residents of Washington State. The AP report that the Wenatchee newspaper chose to run on April 7 quoted from and discussed Washington Governor Martin's appeal to local employers to "meet the rising costs of living with the highest possible [wage] scales in every industry."[86] It left to other newspapers reports that quoted from and discussed the President's comments that accompanied the Attorney General's opinion.[87]

Life after *Parrish*

Elsie Parrish's legal crusade came to its formal conclusion on May 24, 1937. However, if we are truly to understand the *local* story of *West Coast Hotel v. Parrish*, we must look

beyond the filing of the Satisfaction of Judgment in the case.[88]

As the *Wenatchee Daily World* reported six weeks earlier, on April 9, 1937, legal proceedings were initiated against the West Coast Hotel Company by Mrs. Jennie Estella Sample, who worked as a chambermaid at the Cascadian Hotel between October 1931 and October 1936. Like Elsie, she was paid less than the weekly minimum wage of $ 14.50 and sought to recover back pay (as the newspaper reported, the original amount sought was $702.40, but this was subsequently amended downwards in the court filings to reflect the years of employment that were exempted by the Statute of Limitations). She was represented by Conner and was opposed by Fred Crollard, counsel for the West Coast Hotel Company. In March 1938, almost a year after the decision in *Parrish*, Judge Parr entered a judgment awarding Jennie Sample $292 in back pay and $61.80 in court costs and taxes.[89] In the wake of *Parrish* this was not actually the "*first* of a probable flood of minimum wage law suits to be filed in the state of Washington," as the Wenatchee newspaper reported. The first such suit appears to have been brought by one Miss Ann Walker, formerly employed by the Oxford Hotel in Seattle. Nevertheless, the floodgates were indeed open and, as the *Wenatchee Daily World* reported, "other suits are pending."[90] C.B. Conner died in 1941 and whether he handled any other minimum wage lawsuits before his death is unclear; had he done so, no member of the Wenatchee community would have been surprised.[91]

The following year claimed the life of Judge Parr. On February 16, 1942, he went into the office to file probate on the will of his only child, Florence Parr Lindston, who had died five weeks earlier. The following day Judge Parr died. His daughter's untimely death (at the age of twenty-six) had broken his heart. Parr's death deprived Wenatchee of one of its most esteemed residents. As the *Wenatchee Daily World* reported, he "had been a lawyer and superior court judge for over 40 years—since Chelan county was organized. And in his passing, we have lost one of our most distinguished and useful citizens."[92]

Elsie Parrish, undoubtedly one of Wenatchee's most *famous* former citizens, outlived Conner, Crollard, and Parr by several decades. Little is known of her life after her fifteen minutes of legal fame. What we do know is that in 1938 she headed west to Montana for a Murray family reunion. Pictured doting over children and proudly posing with her relatives—including her sister Minnie—Elsie is the personification of working class pride.

Some time during the 1940s Elsie and her family moved to California. By the time she was interviewed by the journalist Adela Rogers St. Johns in 1972, she was living in Anaheim—where she was buried upon her death on April 3, 1980 (five days after the forty-third anniversary of *Parrish*). During that 1972 interview, Elsie observed that, "'nobody paid much attention at the time, and none of the women running around yelling about Liberty and such have paid any since.'"[93] This is, as Julie Novkov has detailed, an accurate assessment of *feminist* responses to the U.S. Supreme Court's decision in *Parrish*. On the one hand the decision was a victory for female workers because they now had a constitutional right to be paid a fair minimum wage. Yet, on the other hand, they had gained this victory by virtue of a judicial opinion that reiterated the decades–old jurisprudential conclusion that a "woman's physical structure and the performance of maternal functions place[d] her at a disadvantage in the struggle for subsistence," thereby necessitating special, paternalistic treatment from the State.[94]

If we look beyond feminist reactions to *Parrish*, however, what we find is that Elsie's observation is an inaccurate reminiscence of the responses to the U.S. Supreme Court's judgment in her case. The abundant literature about *Parrish* shows clearly that she was

wrong to conclude that "'nobody ... so much as noticed me or my decision'"—then or now.[95] Yet, to criticize Elsie for making this observation is to overlook the fact that, during the interview, she was primarily expressing bemusement at the journalist's interest in her story, rather than lamenting the inattention it had received. For, as Darlene Spargo accurately observes, Elsie "never wanted to be famous, just fairly compensated."[96]

Conclusion

In 1997, the *Wenatchee Business Journal* published an article celebrating the sixtieth anniversary of *Parrish* and discussing its important place in the city's history. "Elsie," it observed, "moved to Omak where she and her husband raised their family and disappeared into history."[97] For students of American Constitutional history, the decision in *Parrish* has not "disappeared into history." Instead, seventy-five years later, it remains widely regarded as one of the U.S. Supreme Court's landmark judgments.

As this article has shown, in 1936 and 1937 people did notice and pay attention to both the *Parrish* case and the story that it told of the former employee of the Cascadian Hotel. However, the local newspaper coverage of the case that the residents of Chelan County, Washington received focused on the local, human-interest aspects of the story rather than the national political narrative for which *Parrish* has since become most well known.

Analysis of this coverage brings to light the importance of telling the stories of U.S. Supreme Court decisions. "With the exception of the Thirteenth Amendment, the Constitution only addresses government actors; yet the duties it assigns these actors correlate with rights and interests of real people."[98] Unless we pay attention to the stories of the "real people" whose lives *Parrish* most directly affected, we remain ignorant of the fact that, in Washington State, as opposed to Washington, D.C., the spotlight of the case fell not upon the actions of President Roosevelt or Justice Roberts, but rather upon Elsie Parrish, the thirty-seven-year-old grandmother and employee of the Model Laundry & Cleaners in Omak, Washington.

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ENDNOTES

[1] Census records show that Elsie and Roy had seven children together, but only six appear to have lived long enough to accompany their parents to Washington State. Unless indicated otherwise, all of the genealogical information used in this article was provided by Darlene

Spargo, Wenatchee Valley Museum and Cultural Center, Wenatchee, WA, and Bill Murray (whose grandfather was Elsie's older brother).

[2] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). *Ernest Parrish, and Elsie Parrish, his wife v. West Coast Hotel Company*, Superior Court of the State of Washington in and for the County of Chelan, No. 12215—Complaint, June 10, 1935, 1-2; Amended Complaint, July 12, 1935, 1-4, 6; Answer to Amended Complaint, September 9, 1935, 2-3. Chelan County Marriage Records, reference number cechemar-cert0007480, July 28, 1934. Elsie and Ernest probably met at the Cascadian. Ernest was a "retail meat salesman," and Wenatchee was the midway point on his regular route between Portland, OR, and Colville, WA. 1930 United States Federal Census.

[3] Complaint, June 10, 1935.

[4] Historic Property Inventory Form, State of Washington, Department of Community Development, Field Site No. _04-84 (The Cascadian Hotel)—in the files of the Wenatchee Valley Museum & Cultural Center; Chris Rader, "Centipedes Still Dancing after Nearly 60 Years," *The Confluence: Publication of Wenatchee Valley Museum & Cultural Center*, 2011, 8-11.

[5] Julie Novkov, **Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years** (Ann Arbor, MI: University of Michigan Press, 2004), 3.

[6] *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

[7] Novkov, **Constituting Workers**, 5.

[8] The most prominent works that incorporate Elsie's story into their analyses of the *Parrish* case are William E. Leuchtenburg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York: Oxford University Press, 1995), 163-79, and Gerry L. Alexander, "*Parrish v. West Coast Hotel Co.*—Did This Washington Case Cause the Famous 'Switch in Time That Saved Nine'?" *Washington State Bar News*, December 2010, 22-27.

[9] Howard Zinn, "Foreword," **A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution**, ed. Peter Irons (New York: Penguin, 1999), v.

[10] *Ibid.*

[11] These advancements include the Landmark Law Cases and American Society series published by the University Press of Kansas, and the Law Stories series published by Foundation Press.

[12] Leuchtenburg, **Supreme Court Reborn**, 175.

[13] For example, see Matthew Hall, "High Court Headlines: An Analysis of Case Characteristics Associated with Media Attention to Supreme Court Rulings," (2009), http://ssrn.com/abstract=1428548 (last accessed April 15, 2012).

[14] Gerhard Peters and John T. Woolley, "Franklin D. Roosevelt: 'Excerpts from the Press Conference,' June 2, 1936," http://www.presidency.ucsb.edu/ws/?pid=15292 (last accessed April 15, 2012).

[15] **Journal of the House, State of Washington** (1913), 1062-63; **Journal of the Senate, State of Washington** (1913), 612-13; **Washington State Public Documents 1911-1912**, vol. 1 (1913), 190-93.

[16] Washington State Laws of 1913, chapter 174, page 602.

[17] "Judiciary: Chambermaid's Day," *Time Magazine*, April 5, 1937.

[18] "Story of Minimum Wage Legislation," *Congressional Digest*, June/July 1957; Clifford F. Thies, "The First Minimum Wage Laws," *Cato Journal* 10, no. 3 (1991): 718-19.

[19] 198 U.S. 45, 56 (1905).

[20] *Stettler v. O'Hara*, 243 U.S. 629 (1917); *Bunting v. Oregon*, 243 U.S. 426 (1917); *Wilson v. New*, 243 U.S. 332 (1917).

[21] 261 U.S. 525, 546, 556 (1923).

[22] *Murphy v. Sardell*, 269 U.S. 530 (1925); *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927).

[23] 298 U.S. 587 (1936); Kermit L. Hall and John J. Patrick, **The Pursuit of Justice: Supreme Court Decisions that Shaped America** (New York: Oxford University Press, 2006), 88.

[24] c. 584 of the laws of 1933 (Cons. Law, c. 31, art. 19), §551 (8), quoted in 298 U.S. at 605.

[25] 298 U.S. at 610.

[26] Merlo J. Pusey, **Charles Evans Hughes**, 2 vols., vol. II (New York: Macmillan, 1951), 757-58.

[27] "Editorial: History-Making Decision," *The Journal* (East Wenatchee, WA), January 21, 1937.

[28] Charles Evans Hughes, **The Supreme Court of the United States, Its Foundation, Methods and Achievements; an Interpretation** (New York: Columbia University Press, 1928), 50.

[29] 300 U.S. at 399, 390.

[30] *Ibid*, at 398, 399.

[31] Robert H. Jackson, **The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics** (New York: Alfred A. Knopf, 1941), 207.

[32] **N. W. Ayer & Son's Directory of Newspapers and Periodicals** (Philadelphia: N. W. Ayer & Son, 1935, 1936, 1937); email correspondence between Wilfred Woods (former publisher of the *Wenatchee Daily World*) and the author, January 25, 2012.

[33] *Ernest Parrish, and Elsie Parrish, his wife v. West Coast Hotel Company*, Judgment and Decree, Superior Court of the State of Washington in and for the County of Chelan, No. 12215, November 9, 1935, 2.

[34] "William O. Parr," *Wenatchee Daily World*, February 18, 1942; Rod Molzahn, "Those Were the Days: Was the Tough Sheriff Also a Moonshiner?" October 26,

2011; available at http://www.ncwgoodlife.com/_blog/Those_were_the_days/post/Was_the_tough_sheriff_also_a_moonshiner/ (last accessed April 15, 2012).

[35] *Ernest Parrish, and Elsie Parrish, his wife v. West Coast Hotel Company*, Superior Court of the State of Washington in and for the County of Chelan, No. 12215, Judgment, October 17, 1935; "Judge W.O. Parr Upholds Constitution," *Wenatchee Daily World*, October 19, 1935, 4.

[36] "Judge W.O. Parr Upholds Constitution," 4.

[37] Letter from Fred M. Crollard to Frederick M. Crollard, Jr., October 1935. Excerpts from the letters provided to the author, in email correspondence, by Ross Crollard (Fred M. Crollard's grandson), March 19, 2012, and reprinted with Ross Crollard's permission.

[38] Fred M. Crollard's file notes about his upbringing, education, and career, provided to the author in email correspondence by Ross Crollard, April 15, 2012; "Fred M. Crollard," *Wenatchee Daily World*, June 24, 1968.

[39] Kris Young and Mark Behler, "Cascadian Hotel Was Site of Historical Lawsuit," *Wenatchee Business Journal* 11, no. 7 (1997).

[40] AP, "Minimum Wage Law Is Unconstitutional," *Everett Herald*, October 19, 1935, 5; AP, "Wage Law Invalid," *Seattle Post-Intelligencer*, October 18, 1935, 3; AP, "Minimum Wage Suit Dismissed," *Seattle Times*, October 18, 1935, 14; UP, "Women's Wage Law Held Invalid," *Tacoma News-Tribune*, October 18, 1935, 8.

[41] "Minimum Wages of Women Loses," *Spokesman-Review*, October 18, 1935, 1.

[42] *Ernest Parrish, and Elsie Parrish, his wife v. West Coast Hotel Company*, Superior Court of the State of Washington in and for the County of Chelan, No. 12215, Judgment and Decree; Order Denying Motion for New Trial, November 9, 1935; "Judgment Entered," *Wenatchee Daily World*, November 12, 1935, 2.

[43] *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083 (1936).

[44] Chapter 174, Laws 1913 (page 602), Section 1, quoted at 185 Wash. at 581-82, 585-92 (discussing Taft and Holmes).

[45] *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037 (1918); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920).

[46] 185 Wash. at 596.

[47] *Munn v. Illinois*, 94 U.S. 113 (1877); 185 Wash. at 595. Millard did not cite *Munn*.

[48] 185 Wash. at 597.

[49] Quoted in Charles H. Sheldon, **Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991** (Pullman, WA: Washington State University Press, 1992), 250-51. "The publicity surrounding the case [*Parrish*] led to speculation that Millard might be in line for appointment to the federal circuit court of appeals," but it did not have a negative effect upon his standing with the electorate; Millard was reelected in 1936. *Ibid*, 251; AP, "William J. Millard Dies at 87," *Seattle Times*, December 14, 1970.

[50] Letter from Fred M. Crollard to Frederick M. Crollard, Jr., February 26, 1936. Also see letters from Fred M. Crollard to Frederick M. Crollard, Jr., February 22, and March 11, 1936.

[51] Letter from Fred M. Crollard to Frederick M. Crollard, Jr., April 6, 1936.

[52] Recent works examining the limited coverage of state supreme court decisions include Richard L. Vining, Jr. and Teena Wilhelm, "Explaining High-Profile Coverage of State Supreme Court Decisions," *Social Science Quarterly* 91, no. 3 (2010); Alixandra B. Yanus, "Full-Court Press: An Examination of Media Coverage of State Supreme Courts," *Justice System Journal* 30, no. 2 (2009); and F. Dennis Hale, "Newspaper Coverage Limited for State Supreme Court Cases," *Newspaper Research Journal* 27, no. 1 (2006). These works build upon F. Dennis Hale, "The Court's Perception of the Press," *Judicature* 57, no. 5 (1973); F. Dennis Hale, "How Reporters and Justices View Coverage of a State Appellate Court," *Journalism Quarterly* 52, no. 1 (1975); F. Dennis Hale, "Press Releases vs. Newspaper Coverage of California Supreme Court Decisions," *Journalism Quarterly* 55, no. 4 (1978); and F. Dennis Hale, "Factors Associated with Newspaper Coverage of California Supreme Court Decisions," *Orange County Bar Journal* 6, no. 1 (1979).

[53] AP, "Local Court Reversed in Hotel Case," *Wenatchee Daily World*, April 2, 1936, 1.

[54] Appearance Docket, Supreme Court State of Washington, No. 26038, *Ernest Parrish and Elsie Parrish, his wife, Appellants vs. West Coast Hotel Company, Respondents*; "Review Is Refused on State Wage Act by Supreme Court," *New York Times*, October 13, 1936, 1; John W. Chambers, "The Big Switch: Justice Roberts and the Minimum Wage Cases," *Labor History* 10 (1969): 56.

[55] AP, "Wage Law Is Held Invalid," *Wenatchee Daily World*, June 1, 1936, 1; UP, "Wage Law Is Held Invalid," *Wenatchee Daily World*, June 1, 1936, 1.

[56] AP, "High Court to Hear Wage Case," *Wenatchee Daily World*, October 12, 1936, 1.

[57] "High Court Hears Women Wage Case," *New York Times*, December 17, 1936, 13; "United States Supreme Court," *New York Times*, December 17, 1936, 54; "Wilbur A. Toner," *Walla Walla Union-Bulletin*, July 7, 1950.

[58] Email from Chris Conner (C.B. Conner's granddaughter) to the author, March 31, 2012.

[59] Appellee's Brief on the Law, *West Coast Hotel Co. v. Ernest Parrish and Elsie Parrish*, 300 U.S. 379 (1937) (No. 293), in Philip B. Kurland and Gerhard Casper, eds., **Landmark Briefs and Arguments of the Supreme**

Court of the United States: Constitutional Law, vol. 33 (Washington, D.C.: University Publications of America, 1975), 125-29.

[60] 300 U.S. at 388 (discussing Toner's oral argument).

[61] William Haltom, **Reporting on the Courts: How the Mass Media Cover Judicial Actions** (Chicago, Ill: Nelson-Hall, 1998), 101.

[62] "Wage Case in Highest Court," *Wenatchee Daily World*, December 4, 1936, 3.

[63] AP, "Local Wages Case Argued," *Wenatchee Daily World*, December 14, 1936, 1.

[64] AP, "Wage Case Argument Up Today," *Wenatchee Daily World*, December 17, 1936, 1.

[65] AP, "State Wage Law May Be Illegal," *Seattle Post-Intelligencer*, December 18, 1936, 3; AP, "Out of Wage Act Hearing," *Tacoma News-Tribune*, December 17, 1936, 12.

[66] UP, "Minimum Wage Law Question Arouses Much Speculation," *Everett Herald*, December 17, 1936, 13; UP, "State Attorney Defends Wage Law," *Spokane Press*, December 17, 1936, 1; John A. Reichmann, "Minimum Wage Law Is Periled in Court," *Seattle Star*, December 17, 1936, 5.

[67] Reichmann, "Periled in Court," 5. The article in which McReynolds is described as absent "on personal business" is UP, "Much Speculation," 13.

[68] AP, "Court May Rule on Wage Case Jan. 4," *Wenatchee Daily World*, December 18, 1936, 12.

[69] *Ibid.*

[70] William E. Leuchtenburg, "The Nine Justices Respond to the 1937 Crisis," *Journal of Supreme Court History* 1997, no. 1 (1997): 67.

[71] For example, see Chambers, "Big Switch"; Barry Cushman, **Rethinking the New Deal Court: The Structure of a Constitutional Revolution** (New York: Oxford University Press, 1998); Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence** (Durham, NC: Duke University Press, 1993).

[72] Hughes quoted in David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes** (Cambridge, MA: Harvard University Press, 1973), 312; Pusey, **Charles Evans Hughes**, II, 703.

[73] Merlo J. Pusey, "Justice Roberts' 1937 Turnaround," **Yearbook of the Supreme Court Historical Society** 1983 (1983): 106.

[74] David Lawrence, "Denies Roosevelt Bill Swayed Supreme Court," *Spokane Daily Chronicle*, April 1, 1937, 1; David Lawrence, "Washington Wage Case Decided in December: Charge of Change in Court Mind Refuted," *Seattle Times*, April 1, 1937, editorial page, 10. During World War 1 Lawrence became the country's first syndicated Washington newspaper journalist. By 1937 his five-times-a-week column was regularly distributed to almost 300 newspapers nationwide. Peter Edson, "Interpretation and Analysis of Washington News," in **The Press in Washington: Sixteen Top Newsmen Tell How the News Is Collected, Written, and Communicated from the World's Most Important Capital**, ed. Ray Eldon Hiebert (New York: Dodd, Mead & Company, 1966), 25-26; John H. Sweet, "Introduction," in **The Editorials of David Lawrence** (Washington, D.C.: Books by U.S. News & World Report, 1970), xvi.

[75] Michael Ariens, "A Thrice-Told Tale, or Felix The Cat," *Harvard Law Review* 107 (1994): 621. On the substance of Ariens's article, it is important to compare Richard D. Friedman, "A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger," *University of Pennsylvania Law Review* 142 (1994): 1985-95.

[76] The Court announced its decisions at midday. Jeff Shesol, **Supreme Power: Franklin Roosevelt vs. The Supreme Court** (New York: W. W. Norton, 2010), 404.

[77] AP, "Minimum Wage Law Is Upheld," *Wenatchee Daily World*, March 29, 1937, 1.

[78] "Wins Important Case," *Wenatchee Daily World*, March 29, 1937, 1.

[79] AP, "Decision Affirms 29-Year-Old Law," *Wenatchee Daily World*, March 29, 1937, 10 (the text of the article got the age of the 1913 law correct even though the headline did not).

[80] AP, "Great Victory for State's Rights," *Wenatchee Daily World*, March 29, 1937, (it is interesting to note that, while the quotation from Millard pluralizes the states, the headline does not; taken in their entirety, Millard's comments suggest that he did not intend for his quotation to suggest that the "rights" he was referring to were anything other than the "rights" of Washington State). Millard's Term as Chief Justice ended on January 11, 1937. Sheldon, **Washington High Bench**, 250-53.

[81] AP, "Minimum Wage Law Will Be Enforced," *Wenatchee Daily World*, March 29, 1937, 2; AP, "Minimum Wage Law to Be Enforced," *Daily Olympian*, March 29, 1937, 1; AP, "State to Crack Down on Wage Law Violators," *Seattle Post-Intelligencer*, March 30, 1937, 2.

[82] "Omak Woman Wins Back Wages Case In Supreme Court," *Omak Chronicle*, March 30, 1937, 1.

[83] "Omak's Minimum Pay Law Joan d'Arc Would Lecture," *Wenatchee Daily World*, April 6, 1937, 1.

[84] "Her Wage Suit Brought Decision," *Wenatchee Daily World*, March 29, 1937, 1; AP, "Started Wage Law Test," *Tacoma News Tribune*, March 30, 1937, 2.

[85] "Omak's Minimum Pay Law Joan d'Arc Would Lecture," 1, 10.

[86] AP, "Raise Wages, Martin Urges," *Wenatchee Daily World*, April 7, 1937, 1.

[87] For example, see AP, "Minimum Wage Laws All Stand," *Spokesman-Review*, April 7, 1937.

[88] *Ernest Parrish, and Elsie Parrish, his wife v. West Coast Hotel Company*, Superior Court of the State of Washington in and for the County of Chelan, No. 12215—Satisfaction of Judgment, May 24, 1937.

[89] "Another Minimum Wage Suit Filed," *Wenatchee Daily World*, April 10, 1937, 1. *William R. Sample and Jennie Estella Sample v. West Coast Hotel Company*, No. 13086, Complaint, April 9, 1937; Amended Complaint, June 5, 1937; Judgment, Superior Court of the State of Washington in and for the County of Chelan, March 8, 1938.

[90] "Another Minimum Wage Suit Filed"; AP, "Chambermaid Sues to Get Back Pay," *Wenatchee Daily World*, April 1, 1937, 1. Miss Walker's lawsuit was also reported in "Maid Sues for $87 under Wage Rule," *Seattle Post-Intelligencer*, April 2, 1937, 7; "Women to Demand Pay," *Seattle Star*, April 2, 1937, 14.

[91] "Heart Attack in Seattle Is Fatal to C.B. Conner," *Wenatchee Daily World*, May 22, 1941; "Conner Rites Tuesday," *Wenatchee Daily World*, May 26, 1941; "Services for C. B. Conner," *Wenatchee Daily World*, May 28, 1941.

[92] "William O. Parr"; "Judge W.O. Parr Stricken Suddenly," *Wenatchee Daily World*, February 18, 1942, 1, 10; "Parr Services to Be Friday, 11 A.M.," *Wenatchee Daily World*, February 19, 1942. The newspaper similarly applauded the civic contributions made by Fred Crollard when it reported his death in St. Anthony's Hospital in Wenatchee, at the age of eighty-three, on June 22, 1968. "Fred M. Crollard."

[93] Quoted in Adela Rogers St. Johns, **Some Are Born Great** (Garden City, NY: Doubleday, 1974), 185, 187.

[94] Novkov, **Constituting Workers**; *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

[95] Quoted in Rogers St. Johns, **Some Are Born Great**, 185.

[96] L. Darlene Spargo, "Wenatchee's Quiet Warrior—Elsie Parrish," *The Good Life*, April 2012, 9.

[97] Young and Behler, "Cascadian Hotel."

[98] Michael C. Dorf, "Putting the People Back in 'We the People,'" in **Constitutional Law Stories**, ed. Michael C. Dorf, 11 (New York: Foundation Press, 2009).

"He Travels Fastest Who Travels Alone": Justice Robert H. Jackson —One of the Court's Finest Advocates and Writers

DAVID M. O'BRIEN

When moving into the marble temple in 1941, Justice Robert H. Jackson brought a framed 1919 *Life* magazine photograph of a man working alone at his desk. The caption read "He travels fastest who travels alone"—from "The Winners" in **The Story of the Gadsbys** (1888), by English poet Rudyard Kipling (1865-1936). Jackson lived by that motto—it reflected his upbringing and symbolized his life's pursuits.

He acquired the photograph years earlier when working as an apprentice in Frank Mott's law office in rural Jamestown, New York. A cousin of his mother, Mott oversaw his study of the practice of law. Mott also introduced him to New York Democratic politics and to Franklin D. Roosevelt, at the time a state senator and rising star. In the following decades along with building a lucrative legal practice, Jackson became increasingly active in Democratic politics and close to F.D.R., who rose to the governorship in 1928 and to the White House after the 1932 presidential election. In 1934, F.D.R. persuaded him to join the New Deal administration. Jackson's career in public service, then, was meteoric. Within seven years he moved from working as general counsel for the Internal Revenue Service (1934-1936), to an assistant attorney general for the tax and antitrust divisions in the Department of Justice (1936-1937), to serving as Solicitor General (1938-1940), to Attorney General (1940-1941), and, at age forty-nine, to a Justice on the Supreme Court (1941 until his death on October 9, 1954).

Always a loner (except with family and close friends), Jackson was complex and paradoxical. He had "a dialectical mind," recalls Paul A. Freund, a long-time Harvard Law School professor who had clerked for Justice Louis D. Brandeis (1916-1939) and worked with Jackson in the Solicitor General's

office.[1] Although fiercely independent, Jackson nonetheless had a keen sense of community. Highly ambitious in both law and politics, as well as deeply concerned about his place in history, he was a "country-gentleman lawyer" who achieved national and international prominence.

While basically self-taught, he was erudite and eloquent. Like most New Deal liberals battling with the conservative majority on the pre-1937 Court, he championed "judicial self-restraint"—a label that, after *Brown*, conservatives would embrace in attacking the liberal "judicial activism" of the Warren Court (1953-1969). Although concerned about the institutional and prudential limits of the Court's power, he nonetheless remained no less committed to the exercise of judicial review and its role in balancing competing interests between the nation and the states, and those of minorities against majoritarian democracy.

An Outsider Inside

Jackson was born 1892 in Spring Creek, Warren County, Pennsylvania to a family of yeomen farmers of Scottish-Irish heritage. Five years later the family moved to Frewsburg, New York, a village near up state Jamestown. There, he grew up and spent the next two decades in private practice and Democratic politics. His family was "uncompromisingly" Democratic, a minority in a virtually all white rural Republican community. (There was one black family in his community and Jackson never experienced segregation first hand until he moved to Washington, D.C. in 1934.) His family was also Presbyterian but not regular churchgoers like their neighbors. He was later introduced to the Eastern philosophy of theosophy and other Universalist faiths of spiritual colonies in late-nineteenth century upstate New York —like Harmonia, six miles south of Jamestown.[2] Tolerant of others but staunchly independent, Jackson recalled, his family largely lived "independent of community life" and "never looked to others for support or even companionship."

In a revealing interview given for Columbia University's oral history collection in the early 1950s, he described his family as having "a certain detachment from other people, a certain self-reliance and self-dependence in them that did not care very much what other people thought, or did, or said .... They were individualists of the strongest kind .... [and] were self-sufficient and self-reliant, believed it was up to them to take care of themselves, sought no help and taught, insofar as they consciously taught anything, thrift, industry, and self-reliance."[3]

Jackson was even more revealing about the influences on his early life when he drafted (but never completed) an autobiography. There, he recalled growing up in a different America—one reminiscent of the nineteenth century in which communities were small, rural, and revolved around strong and self-supporting Yankee farmers. That life had quickly receded after World War I, and then, in the years following World War II, increasing urbanization and the growth of a national integrated economy—oriented toward the accumulation of wealth and social stratification—further transformed the American way of life. His reflections merit quoting because they reveal his complexity and sense of being torn throughout his life between two worlds:[4]

> I have lived much of my life in a time and an environment that was truly and deeply democratic—democratic in an economic and social as well as in a political sense. That kind of society has largely passed, and I am from the last generation to have had that experience and to have felt the influence of that kind of democracy. The great change in the life I knew dates from World War I. Before that we lived in a fool's paradise

President Roosevelt congratulated Robert H. Jackson after he took the oath as Associate Justice on July 11, 1941. Jackson's friendship with F.D.R. dated to the 1910s, when Jackson was building a legal practice in Jamestown, New York and Roosevelt was a New York state senator and rising star in the Democratic party.

perhaps—but it was the nearest Paradise that most of us ever knew.

Really fundamentally democratic life existed in this country only in communities made up of small, self-sufficient, family-operated farms. These predominated in a belt extending from the coasts of New England through New York, Pennsylvania and Ohio and into the northern Mississippi Valley .... The farms of which I speak had rarely over two hundred acres and usually about half that .... The design was to be self-sufficient, ... to depend on markets for cash as little as need be, resorting to them mainly to dispose of surplus above farm needs. Those farms provided a living and a way of life. Their owners were both producer and consumer; they were labor and capital in a unit .... The source of well being on these farms was the labor of the family applied to the soil. No great accumulation is possible in this economy and none was expected .... Our general level of existence was to be independently poor ....

Looking backwards, even as he was personally driven and rose in his career, Jackson observed: "Our statesmen, lawyers, judges, and leaders no longer come from this socially classless society. They come, instead, from one side or the other of the railroad tracks, often with bitterness from the wrong side or superciliousness from the right side. No longer do they come from homes where they were taught respect both for labor and for property which it produces."

After graduating from Frewsburg High School in 1910, he took a daily trolley for a year to attend Jamestown's high school. There, he was on the debate team and was greatly influenced by two teachers, Mary Willard and Milton J. Fletcher. They introduced him to the classics and taught history and economics, as well as encouraged him to go to law school. Following graduation, over the objections of his father, who wanted him to become a doctor, Jackson instead began his apprenticeship with Mott.

Although Jackson did not go to college, he was not "a rare exception, having become a lawyer without attending law school."[5] In fact, the one year he spent at Albany Law School, coupled with his first year as an apprentice, met the school's requirements for its two-year degree. Jackson was not yet twenty-one years old and, under the school's charter, was therefore given a certificate instead of a degree. While in Albany, he also made a practice of listening to oral arguments before the state's highest court, which increased his zeal for advocacy and debate. After the year, he returned to Mott's law office for another year before passing the bar exam.[6]

In short, Jackson largely learned law through apprenticeship and self-study, like most members of the Court throughout the nineteenth century. F.D.R. never completed law school but passed a bar exam. His first appointee to the Court, Justice Hugo L. Black, had a law degree from the University of Alabama but had not gone to college. F.D.R.'s second appointee, Justice Stanley Reed, attended Columbia and the University of Virginia law schools but did not graduate. Neither did Justice James Byrnes. Other Justices that Jackson argued before and joined on the Bench did have degrees from prestigious schools: Chief Justice Harlan F. Stone and Justice William O. Douglas graduated from Columbia and Justice Felix Frankfurter from Harvard. With the exception of Chief Justice Fred Vinson, whose degree was from Centre College, President Harry Truman's appointees also had graduated from distinguished schools: Harold Burton from Harvard, Tom C. Clark from the University of Texas, and Sherman Minton from Yale. Still, it was not until 1957 (after Jackson's death) that all nine sitting justices had law degrees. Jackson was thus not exceptional in this regard. For F.D.R. and Truman, personal friendship, rewarding party faithful, and liberals—liberals from across the broad spectrum of the New Deal coalition—were more important factors in making judicial appointments than their nominees' legal backgrounds.[7]

In private practice and later in the government, Jackson continued to relished advocacy. As he once explained:[8]

> I like the combat. I always liked the underdog's side, but I had no great emotion about it and no conviction that the underdog is always right, like some people think .... My people never looked down on anybody; never had any bitter experiences; I never needed anything that I didn't have. I was never a crusader. I just liked a good fight.

While taking pride in being a "country lawyer," his legal practice in fact included banks, corporations, railroads, and wealthy individuals. Amassing considerable wealth in Jamestown, his legal reputation grew even greater after moving to the District of Columbia and entering government service. One of his earliest cases commanding national attention was the successful prosecution of millionaire Andrew Mellon for tax evasion. Later, he would take a year's leave from the High Bench to serve as chief prosecutor at the Nuremberg war crimes trial of Nazi leaders (1945-1946), the first war-crimes trial. And his opening and closing arguments commanded worldwide attention.

Even before becoming Solicitor General, Jackson had argued fourteen cases before the Court. As Solicitor General and Attorney

General he argued another twenty-five cases, winning nineteen, and, including reargu-ments, appeared before the Court forty-four times.[9] He cherished serving as "S.G.," claiming it was "the most enjoyable period of my whole life,"[10] though he likewise felt serving as Nuremberg's chief prosecutor was "infinitely more important than my work on the Supreme Court."[11]

Unquestionably a skilled advocate, he was clear, concise, confident, relaxed, and invariably commanded a "bird's eye view" of cases. He was so outstanding that Justice Brandeis reportedly said he should be "Solicitor General for life."[12] He nonetheless remained an ambitious loner. As one of his assistants in the S.G.'s office, and later a federal judge, Charles E. Wyzanski, Jr., observed: "He never had a team nor did he ever evoke that kind of team loyalty in spite of the admiration of everybody who played with him had for him as a player."[13] Another assistant, Paul Freund, agreed while fondly remembering his "gift of phrase" and quick wit during oral arguments.[14]

Jackson never participated in moot courts (as most attorneys now regularly do) and rarely even discussed preparations in advance of oral arguments. He maintained a disci-plined, hard-working pace that most attorneys would find exceptionally grueling—once arguing seven cases in ten days. As a result, Jackson ranked among the most notable members of the Court's bar in the twentieth century, including John W. Davis (1873-1955), who argued a record 140 cases and defended segregation in South Carolina's companion case to *Brown v. Board.*[15]

Along with relishing advocacy, Jackson invariably celebrated the "country lawyer," the solo practitioner. He lamented how, in the early twentieth century, legal practice was moving toward large corporate law firms along with greater specialization and more law schools.[16] The experience of learning law through apprenticeship and a generalist practice, he thought, taught much about "the structure of society and how its groups interlock and interact, because [the lawyer] lives in a community so small that he can keep it all in view." Accordingly, the country lawyer understood "how disordered and hopelessly unstable [society] would be with-out law." Law, for him, was "like a religion, and its practice was more than a means of support; it was a mission."[17]

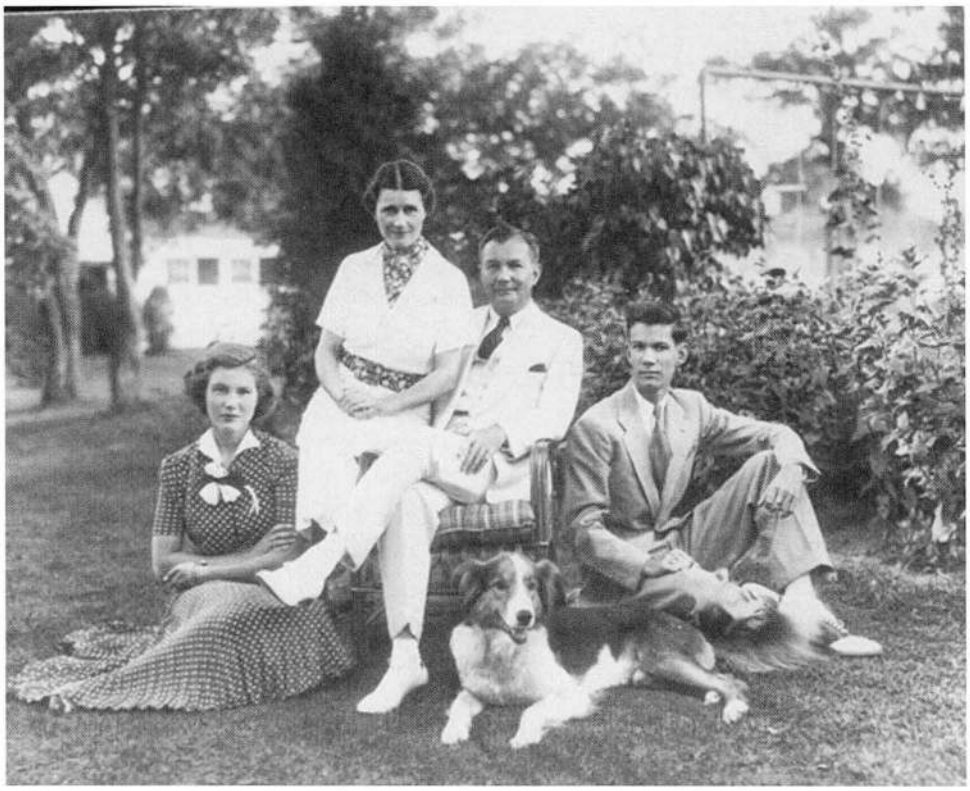
As a young attorney active in Democratic politics, Jackson stood out in Jamestown's Republican party–dominated community. Yet, that never hurt his legal practice. So too, years later he remained an "outsider" inside F.D.R.'s Ivy League–dominated inner circle. As he reflected:[18]

> I was never strictly a New Dealer in the sense of belonging to the crowd of young college men that came to Washington and formed a sort of clique. I wasn't a member of the so-called "brain trust." I never even went to college. Neither was I one of the political group, for I never had served in the political national committee, run for office, had a political following or any of that sort of thing. I was pretty much outside of all those groups and yet friendly with many of the members of all of them.

In sum, although growing up in rural New York and rising to the top of the legal profession, Jackson never forgot his roots, while ambitiously pursuing legal and political acclaim. He remained "by temperament an individualist"[19]—driven, disciplined, and self-reliant.

Self-Educated, Erudite and Eloquent

On the High Bench, Justice Jackson remained no less independent, neither a team player nor concerned about building coali-tions. Indeed, he rarely went to lunch with the Brethren on oral argument days, once explaining to a law clerk that all Chief Justice



This family portrait was taken in 1937, probably after Jackson's son William Eldred Jackson (seventeen) graduated from St. Alban's School (daughter Mary Margaret was sixteen). Jackson had come to Washington in 1934 at F.D.R.'s request to serve as general counsel for the Internal Revenue Service and had since been promoted to assistant attorney general for the tax and antitrust divisions in the Department of Justice.

Vinson wanted to talk about was baseball and bridge.[20] His former law clerk and later Justice and Chief Justice (1972-2005), William H. Rehnquist, remembered him as "maintaining throughout his life a sturdy independence of view [that] took nothing on someone else's say-so."[21] Not surprisingly, he found life in the marble temple most congenial, even though often warring with friends and foes on the Bench. As he explained, "The court functions in a way that is pleasing to an individualist. Each justice has his own office and his own staff. It's a completely independent unit. A justice might be in this building and work for a week and never see any associate."[22]

In his short time on the Bench, Justice Jackson delivered 154 opinions of the Court, 46 concurring opinions, 115 dissenting opinions, and another 15 separate opinions concurring and dissenting in part.[23] Among his most notable opinions for the Court was *Wickard v. Filburn* (1942).[24] Writing for the Court, Jackson again transcended the localism of his farming heritage and defended the New Deal vision for the role of government in leading a national economic recovery from the Great Depression. He was always a small "d" and a big "D" Democrat. In *Wickard*, he confidently upheld the Agricultural Adjustment Act of 1938—a key piece of New Deal legislation authorizing the executive branch to set quotas for farmers' crops—crops entirely grown and consumed on a single farm—in order to stabilize prices in the country. In affirming Congress's broad power to regulate interstate commerce under Article I of the Constitution, and the aggregation principle underlying a national economic common market, *Wickard* underscored as well the

As Solicitor General and Attorney General, Jackson argued twenty-five cases before the Supreme Court, bringing his total to forty-four (he had already argued fourteen before becoming Solicitor General). This photograph shows him in 1940 when he became Attorney General.

post-1937 Roosevelt Court's deference to Congress over national economic regulation. Moreover, *Wickard* stood the test of time, even though the Court under Chief Justices Warren E. Burger (1969-1986), William H. Rehnquist (1986-2005), and John G. Roberts, Jr. (2005-present) has moved in the direction of curbing such assertions of congressional power.[25]

No less memorable are his opinions striking down compulsory flag-salute statutes in *West Virginia State Board of Education v. Barnette* (1943);[26] his concurrence with a still widely-cited pragmatic analysis of presidential power in the famous "Steel Seizure case," *Youngstown Sheet & Tube Co. v. Sawyer* (1952);[27] and his dissent from the majority's decision to uphold the government's relocation and internment of Japanese-Americans during World War II.[28]

Throughout his career, he was an active speaker, campaigner, and writer.[29] The year he was appointed to the Court his first book, **The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics**,[30] appeared. Written while serving as S.G. and Attorney General, it reviewed the Court's pre-1937 defense of the old constitutional order against the rising progressive political tide and the battle over F.D.R.'s "Court-packing" proposal to increase the number of Justices from nine to fifteen in order to secure a majority favorable to upholding New Deal programs. The lesson Jackson drew from that battle and the Court's so-called "switch-in-time-that-saved-nine"—abandoning its jurisprudence of laissez-faire capitalism—was that, though judicial supremacy is central to the rule of law, if the Court gets too far out of step with the country it will confront a backlash. He understood that the power of judicial review in the long run rests, in the words of Chief Justice Edward Douglas White (1910-1921), "solely upon the approval of a free people."[31]

While on the Bench, among other extra-judicial publications were **Full Faith and Credit: The Lawyer's Clause of the Constitution**[32] and two books on the Nuremberg

Jackson's first book, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*, appeared in 1941, his first year on the Court. He examined the Court-packing battle of 1937 and concluded that, though judicial supremacy is central to the rule of law, if the Court gets too far out of step with the country it will confront a backlash. Justice Jackson is pictured above with his wife, Irene.

One of Jackson's most influential opinions was *Wickard v. Filburn*, in which he upheld the Agricultural Adjustment Act of 1938—a key piece of New Deal legislation authorizing the executive branch to set quotas for farmers' crops in order to stabilize prices in the country. In doing so, Jackson transcended the localism of his upstate New York farming heritage.

trials.[33] In addition, in the early 1950s, he worked on a manuscript on F.D.R., which appeared posthumously.[34] Another book, **The Supreme Court in the American System of Government**,[35] was published shortly after his death in 1955 at the age of sixty-two. It was prepared as three lectures on the Supreme Court: (1) "as a Unit of Government," (2) "as a Law Court," and (3) "as a Political Institution." They were written and to be given as the Godkin Lectures at Harvard in 1954-1955. Significantly, they were also written in the spring and summer of 1954, while recovering from a heart attack in the hospital and after his last draft of his unpublished opinion on *Brown v. Board*. That book thus reflects his ultimate thinking about the role of the Court as a legal and a political institution, as well as his reflections on its role in the desegregation controversy.

The **Supreme Court in the American System of Government** was a kind of bookend to the earlier **The Struggle for Judicial Supremacy**. In both, as in his unpublished *Brown* opinion,[36] he candidly acknowledged that major constitutional cases and controversies are inexorably "political." As he candidly put it: "Any decision that declares the law under which a people must live or which affects the powers of their institutions is in a very real sense political."[37] At the same time, he never doubted if the Court's rulings went too far or too fast—whether in the direction of waging a rearguard action (as against the New Deal before 1937) or fighting in the vanguard (as after 1937 with rulings like *Brown*)—the Court invites confrontation and popular demands for curbing its power. That was the lesson of the 1937 "constitutional crisis." Indeed, recalling F.D.R.'s battle over the Court, he emphasized that "not one of the basic power conflicts

which precipitated the Roosevelt struggle against the judiciary has been eliminated or settled, and the old conflict between the branches of Government remains, ready to break out again whenever the provocation becomes sufficient."[38] For that reason, he repeatedly warned against the Court seizing "the initiative in shaping the policy of the law, by either constitutional interpretation or by statutory construction."[39]

Justice Jackson's opinions from the Bench remain widely admired no less than his oral advocacy and extra-judicial writings. His style, as Freund observed, was "artistry. He had style to delight, grace and power of expression to captivate .... [gusto] for the swordplay of words."[40] Philip Kurland, a University of Chicago Law School professor who had clerked for Justice Frankfurter and later planned a biography of Jackson, likewise praised his work as "probably the best writing that a Justice of the Supreme Court has ever produced."[41] One of Jackson's own law clerks characterized his writing as "incisive and effective. He did not employ purple prose or picturesque language. His strength was in his ability to utilize clear, expressive, distinctive language appropriate to the particular occasion."[42] Jackson was "gifted and beguiling," "ineluctably charming," a "naturalist," in Justice Frankfurter's words: "He wrote as he talked, and he talked as he felt. The fact that his opinions were written talk made them as lively as the liveliness of his talk."[43]

His literary flair and the ability to turn a phrase has rarely been matched on the Court. Dissenting, for example, from Justice Douglas's opinion overturning a conviction for breach of peace in *Terminiello v. Chicago* (1949),[44] he charged the bare majority with threatening to "convert the constitutional Bill of Rights into a suicide pact." Arthur Terminiello had been convicted for an inflammatory speech denouncing racial groups before a crowded auditorium. In such circumstances, like Justice Oliver Wendell Holmes (1902-1932), Jackson would have weighed the individual's freedom of expression against the interests of the community, and decide whether there was a "clear and present danger."[45]

When it came to constitutional interpretation, Jackson was neither an "absolutist" nor an uncompromising libertarian, like Justices Black and Douglas.[46] Still, like the others on the Roosevelt Court, he could not escape the legal realist movement and liberal legalism that swept legal education and the profession in the first half of the twentieth century.[47]

American legal realism debunked the traditional view, as Holmes put it, that judges are mere "oracles of the law,"[48] who discover and declare law as "a brooding omnipresence in the sky."[49] Instead, legal realism taught that judges in fact "make law" and that the law has an indeterminancy. As Chief Justice Stone, a Republican and judicial conservative, reflected in a letter to Princeton's constitutional historian, Edward Corwin: "I always thought the real villain in the play was [Sir William] Blackstone, who gave to both lawyers and judges artificial notions of the law which, when applied to constitutional interpretation made the Constitution a mechanical and inadequate instrument of government."[50]

Justice Frankfurter elaborated (although rarely publicly articulated) that view in a rather snide letter to his frequent antagonist and the standard bearer of "absolute literalism," Justice Black:[51]

> I think one of the evil features, a very evil one, about all this assumption that judges only find the law and don't make it, often becomes the evil of a lack of candor. By covering up the law-making function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do ....
>
> That phrase "judicial legislation" has become ever since a staple of a term of condemnation. I, too, am opposed

"He wrote as he talked, and he talked as he felt. The fact that his opinions were written talk made them as lively as the liveliness of his talk," said Felix Frankfurter (above) of Jackson.

> to judicial legislation in its invidious sense, but I deem equally mischievous—because founded on an untruth and an impossible aim—the notion that judges merely announce the law which they find and do not themselves inevitably have a share in the law-making. [T]he difficulty comes from arguing in terms of absolutes when the matter at hand is conditioned by circumstances, is contingent upon the everlasting problem of how far is too far and how much is too much.

For Justice Frankfurter, the issue was not whether judges make law but when, how, and how much. He concluded, quoting Justice Holmes' quip that, "'they can do so only interstitially; they are confined from the molar to molecular motions.' I used to say to my students that legislatures make law wholesale, judges retail."

Justice Jackson was, nonetheless, much more candid about judges making law and rendering political decisions than Justice Frankfurter and some later Justices. Moreover, he did not seek reassurance with purported reliance on the Framers' "original intent" or the pretense of "strict constructionism." His widely cited concurring opinion in the "Steel Seizure Case" remains illustrative. There, Justice Black for the Court rejected President Truman's claim of inherent power to seize steel mills in the interest of "national security" during the Korean "war." Justice Jackson, however, distanced his pragmatic position from Justice Black's absolute "literalism"—just as he also did with respect to interpreting the scope of the Fourteenth Amendment's due process clause.[52] Hence, in *Youngstown Sheet & Tube* he was moved to observe: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams of Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other." Not to leave it at that, tongue-in-cheek he cited contradictory statements on presidential power by Alexander Hamilton versus James Madison, Professor William Howard Taft versus President Theodore Roosevelt, and Professor Taft versus President Taft. In his unpublished opinion in *Brown*, he would likewise find the record of the drafting and ratification of the Fourteenth Amendment ambiguous and inconclusive, revealing little definitive except that it was "a passionate, confused, and deplorable era."

Claims to "strict constructionism" or "literalism" were deemed not merely not determinative but often misleading. Justice Jackson ridiculed such claims for actually leading to the "[l]oose and irresponsible use of adjectives [that] colors all non-legal

and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings."[53]

In addition, in his pragmatic and prudential fashion he emphasized that governing "does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

In writings on and off the Bench, Jackson was both a careful literary stylist and an occasionally unpredictable pragmatic balancer. In his view, as explained in the Godkin Lectures, the Court has a crucial "political function" in reconciling competing constitutional values:[54]

> In a society in which rapid changes tend to upset all equilibrium, the Court, without exceeding its own limited powers, must strive to maintain the great system of balances upon which our free government is based. Whether these balances and checks are essential to liberty elsewhere in the world is beside the point; they are indispensable to the society we know. Chief of these balances are: first, between the Executive and Congress; second, between the central government and the states; third, between state and state; fourth, between authority, be it state or national, and the liberty of the citizen, or between the rule of the majority and the rights of the individual.

Furthermore, he was especially frank about "how thin is the line that separates law and politics."[55] In his Godkin Lectures and unpublished opinion in *Brown*, he elaborated by quoting Justice Benjamin Cardozo (1932-1938) about the difference between sitting on the New York Court of Appeals and on the Supreme Court: "[The New York Court of Appeals] is a great common law court; its problems are lawyers' problems. But the Supreme Court is occupied chiefly with statutory construction—which no man can make interesting—and with politics." Justice Cardozo, according to Jackson, acknowledged that the Court was a political institution, not in the "sense of partisanship but in the sense of policy-making."[56] So too, in his chapter "Government by Lawsuit" in **The Struggle for Judicial Supremacy**, he acknowledged the limitations of lawsuits and legal procedures for forging public policy, while at the same time embracing the inevitability of exercising such power in deciding constitutional controversies.

Justice Jackson's understanding of the intersection of law and politics, thus, differed significantly from Justice Frankfurter's. Their differences bear emphasizing since both were known for advocating "judicial self-restraint." As Judge Charles D. Breitel once perceptively observed: "the two of them often reached the same views and the same conclusions and the same results in cases, but by entirely different ways."[57]

To be sure, both agreed that constitutional law, in Frankfurter's words, "is not at all a science, but applied politics."[58] And in his Godkin Lectures Justice Jackson candidly admonished: "Only those heedless of legal history can deny that in construing the Constitution the Supreme Court from time to time makes new constitutional law or alters the law that has been. And it is idle to say that this is merely the ordinary process of interpretation."[59]

Still, they did not share a "common eye" (and, thus, drew different conclusions about the role of the Court). How could they, Frankfurter noted, given "the great

differences in [their] backgrounds." One "was a child of the country" and rural America, the other of "the big city" and an immigrant. One was self-trained, the other Harvard educated. More importantly, one took great pride in his celebrated art of advocacy, while the other was a self-consumed academic—a life-long professor. As Justice Frankfurter concluded in a rather self-serving tribute after Jackson's death: "The function of the advocate is not to enlarge the intellectual horizon. His task is to seduce, to seize the mind for a predetermined end, not to explore paths to truths. There can be no doubt that Jackson was specially endowed as an advocate."[60]

On the Bench, Justice Frankfurter's brand of "judicial self-restraint" was exemplified in championing "standing doctrines" such as mootness, ripeness, and "political questions."[61] He did so in order to delay or avoid deciding cases that might spark political controversy. And not surprisingly, he pushed for delays in deciding *Brown* and other segregation cases. He, perhaps, took too seriously and too far his beloved Justice Brandeis' admonition that "[t]he most important thing we do is not doing."[62]

By contrast, while advocating "judicial self-restraint" Justice Jackson candidly admitted what the Court was doing and why—namely, resolving conflicts in constitutional politics by balancing competing interests. Even before coming to the Court, Jackson diverged from Frankfurter's stance. In his first book, published the year he joined the Court, Jackson quoted extensively from an essay written by Frankfurter before his own appointment to the Court. In an essay on "The Supreme Court of the United States," appearing in a 1939 collection **Law and Politics**, Frankfurter praised "elaborate and often technical doctrines for postponing if not avoiding constitutional adjudication." He did so because "prolonged uncertainty was less harmful than 'the mischief of premature judicial intervention,'" by which the "Court's prestige within its proper sphere would be inevitably impaired."[63] To the contrary, Jackson responded:[64]

> Must we choose between "*premature judicial intervention*" on the one hand and "*technical doctrines for postponing if not avoiding constitutional adjudication*" on the other? If that were our choice I would think Mr. Frankfurter had chosen wisely. But need we be gored by either horn of such a dilemma? Can we not establish a procedure for determination of substantial constitutional questions at the suit of real parties in interest which will avoid prematurity or advisory opinions on the one hand and also avoid technical doctrines for postponing inevitably decisions? Should we not at least try to lay inevitable constitutional controversies to early rest?

Justices Jackson's and Frankfurter's views of the role of the Court and exercise of judicial review were subsequently put into bold relief in the second flag-salute decision, *West Virginia State Board of Education v. Barnette* (1943). There, Justice Jackson overruled *Minersville School District v. Gobitis* (1940),[65] which Justice Frankfurter had delivered (with only Justice Stone dissenting), upholding compulsory flag salutes at the beginning of each school day over the objections of Jehovah's Witnesses and their First Amendment free exercise of religion claims. In the three years after *Gobitis*, F.D.R. had elevated Justice Stone to Chief Justice and appointed Justices Jackson and Byrnes (the latter was replaced a year later by former liberal law school professor Wiley Rutledge). Justices Black, Douglas, and Frank Murphy, who had voted with Frankfurter's majority in *Gobitis*, now switched their positions in *Barnette*. Chief Justice Stone in turn assigned the Court's opinion to Justice Jackson, who notably

based the Court's decision on the First Amendment guarantee for freedom of speech and eloquently wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted ....
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control ...

Not to be outdone, dissenting Justice Frankfurter issued (ironically) an impassioned and highly personal appeal to his ideal of judicial impartiality and self-restraint that warrants quoting:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion .... But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores .... The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench.

Justice Jackson would have none of that and ridiculed Frankfurter's claim that "national unity [inspired by mandatory saluting of the flag] is the basis of national security." With his typical flair, Jackson countered that "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." He also cautioned against Frankfurter's purblind deference to legislative majorities by recalling the Romans' attempt to ban Christianity and, alluding to the more recent experience in Nazi Germany, observing that, "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

Principled Pragmatism

Justice Jackson was by no means a libertarian like his and Frankfurter's frequent foes, Justices Black and Douglas. In *Barnette*, he did not single out the Jehovah's Witnesses for special treatment because of their religious beliefs. Concurring in a decision handed down the same term as *Barnette* upholding an ordinance forbidding the ringing of household doorbells even for religious purposes by the Jehovah's Witnesses, Jackson made clear his view that, "The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its limits. Civil government cannot let any group ride roughshod over others simply because their 'consciences' tell them to do so."[66] He underscored (in opposition to the absolutism of Justices Black and Douglas) the importance of balancing individuals' interests against governmental authority by weighing "the realities of life in those communities."[67] Rather than simply deferring to majoritarian democracy as Frankfurter was so inclined, Jackson looked to the deeper implications of the interests involved in other decisions rejecting minorities' objections; one such case, for example, involved ordinances forbidding children from selling religious literature on the city streets.[68] Justice Jackson did so due to his nostalgic sense of community and democratic self-governance in rural America.

While Justices Frankfurter and Jackson advocated judicial "self restraint," they differed fundamentally in their deference to legislative majorities, as their opinions in *Barnette* highlight. Their rival understandings of "judicial self-restraint" registered not only differences in candor but, ultimately, in their visions of the role of the Court. Frankfurter's far more deferential stance toward the operation and outcomes of majoritarian democracy led him to embrace the "passive virtues"[69] of the exercise of judicial review. Whereas, majoritarian democracy for Justice Jackson remained much more constitutionally constrained and, consequently, the Court had a pivotal role to play in overseeing constitutional balances between the majority and minorities. For him, in some cases the Court had "a duty to decide"[70] even politically explosive controversies like that presented in *Brown v. Board.*

Along with his literary flair and commitment to pragmatically balancing competing interests, Justice Jackson was inclined to quote, paraphrase, or draw allusions to classical literary works in support of his positions and when challenging others on the Court. Dissenting in *Everson v. Board of Education* (1947),[71] for instance, he criticized the reasoning of Justice Black's opinion for the Court by quoting the poem "Don Juan" (1819) by British romantic Lord Byron (1788-1824). In *Everson*, Justice Black invoked the "high wall" metaphor of the separation of church and state in holding that, under the Fourteenth Amendment, the First Amendment (dis)establishment clause limits the states no less than the federal government. Yet, his opinion for a bare majority concluded that a New Jersey program of paying for the transportation of students to parochial schools did not run afoul of the separation of church and state. Instead, the busing was an "indirect benefit"—benefitting primarily the children. Justice Jackson and three other dissenters, however, maintained that there should be "strict neutrality" between government and religion. In his words: "The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'"

In another case, Justice Jackson mischievously quoted "Lycidas" (1637) by John Milton (1608-1674), with respect to the judicial mind and his colleagues: "[I]f

fame—a good public name—is as Milton said the 'last infirmity of a noble mind,' it is frequently the first infirmity of a mediocre one."[72] Years later, he drove home the need for judicial humility, reminiscent of the position laid out in **The Struggle for Judicial Supremacy**, with the quip: "We [judges] are not final because we are infallible, but we are infallible only because we are final."[73]

Notably, Justice Jackson most frequently and fondly paraphrased or alluded to a poem by Matthew Arnold (1822-1888), a late Victorian writer known for his malaise and restrained prose. He did so in the opening sentence of his draft opinion prepared for but not delivered in *Brown v. Board*. "Since the close of the Civil war," Jackson wrote, "the United States has been 'hesitating between two worlds—one dead, the other powerless to be born." So too, chapter three of his **The Struggle for Judicial Supremacy** is entitled: "The Court Hesitates between Two Worlds." Arnold's poem "Stanzas from the Grande Chartreuse" (1855) reads: "Thinking of his own gods, a Greek, In pity and mournful awe might stand Before some fallen Runic stone—for both were faiths, and both are gone. Wandering between two worlds, one dead, The other powerless to be born, With nowhere yet to rest my head, Like these, on earth, I wait forlorn."

Undoubtedly, Jackson found the metaphor appealing for a number of reasons. It was also apt in a number of ways. The Civil War failed to resolve the country's racial problem. Slavery ended yet segregation remained. And desegregation appeared only dimly on the political horizon, with integration far beyond that. Born in the nineteenth century and confronting *Brown* at the mid-twentieth century, Justice Jackson looked backwards and forward to the twenty-first century. The nineteenth century was the age of "separate but equal"—symbolized by Homer Plessy, an octoroon (one-eighth black and seven-eighths white), and constitutionally sanctioned by the Court in *Plessy v. Ferguson* (1896).[74] *Brown* presented a historic turning point, the most controversial decision in the twentieth century. And Justice Jackson foresaw the pushback, decades of resistance, and potential for disaster by judicial decree comparable to (if not surpassing) that engulfing the Court and the country during the 1937 constitutional crisis. Still, he looked beyond to the inexorable change that was transforming the country.

ENDNOTES

The author appreciates the comments on an early draft by University of Chicago Law School Professor Dennis J. Hutchinson and St. John's University School of Law Professor John Q. Barrett. This is part of a larger work in progress on Justice Jackson.

[1] Paul A. Freund, "Mr. Justice Jackson and Individual Rights," in Charles Desmond, et al., eds. **Mr. Justice Jackson: Four Lectures in His Honor** (New York: Columbia University Press, 1969), at p. 36.

[2] Notably, Jackson saved two articles from the 1951 *Jamestown Sun Magazine* in the back of the binder for his draft autobiography. Robert Jackson Papers, Box 189, Manuscripts Division, Library of Congress (LC). One recalled that Jackson, at age twenty-five, read from the **Bhagavad Gita** at the funeral of a friend and theosophist, Eaton La Rue Moses.

[3] Robert H. Jackson, Oral History Interview, Jackson Papers, Box 190, (LC).

[4] Robert H. Jackson, "Draft of Autobiography," Jackson Papers, Box 189, LC., pp. 2-3, 5, 8, and 18.

[5] Michael Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York: Oxford University Press, 2004), at p. 309. See also Laura K. Ray, "A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert H. Jackson," 29 *Indiana Law Review* 535 (1996), at p. 537.

[6] For further discussion see John Barrett, "Albany in the Life Trajectory of Robert H. Jackson," 68 *Albany Law Review* 513 (2005), at pp. 516-25.

[7] For further discussion see David M. O'Brien, **Storm Center: The Supreme Court in American Politics** (New York: W.W. Norton, 9th ed., 2011), at Ch. 2.

[8] Quoted in Eugene Gerhart, **America's Advocate: Robert H. Jackson** (New York: Bobbs-Merrill, 1958), at p. 36.

[9] E. Barrett Prettyman, Jr., "Robert H. Jackson: 'Solicitor General for Life,'" 1992 *Journal of Supreme Court History* 75 (1992), p. 76 and note 69, discussing discrepancies in the number of cases Jackson argued.

[10] Quoted by Gerhart, supra, at p. 191, and in Philip B. Kurland, "Robert H. Jackson," in Leon Friedman and Fred Israel, eds., **The Justices of the United States Supreme Court 1789-1969** (New York: Chelsea House, 1969), at p. 2557. *See* also Jackson's "Draft Autobiography," *supra*, Jackson Papers, Box 189, LC.

[11] Jackson, Oral History Interview, Jackson Papers, Box 190, pp. 1475-1476, LC.

[12] Quoted and discussed in Prettyman, "Robert H. Jackson," *supra*, at p. 75-76.

[13] Quoted *Id.*, at p. 77.

[14] Quoted *Id.*, at p. 82.

[15] In 2003, Lawrence Wallace, former deputy solicitor general, ended his career with 157 cases, and in the nineteenth century, when the Court's bar was much smaller and transportation more difficult, Senator Daniel Webster and Walter Jones are believed to have argued more cases. For further discussion *see* William Harbaugh, **Lawyer's Lawyer: The Life of John W. Davis** (New York: Oxford University Press, 1973.

[16] *See*, e.g., Jeffrey Hockett, **New Deal Justice** (Lanaham, MD.: Rowman & Littlefield, 1996), at pp. 220-226.

[17] Robert H. Jackson, "Tribute to Country Lawyers: A Review," 30 *A.B.A. Journal* 136 (1944), at p. 139.

[18] Oral History Interview, Jackson Papers, Box 190, LC, at p. 350.

[19] Robert H. Jackson, 1 **Unpublished Speeches** 12, Jackson Papers, Box 31, LC.

[20] According to James Marsh as retold to the author by Professor Dennis J. Hutchinson.

[21] William H. Rehnquist, "Robert H. Jackson: A Perspective Twenty-Five Years Later," 44 *Albany Law Review* 533 (1980), at p. 536.

[22] Jackson, Oral History, supra, at p. 1104-105.

[23] Based on Linda A. Blandford and Patricia Russell Evans, eds., **Supreme Court of the United States 1789-1980: An Index to Opinions Arranged by the Justice, Vol. II: 1902-1980**, 861-871 (New York: Kras International Publications, 1983). Note, however, omitted from that list is Justice Jackson's opinion for the Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and is included here.

[24] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[25] The ruling in *Wickard* was reaffirmed, for example, in *Gonzales v. Raich*, 545 U.S. 1 (2005). For further discussion see, e.g., David M. O'Brien, **Constitutional Law and Politics, Vol. 1, Struggles for Power and Governmental Accountability** 589-668 (New York: W.W. Norton, 8th ed., 2011).

[26] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[27] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[28] *Korematsu v. United States*, 323 U.S. 214 (1944).

[29] A "Bibliography of Extrajudicial Writings by Robert H. Jackson" is available from the Robert H. Jackson Center and at www.roberthjackson.org/the-man/bibliography/.

[30] Robert H. Jackson, **The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics** (New York: Alfred Knopf, 1941).

[31] Edward Douglas White, "The Supreme Court of the United States," 7 *American Bar Association Journal* 341 (1921).

[32] Robert H. Jackson, **Full Faith and Credit: The Lawyer's Clause of the Constitution** (New York: Columbia University Press, 1945).

[33] Robert H. Jackson, **The Case Against the Nazi War Criminals** (New York: Alfred Knopf, 1946); and **The Nuremberg Case** (New York: Alfred Knopf, 1947).

[34] Robert H. Jackson, with an introduction and edited by John Q. Barrett, **That Man: An Insider's Portrait of Franklin D. Roosevelt** (New York: Oxford University Press, 2003).

[35] Robert H. Jackson, **The Supreme Court in the American System of Government** (Cambridge: Harvard University Press, 1955).

[36] In Justice Jackson Papers, Box 184, LC. The unpublished opinion is excerpted and discussed in David M. O'Brien, **Constitution Law and Politics, Vol. 2, Civil Rights and Civil Liberties**, pp. 1456-1459 (New York: W. W. Norton & Co., 8th ed., 2011); and in Mark Tushnet, ed., **I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases** (Boston: Beacon Press, 2008), though notably none of Jackson's drafts gives any indication of being prepared as a dissent.

[37] Jackson, **The Supreme Court in American Government**, *supra*, at p. 53.

[38] *Id.*, at p.9.

[39] *Id.*, at p. 79.

[40] Paul A. Freund, "Address of Paul A. Freund at a meeting of the Bar of the Supreme Court of the United States" (1955), available from the Jackson Center at www.roberthjackson.org/the-man/speeches-articles/.

[41] Philip Kurland, "Justice Robert H. Jackson—Impact on Civil Rights and Civil Liberties," 1977 *Law Forum* 551 (1977), at p. 555.

[42] James Marsh, "The Genial Justice: Robert H. Jackson," 68 *Albany Law Review* 41 (2004), at p. 47.

[43] Felix Frankfurter, "Mr. Justice Jackson," 68 *Harvard Law Review* 937 (1955), reprinted in Philip Kurland, **Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution** 508 (Cambridge: Harvard University Press, 1970), at 510.

[44] *Terminiello v. Chicago*, 337 U.S. 1 (1949) (Jackson, J., dis. op.), at p. 37.

[45] *See*, e.g., Justice Holmes' opinions in *Schenck v. United States*, 249 U.S. 47 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919). *See* also Justice Jackson's concurring opinion in *Dennis v. United States*, 341 U.S. 494 (1951); and his separate opinion in *American Communications Association v. Douds*, 339 U.S. 382 (1950).

[46] *See*, e.g., Hugo L. Black, **A Constitutional Faith** (New York: Knopf, 1968).

[47] *See*, e.g., Wilfred Rumble, **American Legal Realism: Skepticism, Reform, and the Judicial Process** (Ithaca: Cornell University Press, 1968); and William W. Fisher, III, Morton J. Horwitz, and Thomas A. Reed, eds., **American Legal Realism** (New York: Oxford University Press, 1993).

[48] Oliver Wendell Holmes, "The Path of Law," 10 *Harvard Law Review* 457 (1897).

[49] *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[50] Letter to Edward Corwin (November 5, 1942), Harlan Fiske Stone Papers, Box 10, Manuscripts Division, Library of Congress (LC).

[51] Letter to Justice Black (December 15, 1939), Frankfurter Papers, Box 13, LC.

[52] *See* and compare, e.g., the opinions of Justices Reed, Black, Frankfurter, and Jackson in *Adamson v. California*, 332 U.S. 46 (1947), on the incorporation of the guarantees of the Bill of Rights into the Fourteenth Amendment and their application to the states.

[53] *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., con. op.), at pp. 646-47.

[54] Robert H. Jackson, **The Supreme Court in the American System of Government** (Cambridge: Harvard University Press, 1955), at p. 61. *See* also *id.*, at 62-68.

[55] *Id.*, at 31.

[56] Justice Jackson quoting Justice Cardozo, *id.*, at p. 54.

[57] Charles D. Breitel in Charles S. Desmond, Paul A. Freund, Potter Stewart, and Lord Shawcross, **Mr. Justice Jackson: Four Lectures in His Honor** (New York: Columbia University Press, 1969), at p. 31.

[58] Felix Frankfurter, edited by E.F. Prichard, Jr., and Archibald MacLeish, *Law and Politics* (New York: Harcourt, Brace, and Co., 1939), at p. 6.

[59] Jackson, **The Supreme Court in the American System of Government**, *supra*, at p. 56.

[60] Felix Frankfurter, in Kurland, **Felix Frankfurter on the Supreme Court**, *supra*, at pp. 508-511.

[61] *See* for example Justice Frankfurter's opinions in *Colegrove v. Green*, 328 U.S. 549 (1946) (on the "political question" doctrine); and *Poe v. Ullman*, 367 U.S. 497 (1961) (on standing, mootness, and ripeness).

[62] *Ashwander v. T.V.A.*, 297 U.S. 288 (1936).

[63] Justice Jackson quoting Justice Frankfurter in **The Struggle for Judicial Supremacy**, *supra*, at pp. 305-306.

[64] *Id.*, at p. 306.

[65] *Minersville School District v. Gobitus*, 310 U.S. 568 (1940).

[66] *Douglas v. City of Jeannette*, 319 U.S. 157 (1943) (Jackson, J., con. op.), at p. 179.

[67] *Id.*, at p. 174.

[68] *See*, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Jackson, J., con. op.).

[69] For a further discussion *see* Justice Frankfurter's former law clerk and Yale Law School Professor Alexander Bickel's **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (New York: Bobbs-Merrill, 1962), at pp. 1-33 and 111-98; and his article "The Supreme Court, 1960 Term—Foreword: The Passive Virtues,"' 75 *Harvard Law Review* 40 (1961).

[70] For a further discussion *see* Gerald Gunther, "The Subtle Vices of the 'Passive Virtues,"' 64 *Columbia Law Review* 1 (1964), and compare Bickel, *id.*

[71] *Everson v. Board of Education*, 330 U.S. 1 (1947) (Jackson, J., dis. op.), at p. 19.

[72] *Craig v. Harney*, 331 U.S. 367 (1947) (Jackson, J., dis. op.), at p. 396.

[73] *Brown v. Allen*, 344 U.S. 443 (1953) (Jackson, J., con. op.), at p. 540.

[74] *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* generally Charles Lofgren, **The Plessy Case: A Legal-Historical Interpretation** (New York: Oxford University Press, 1987).

The Supreme Court as an Issue in Presidential Campaigns

WILLIAM G. ROSS

Although the Supreme Court's decisions have far-reaching political consequences and presidential elections profoundly affect the Court by determining who will appoint the Justices, the Court only sporadically has emerged as a significant issue in presidential campaigns. During the nineteenth and most of the twentieth centuries, the Court emerged as an issue only at times when its decisions were particularly controversial. During the past forty years, as voters have acquired more awareness of the political significance of Supreme Court appointments, the Court has become a persistent—but nearly always peripheral—election issue. Controversies concerning the Court, however, have provided some dramatic moments in presidential campaign history on the relatively rare occasions when candidates have placed the Court at center stage.

Judicial issues first played a role in the election of 1800, when the controversy over the federal judiciary's enforcement of the Alien and Sedition Acts may have helped to elect Thomas Jefferson to the presidency. Although this election preceded the 1801 appointment of John Marshall to the chief justiceship and the emergence of the Court as a powerful counterweight to Congress and the President, Jefferson's election reflected widespread discontent with the federal judiciary's imposition of harsh penalties under these statutes, which were designed to stifle opposition to the policies of President Adams, who steadfastly rejected attempts to lend American support to France in its war with Great Britain. During the election campaign, these laws acquired a political importance that exceeded their practical importance since Jeffersonians claimed that they represented a political attitude that threatened liberty itself.[1] Opposition to the statutes and attacks on the federal judiciary's enforcement of the laws encouraged John Adams to appoint Marshall to the chief justiceship during the waning days of his presidency. During the next two decades, the Marshall Court's controversial decisions protecting vested property interests, expanding the power of the federal government and increasing the

authority of the judiciary, generated hostility toward the Court among Jeffersonian Republicans, some of whom advocated measures to curtail federal judicial power. The Court, however, was not a significant issue in presidential elections, except in 1832, when the campaign was dominated by President Jackson's opposition to the Bank of the United States, which Congress had created to facilitate federal financial transactions and to create a source of credit for private businesses. To Jackson, this symbolized the expansion of federal power at the expense of the states and the aggrandizement of the power of wealthy merchants, financiers, and speculators at the expense of farmers, craftsmen, and owners of small businesses. The Court could not help but to be swept into the maelstrom since it had upheld the constitutionality of the Bank in *McCulloch v. Maryland* (1819),[2] a decision that provided a sweeping vision of congressional power to legislate for the nation's welfare under the Constitution's Necessary and Proper Clause. In vetoing the renewal of the Bank's charter in July 1832, Jackson declared that "[t]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[3] As one scholar has explained, Jackson's transformation of the election into a referendum on his veto "placed the constitutional role of the Court in doubt."[4] Jacksonians derogated the Court's power of judicial review–even though the Court in *McCulloch* had not struck down the bank statute, while National Republicans claimed that criticism of judicial review called into question the rule of law. Jackson's reelection, however, did not result in any erosion of the Court's power. Although Chief Justice Taney and other Justices appointed by Jackson were less inclined than Marshall to favor vested property interests and the expansion of congressional power, the Taney Court used the power and prestige won for the Court during the Marshall era to craft a doctrine of state police power that helped to facilitate the continuation of economic development along capitalistic lines. The Court itself was not at the vortex of a presidential campaign until 1860, following its notorious *Dred Scott* decision, which held that Congress could not constitutionally exclude slavery from the territories.[5] Although the Justices apparently hoped that this decision would resolve an issue that the political system had failed to settle, Dred Scott exacerbated the controversy over slavery and helped to precipitate the Civil War. Bitterly assailed by the nascent Republican party, Dred Scott provided opponents of slavery with a tangible target on which to focus.[6] The decision was a prominent feature of the debates between Abraham Lincoln and Stephen Douglas in their 1858 contest to represent Illinois in the U.S. Senate,[7] and fear of the extension of slavery was such a dominant force in the 1860 presidential election that the legal scholar Charles Warren concluded that "Chief Justice Taney elected Abraham Lincoln to the Presidency."[8]

In contrast with later periods in which judicial decisions were controversial, opponents of Dred Scott tended to advocate the repudiation of this decision rather than the curtailment of the Court's institutional powers. As one scholar has explained, the "Republican remedy for the Dred Scott decision was to win the election of 1860, change the personnel of the Court, and have the decision reversed."[9] Lincoln believed that "a Republican victory at the polls would be enough in itself to prevent further pro-slavery onslaughts by the existing Court."[10] Although Republicans bitterly condemned the decision, one historian has explained that Republican attacks on the Court "were softened during the campaign or dropped outright" as "part of the Republican attempt to moderate their stance and undercut charges that the party was disloyal to the Constitution."[11] Republican campaign literature, however, did not hesitate to criticize *Dred Scott* along with Taney.[12]

The Supreme Court first became a subject of political campaigns in the 1896 contest between William McKinley (left) and William Jennings Bryan (right). Bryan criticized three 1895 Supreme Court decisions striking down the federal income tax, excluding manufacturing from the scope of the Sherman Antitrust Act, and upholding the conviction of labor leader Eugene V. Debs for violating a federal injunction during a strike.

While the Republican platform did not actually mention *Dred Scott* by name, its disapproval of that decision was unmistakable. The platform declared that "the new dogma that the Constitution … carries slavery into the any or all of the territories … is a dangerous political heresy" that was at odds with the text of the Constitution as well as legislative and judicial precedent, and was "subversive of the peace and harmony of the country."[13]

Judicial issues first became regularly intertwined with presidential politics during the period between the 1890s and 1937, when the Supreme Court, lower federal courts, and state courts carefully scrutinized the constitutionality of social and economic regulatory legislation that was designed to ameliorate some of the harsher effects of the Industrial Revolution. These statutes presented novel issues of law since they often interfered with traditional concepts of private property or exceeded generally limits on congressional power under the commerce and taxing powers. Although the courts upheld more regulatory legislation than they struck down, the Court struck down several high-profile statutes, and the specter of judicial nullification of reform legislation demoralized progressive attempts to enact such laws. The courts during this period also often restricted the activities of labor unions, often through the use of injunctions against strikes, boycotts, and organizational efforts. Critics of the Supreme Court and other courts complained that a "judicial oligarchy" was thwarting the rights of the people and proposed various measures to curtail judicial power.

The Court's responses to economic regulation and the growing assertiveness of organized labor first became an issue during the tumultuous and pivotal contest between William McKinley and William Jennings

Bryan in 1896 in the wake of the triad of 1895 Supreme Court decisions striking down the federal income tax, excluding manufacturing from the scope of the Sherman Antitrust Act, and upholding the conviction of labor leader Eugene V. Debs for violating a federal injunction during a strike.[14] The Democratic platform blamed the federal government's deficit on the income tax decisions, alleging that the Court had overturned nearly a century of precedent. The platform also assailed "government by injunction as a new and highly dangerous form of oppression by which Federal judges become at once legislators, judges, and executioners" and proposed a federal statute to permit the use of juries in some cases involving contempt of court.[15] Keenly aware that derogation of theCourt could play into the hands of Republicans who sought to portray him as a dangerous radical, Bryan criticized the Court's decisions as he vigorously barnstormed through the nation, but he was careful to avoid the acerbic rhetoric with which some of his supporters assailed the Court, and he emphasized that he did not challenge judicial review.[16] This did not, however, inhibit various Republicans from alleging that Democrats threatened constitutional government by questioning the Court's decisions.[17]

Judicial issues receded in the election campaigns of 1900 and 1904 before resurfacing to a small degree in 1908, when judicial appointments for the first time became an election issue because of the relatively advanced ages of the Justices.[18] Such concerns were prophetic, for William Howard Taft had the opportunity to nominate six Justices during his single term as President.

By 1912, the surge of Progressivism brought criticism of the courts to a crescendo and ensured that judicial issues were prominent in the presidential election. Some Progressives advocated various measures to restrain judicial power, including abolition of life tenure for federal judges, election of federal judges, and the requirement of a supermajority in decisions striking down legislation. While most of the plethora of progressive proposals for curbing judicial review never advanced beyond rhetoric, Progressives in several Western states secured the enactment of laws to permit the recall of state judges. Conservatives, who found judicial recall shocking, were even more appalled by former President Theodore Roosevelt's proposal for a recall of judicial decisions, which Roosevelt unveiled when he announced his presidential candidacy in February 1912. Roosevelt's recall would have permitted states to allow voters to revise state supreme court decisions that nullified state statutes on state or federal constitutional grounds.[19] Conservatives were not alone in denouncing Roosevelt's proposal as a threat to constitutional government, and Roosevelt soon found the proposal to be an albatross around the neck of his campaign. Although Roosevelt was too stubborn or too committed to the idea to retreat from it, he understandably downplayed his support for it, particularly after he lost the Republican nomination and became the candidate of the newly formed Progressive party. The ability of Roosevelt's opponents to use the recall to portray Roosevelt as a wild and dangerous radical may have caused Roosevelt to criticize the courts less frequently and less stridently during his autumn campaign than he had done during the previous two years.[20]

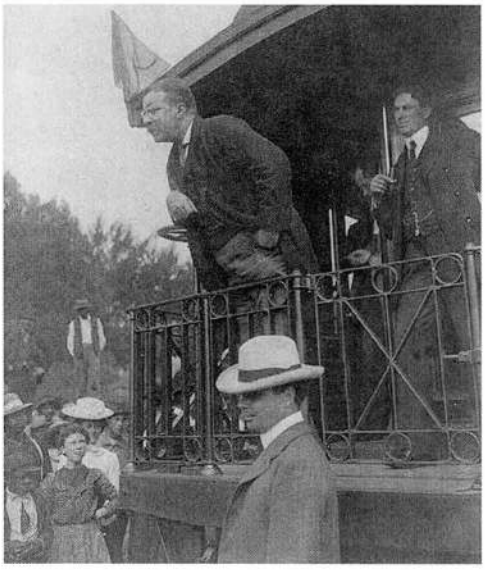
Republicans, however, would not allow the issue to recede and Taft practically made defense of judicial review the centerpiece of his re-election campaign. In accepting the G.O.P. nomination, Taft declared that the preservation of the Constitution was "the supreme issue" of the election and he assailed "hostility to the judiciary and the measures to take away its power and its independence," particularly the judicial recall and measures to restrict the use of injunctions against secondary boycotts and to permit the use of juries in contempt proceedings.[21] The Republican platform echoed these themes, pledging to maintain the "authority and integrity" of the

state and federal courts in order to protect civil liberties and political stability.[22]

In contrast with Taft and Roosevelt, the Democratic nominee, Woodrow Wilson, generally ignored judicial issues in his victorious presidential campaign, apparently fearing that criticism of the courts would offend voters or allow Republicans to brand him as radical.[23] The Democratic platform struck the same note of caution, chiding the Republicans for raising "a false issue respecting the judiciary" and suggesting that "lack of respect for the courts" was widespread.[24]

Although assessment of the precise impact of judicial issues on the 1912 election's outcome is not possible, Roosevelt's criticisms of the courts and his recall proposal did not prevent him from out-polling Taft, with twenty-eight percent of the popular votes and eighty-eight electoral votes.

The Supreme Court's more restrained exercise of judicial review for several years after 1912 and the growing public focus on the prospect of American participation in the First World War helped to ensure that judicial issues were not prominent in the 1916 contest between Wilson and Charles Evans Hughes. The Court nearly became a major issue, however, because Hughes resigned from the Court to accept the Republican nomination. Although Hughes had actively resisted efforts to draft him for the nomination and had accepted it only after Republicans had convinced him that only he could unite their still-fractured party, Hughes's abrupt metamorphosis from jurist to presidential candidate naturally lent credence to the long-standing complaint of progressives and labor unions that judges were merely politicians in black robes.[25] The immediate chorus of outrage over Hughes's acceptance of the nomination included proposals for constitutional amendments to limit political activity by former Justices.[26]



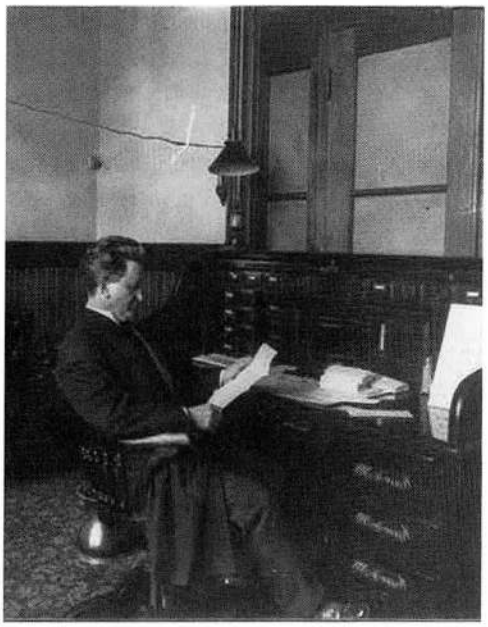
When he announced his presidential candidacy in February 1912, Theodore Roosevelt unveiled his proposal for a recall of judicial decisions, which would have permitted states to allow voters to revise state supreme court decisions that nullified state statutes on state or federal constitutional grounds.

Criticism of Hughes quickly wilted, however, after Wilson refused to permit the Democratic platform to condemn Hughes for resigning from the Court to become a candidate. The widespread perception that Hughes had not sought the nomination also helped to eliminate the Court as an election issue and spared the Court from loss of prestige. As Professor Bickel observed, the hazards that Hughes's candidacy presented to the Court were "negotiated with singular success and luck."[27]

The Court also had at least an indirect impact on the election of 1916 because President Wilson's appointment of Louis D. Brandeis to the Court in January of that year helped Wilson to obtain crucial support of progressives in what was one of the closest presidential elections in history.[28] Many of these progressives had voted for Roosevelt in 1912 and did not believe that Wilson's "New Freedom" reforms had sufficiently advanced the progressive agenda. Moreover, many progressives regarded themselves as Republican. They might have voted for the moderately progressive Hughes in much greater

numbers but for Wilson's nomination of Brandeis, an imaginative, tireless, articulate, and highly successful champion of progressive causes whose membership on the Court ensured that cases involving social and economic regulatory legislation and the rights of labor would receive a sympathetic hearing from a Justice who might be able to influence the thinking of at least some of his Brethren on the Court. Foreign and domestic issues arising out of the First World War dominated the next election in 1920, but judicial issues returned to the fore during the 1924 contest after the Taft Court handed down a number of decisions that restricted labor union activities[29] and invalidated a federal child labor[30] statute and a law regulating wages for women in the District of Columbia.[31] Once again, Progressives produced a multitude of proposals for curbing judicial review, including Wisconsin Senator Robert M. LaFollette's proposal to permit Congress to override Supreme Court decisions by two-thirds votes of both houses. LaFollette first proposed this remedy in 1922 and he continued to advocate it as he campaigned as a third party candidate in 1924, denouncing the Supreme Court decisions that hobbled organized labor and impeded social and economic regulatory legislation. The powerful Committee on Progressive Political Action, which endorsed LaFollette, advocated the virtual abolition of judicial review and called for the election of federal judges for limited terms.[32]

With LaFollette assembling a formidable coalition of intellectuals, liberals, farmers, industrial workers, and ethnic voters, Republicans feared with good reason that he would carry enough Midwestern and Western states to throw the election into the House of Representatives. Borrowing a page from their playbooks of 1896 and 1912, Republicans seized upon LaFollette's criticism of Supreme Court decisions as an ideal means of framing their theme that LaFollette was a dangerous radical who would foment political upheaval that would ruin the nation's burgeoning prosperity. In one of his few campaign speeches, the normally phlegmatic Coolidge feverishly warned that LaFollette's proposal to permit nullification of Supreme Court decisions would encourage "confiscation of property and the destruction of liberty" and that Americans would "see their savings swept away, their homes devastated, and their children perish from want and hunger."[33] In another speech, he alleged that LaFollette's proposal would "destroy the States, abolish the Presidential office, close the courts and make the will of Congress absolute."[34] Meanwhile, Republican vice presidential candidate Charles G. Dawes relished his opportunities to savage LaFollette's proposal in nearly every speech of his campaign.[35] Some Democrats likewise attacked the proposal in apocalyptic rhetoric,[36] as did many prominent attorneys. Hughes, for example, charged that LaFollette's proposal would "denature the Supreme Court" and "destroy



Wisconsin Senator Robert M. LaFollette proposed permitting Congress to override Supreme Court decisions by two-thirds votes of both houses in 1922 and he continued to advocate for it as he campaigned as a third party candidate in 1924, denouncing the Supreme Court decisions that hobbled organized labor and impeded social and economic regulatory legislation.

our system of government,"[37] and a statement signed by many of New York's leading attorneys alleged that "LaFollette's attack upon our Constitution and the Supreme Court is but the first step toward Socialism, Bolshevism, and chaos."[38]

Republicans were particularly adept in using the Court issue as a means of eroding LaFollette's disproportionate support among Roman Catholics, Jews, and Lutherans, who looked to the federal courts for protection against ethnic and religious discrimination in the wake of the resurgent nativism that followed the First World War. Many of these voters, who constituted LaFollette's political base, were grateful to the Supreme Court for its decision in *Meyer v. Nebraska*, which struck down laws prohibiting the teaching of German in parochial and private schools.[39] This decision was particularly important because it cast a pall over a powerful nationwide movement to eliminate parochial education by requiring all children to attend public school. Relying on *Meyer*, a federal district court in March 1924 struck down Oregon's compulsory public education law in a decision that the Supreme Court affirmed after the 1924 election.[40]

Chief Justice Taft, who was worried about the increasing criticism of the Court for its invalidation of economic regulatory legislation, personally encouraged Republicans to use LaFollette's Court-curbing proposal as a political weapon. Taft, for example, advised Coolidge early in his presidential campaign that the Court issue was "so important that it is of great benefit to be stressed,"[41] and he urged the editor of the *St. Louis Post-Dispatch* to praise *Meyer* and the Oregon school decision in editorials denouncing LaFollette's Court proposal.[42] In response to *Meyer*, LaFollette and other progressives pointed out that the Court's use of judicial review had protected vested economic interests far more often than it had fostered non-economic personal liberties, and LaFollette questioned whether people should look toward the Court for protection of their liberties anyway. "In all the history of the world," he told an Omaha audience, "no people has ever looked to the courts as the guardians of its liberties. The liberties of the people rest with the people."[43]

While running for President in 1964, Senator Barry M. Goldwater of Arizona, who perhaps spoke more frequently and more harshly about the Court than any major party's presidential candidate in history, linked his attacks on the Court with the broader themes of his campaign, particularly the threats to states' rights and what he termed America's "moral decay."

LaFollette's volleys against the Court played well with liberals, but even many of LaFollette's most ardent admirers bored easily when their candidate addressed the specific details of judicial decisions. After his supporters vacated Madison Square Garden in droves while LaFollette offered a lesson in the fine points of constitutional law during a speech early in his autumn campaign, LaFollette addressed judicial issues less frequently and in much less detail. Toward the end of the campaign, LaFollette tried to distance himself from his proposal to permit congressional nullification of Supreme Court decisions, admitting that the measure was unlikely to survive the gauntlet of the constitutional amendment process.[44] This reflected LaFollette's recognition that the Republicans had effectively exploited his Court-curbing proposal, as well as his desire to emphasize what he regarded as more important issues.[45] In

order to avoid running afoul of widespread respect for the judiciary, LaFollette also generally avoided personal criticism of Taft, although one of his campaign brochures claimed that it was ironic that Taft, whom the people had rejected in his effort to win re-election to the nation's highest office, now occupied by appointment the powerful position of Chief Justice.[46]

Although LaFollette placed well for a third party candidate, winning seventeen percent of the popular vote and carrying his home state of Wisconsin, his attacks on the Court probably eroded his support. One scholar concluded that "the Supreme Court issue, more than anything else, was responsible for the ease with which the Republicans convinced a large segment of the American voting population of the imminent danger to the Constitution."[47] Contemporary commentators agreed. *The New Republic,* which had endorsed LaFollette, lamented the success of the "whipped-up panic over the supposed danger to the Supreme Court and the Constitution,"[48] and syndicated columnist Mark Sullivan wrote that "LaFollette suffered greatly through dramatizing himself in opposition to the Supreme Court."[49]

While the Supreme Court's review of social and economic regulatory legislation remained controversial, the Court was not an important issue in the 1928 and 1932 elections. The issue flared up only briefly in the closing days of the 1932 campaign after Republicans, including President Hoover, attacked Franklin Roosevelt's off-hand remark that the Republicans controlled the Court.[50]

In 1936, the Court remained in the background of the presidential contest even though one might have expected the Court to become a major issue since the Court had crippled the New Deal by striking down several major New Deal measures during 1935 and 1936. Although many of Roosevelt's supporters urged him to use these decisions as an election issue, Roosevelt refrained from any broadsides against the Court, limiting himself to discreet hints that Court reform might be part of his post-election agenda.[51] Roosevelt may have feared that attacks on the Court might have played into Republican efforts to malign him as an enemy of the Constitution, and he wanted a clean slate on which to work after the election in framing measures to prevent the Court from continuing to obstruct his programs.

The remedy that Roosevelt unveiled after his landslide re-election—the appointment of six additional Justices—generated an enormous controversy in which Roosevelt was accused of trying to "pack" the Court for political purposes. Although Congress rejected Roosevelt's proposal, the Court became much more amenable to social and regulatory legislation starting in 1937, and Roosevelt's ability to appoint several Justices who were sympathetic to the New Deal ensured that the Court ceased to be a target of criticism by liberals and progressives.

Republican allegations that Roosevelt's "Court-packing" proposal was subversive of constitutional government—had grown cold by the time of the 1940 presidential campaign despite sporadic attempts by Republicans to re-kindle it by linking it with their warnings that the New Deal and Roosevelt's bid for an unprecedented third term threatened constitutional government. Republicans also alleged that Roosevelt's success in appointing Justices who were sympathetic toward the New Deal threatened the separation of powers.[52]

Although judicial issues continued to recede in 1944 when Roosevelt sought and received a fourth term, Republicans charged that Roosevelt's appointment of allegedly subservient Justices and his disregard of the two-term tradition threatened constitutional government. The Republican nominee Thomas E. Dewey reminded voters of Roosevelt's effort to obtain "an obedient Supreme Court" through his Court-packing plan and lamented that "time and mortality... have enabled Mr.

Roosevelt to pack the courts with New Deal appointees."[53]

Political criticism of Supreme Court decisions receded after the Judicial Revolution of 1937 but flared up again, this time on the "conservative" end of the political spectrum, during the Warren Court era of the 1950s and 1960s. The Court's decisions opposing racial segregation, particularly *Brown v. Board of Education* (1954), and its decisions protecting the rights of political subversives during the height of the Cold War provoked much controversy, as did its many decisions extending the procedural rights of criminal defendants. Like "liberal" critics of the Court before 1937, these Conservatives proposed various measures to curb the institutional powers of the Court. In particular, they proposed limitating the Court's jurisdiction over various controversial subjects.[54] During the 1956 and 1960 election campaigns, both parties were reticent about the Court's controversial decisions on racial desegregation and domestic security issues, partly because they did not want to politicize these issues even more than they already had been politicized.[55]

The Court's additional decisions in the early 1960s on the sensitive subjects of desegregation, and criminal procedure, and its pioneering decisions on school prayer, and reapportionment helped to ensure that the Court became a major issue in 1964. Campaigning for the Democratic presidential nomination, Alabama Governor George C. Wallace attacked these decisions with gusto in nearly all of his speeches. Borrowing a phrase favored by progressives who criticized the Court earlier in the century, Wallace alleged that "a judicial oligarchy" threatened American democracy.[56] This allegation was later embraced by the Republican presidential nominee, Senator Barry M. Goldwater of Arizona, who perhaps spoke more frequently and more harshly about the Court than any major party's presidential candidate in history. As the columnist Anthony Lewis observed three weeks before the election, Goldwater "has seemed to be running against the nine justices instead of Lyndon B. Johnson."[57]

Goldwater linked his attacks on the Court with the broader themes of his campaign, particularly the threats to states' rights and so-called "moral decay." His particularly harsh criticisms of the Court's reapportionment[58] and school prayer[59] decisions were echoed by the Republican party's platform, which called for constitutional amendments to permit the forty-nine states that had bicameral legislatures to use factors other than population in apportioning membership in one house of the legislature and to permit noncoerced prayer in public schools.[60] Although Goldwater avoided criticizing the Court's desegregation decisions, reporters who covered his campaign believed that southern audiences had these decisions in mind when they cheered Goldwater's attacks on the Court for interjecting itself into social and political issues.[61]

Goldwater's criticisms of the Court, like those of LaFollette in 1924, may have played into the hands of the Democrats, who based much of their strategy on attempts to portray the Republican nominee as a dangerous radical. House Judiciary Committee chair emanuel celler, for example, castigated Goldwater for his "violent demagoguery" and for using the "Court as a political football."[62] Like LaFollette's critics four decades earlier, Cellar warned that Goldwater's remarks could have revolutionary consequences by inciting disrespect for the rule of law. In terms that were reminiscent of the elite bar's admonitions about LaFollette in 1924, fifty prestigious lawyers, including a dozen law school deans and five former American Bar Association presidents, issued a statement on October 11 deploring Goldwater's "attack upon the ultimate guardian of American liberty."[63] Unlike Coolidge in 1924, however, President Johnson refrained from joining such criticism of Goldwater, confining himself to a lofty

declaration that he did not regard the Court as an appropriate election issue.[64]

Like earlier candidates, particularly LaFollette in 1924, Goldwater found that his supporters responded well to general attacks on the Court but that they had scant patience for detailed analysis of judicial decisions. One Republican campaign organizer practically cried when he reported to national headquarters that Goldwater's discussion of constitutional law bored and confused a Charlotte audience that had expected "blood and guts" from Goldwater after South Carolina Senator Strom Thurmond "got the crowd all fired up."[65]

Unlike LaFollette and many of his fellow Conservatives, Goldwater did not advocate any curtailment of the Court's institutional powers. Instead, Goldwater became one of the first presidential candidates to emphasize the connection between presidential elections and federal court appointments. Goldwater warned, for example, that "the makeup of the Supreme Court" was reason to be "very, very worried about who is the President for the next four or eight years,"[66] and he promised to appoint "judges who will support the Constitution, not scoff at it."[67]

Like LaFollette in 1924 and other presidential candidates who have castigated decisions of the Court, Goldwater refrained from personal criticism of the Justices. At a time when many conservatives were calling for the impeachment of Chief Justice Earl Warren and even denouncing him as a traitor, Goldwater publicly described Warren as "a very loyal man" and not "un-American" when one of his supporters at a campaign rally tried to goad him into a personal attack on the Chief Justice.[68]

Goldwater's strident criticisms of the Court's decisions probably had little impact on the outcome of the election, which Goldwater lost in a major landslide, except to the extent that they may have reinforced Democratic allegations that Goldwater was an extremist. Although Goldwater's defeat ensured the demise of growing efforts to use the constitutional amendment process to overturn or modify various Supreme Court decisions, the Court remained controversial. During the next four years, the Court's decisions, particularly *Miranda v. Arizona*[69] and other decisions protecting the rights of criminal defendants, helped to ensure that the Court would become a major election issue in 1968.

During the 1968 campaign, Richard Nixon criticized the Court more than any successful presidential candidate in history.[70] Unlike Goldwater in 1964, Nixon generally refrained from discussions of particular decisions, confining himself to more general criticism of judicial activism, especially in cases involving criminal procedure. Campaigning at a time when rising crime was one of the electorate's major concerns, Nixon's criticisms of the Court fit nicely into his broader efforts to assure voters that he would help to restore so-called "law and order." Although Nixon denounced *Miranda* and advocated legislation to allow a judge and jury to decide whether a confession was voluntary,[71] he generally refrained from proposing institutional reforms or constitutional amendments to overturn specific decisions. Instead, Nixon focused on judicial appointments as a remedy, promising to nominate judges who would "be strict constructionists who saw their duty as interpreting and not making law. "They would see themselves as caretakers of the Constitution and servants of the people, not superlegislators with a free hand to impose their political viewpoints on the the American people."[72] Nixon's promise to nominate such judges had particular resonance because, in June 1968, Warren announced his intention to retire from the Court and eighty-three-year-old Justice Hugo L. Black also was expected to be close to retirement.

Nixon's emphasis on judicial issues paled in comparison with the ferocious manner in which Wallace assailed the Court during his 1968 third party presidential campaign.

Wallace, who carried five southern states and won a larger share of the vote—thirteen percent—than any third party candidate since LaFollette, made attacks on the Court a staple of his campaign speeches. Wallace, for example, declared that "We don't have a sick society, we have a sick Supreme Court," and he decried "perverted decisions" that prohibited classroom prayer while permitting distribution of "obscene pornography."[73] Wallace did not spare Warren, whom he alleged to have "done more to destroy constitutional government in this country than any one man."[74]

The platform of the American Independent party, which was hastily formed to provide Wallace with ballot access, advocated that Supreme Court and Court of Appeals judges be subject to periodic reconfirmation by the Senate, and that district judges face periodic retention elections that would require appointment of a new judge if the voters opposed retention. The platform also castigated the courts for "their solicitude for the criminal and lawless element in our society," which was "one of the principal reasons for the turmoil and near revolutionary conditions which prevail in our country today."[75]

Meanwhile, Democratic nominee Hubert H. Humphrey defended the Court, declaring that the "Court in these very critical years has served the national interest extraordinarily well." [76] Humphrey insisted that the Court's decisions had "not impaired law enforcement; they have merely placed upon the police and the attorneys, county attorneys, district attorneys and others ...a greater understanding of statutory and constitutional law."[77] Humphrey also warned that no President could "manage" the Supreme Court.[78] Judicial issues in the 1968 campaign were understandably important, for Nixon had the opportunity to appoint four Justices during his first term, at least three of whom helped to move the Court in a more "conservative" direction. Professor Stephenson has described the 1968 campaign as "a watershed event for the Supreme Court both institutionally and jurisprudentially" insofar as it "inaugurated an era of conspicuous politicization of the judiciary."[79] Growing public recognition of the importance of Supreme Court appointments has made detailed senatorial examination of Court nominees a permanent part of the confirmation process since the 1970s and also has caused judicial selection to become a perennial issue in presidential campaigns even during times when most of the Court's decisions have been arousing any particular controversy.

Conclusion

Although most voters appear to be aware of at least some major Supreme Court decisions and understand that Presidents help to shape constitutional law by nominating Justices and other federal judges, presidential candidates generally find that the Court is difficult to transform into an election issue. As the nation's most revered defender of the rule of law and the Constitution, the Court is so widely respected, even when its decisions are unpopular, that attacks on the Court always have been politically perilous. Harsh criticism of the Court can backfire, making a candidate vulnerable to allegations that he seeks to politicize the Court or lacks respect for the Constitution.

Transformation of the Court into a political issue is also difficult for presidential candidates because anything other than the most superficial criticism requires discussion of the subtleties of the Court's decisions, which may bore or confuse many voters and are certainly out of place in campaigns that are increasingly focused on simple themes and sound bites. During the past forty years, such criticism has also been problematic because the Court's decisions have been so diffuse that the Court has not been closely identified with the views of either political party or either end of the political spectrum.

It is, therefore, understandable that modern candidates have addressed the Court mostly in the context of the appointment process. Even this, however, presents difficulties since it is never clear which Justices, if any, will depart from the Court during the coming four years. Moreover, even in an age of close scrutiny of nominees, it is never certain that a Justice will conform to the expectations of the President who nominates her. The increasing scrutiny of potential Justices during both the pre-nomination and confirmation processes, however, has helped to reduce the chances of such surprises and therefore helps to ensure that Court appointments will remain an issue in presidential campaigns.

ENDNOTES

[1] See Donald Grier Stephenson, Jr., **Campaigns and the Court: The U.S. Supreme Court in Presidential Elections** 68-69 (1999).

[2] 17 U.S (4 Wheat.) 316 (1819).

[3] James D. Richardson, **Messages and Papers of the Presidents, vol. 2**, 582 (1897).

[4] Stephenson, *op. cit.*, 74.

[5] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[6] See Stephenson, op. cit., 98-103.

[7] See Harold Holzer, ed., The Lincoln-Douglas Debates 22, 42, 101-02, 151, 168-73, 263-64, 295-96, 320, 325, 360, 361-62 (1993).

[8] Charles Warren, The Supreme Court in United States History, vol. 1 357 (rev. ed. 1937).

[9] Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 454 (1978).

[10] Ibid.

[11] William Lasser, **The Limits of Judicial Power: The Supreme Court in American Politics** 51 (1988).

[12] See Stephenson, op. cit., 102.

[13] Donald Bruce Johnson, compiler, National Party Platforms, vol. 1, 32 (1978).

[14] *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *In re Debs*, 158 U.S. 564 (1895).

[15] Donald Bruce Johnson, **National Party Platforms, vol. 1** 98, 99 (1978).

[16] William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890-1937** 35-36 (1994).

[17] Alan F. Westin, "The Supreme Court, the Populist Movement, and the Election of 1896," 15 *Journal of Politics* 30-39 (1953).

[18] See e.g.,"The Supreme Court and the Next President," *World's Work*, Oct. 1908, 10740; "Campaign to Affect Court," *New York Times*, Feb. 10, 1908, 1.

[19] Ross, supra note 6, 134-36.

[20] *Ibid.*, 136-48.

[21] "Speech of William Howard Taft Accepting the Republican Nomination for President of the United States,: Aug. 1, 1912, S. Doc. 902, 62nd Cong., 2d sess., 1912.

[22] Johnson, *supra* note 5, 194.

[23] Ross, *supra* note 6, 151.

[24] *Ibid.*, 176.

[25] Ross, *supra* note 6, 161.

[26] See 51 *Congressional Record*, 63rd Cong., 2d sess., July 31, 1916, 11851; "Stone Raps Hughes and the Platforms," *New York Times*, June 13, 1916, 1.

[27] Alexander M. Bickel and Benno C. Schmidt, Jr., **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 9, The Judiciary and Responsible Government, 1910-1921** 397 (1984).

[28] Melvin Urofsky, **Louis D. Brandeis: A Life** 434-35 (2009).

[29] E.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Truax v. Corrigan*, 257 U.S. 312 (1921); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922).

[30] *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

[31] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[32] Johnson, *supra* note 13, 256.

[33] "Coolidge Assails LaFollette Views on Supreme Court," *New York Times*, Sept. 7, 1924, 1.

[34] "Coolidge States Views on Issue in Last Big Speech," *New York Times*, Oct. 24, 1924, 4.

[35] Charles G. Dawes, **Notes as Vice President 1925-1929** 19-20 (1935).

[36] Although the Democratic nominee John W. Davis, a prominent constitutional lawyer, extravagantly attacked LaFollette's Court proposal early in the campaign, Davis and other Democrats later warned voters that Republicans were using the Court issue as a means of distracting attention from the Teapot Dome scandal. *See* Ross, *supra* note 6, 268-69, 271-72.

[37] "Hughes in St. Paul Scores Third Party," *New York Times*, Oct. 26, 1924, 16; "Hughes in Chicago Promises Prosperity," *New York Times*, Oct. 29, 1924, 8.

[38] "Court Limitation Assailed by Bar," *New York Times*, Oct. 7, 1924, 2.

[39] 262 U.S. 390 (1923).

[40] *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928 (D. Ore. 1924), *aff'd*, 268 U.S. 510 (1925).

[41] William Howard Taft to Calvin Coolidge, Sept. 11, 1924, Taft Papers, Series 3, Reel 267, Manuscript Division, Library of Congress.

[42] William Howard Taft to Casper S. Yost, Sept. 11, 1924, *ibid.*

[43] LaFollette speech, Omaha, Oct. 20, 1924, LaFollette Family Papers, Series B, Box 228, Manuscript Division, Library of Congress.

[44] *See* e.g., LaFollette speech, Detroit, Oct. 9, 1924, LaFollette Family Papers, *ibid.*; LaFollette speech, Chicago, Oct. 11, 1924, *ibid.*;LaFollette speech, Omaha, Oct. 20, 1924, *ibid.*

[45] Ross *supra* note 6, 267.

[46] *Ibid.*, 278-79.

[47] Kenneth C. MacKay, **The Progressive Movement of 1924** 163 (1947).

[48] *New Republic*, Nov. 26, 1924, 1.

[49] Mark Sullivan, "Looking Back on LaFollette," *World's Work*, Jan. 1925, 331.

[50] *See* William E. Leuchtenberg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** 83 (1995).

[51] William E. Leuchtenberg, "When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis," 108 *Yale Law Journal* 195 (1999).

[52] *See* e.g., Wendell Willkie, "The Court Is Now His," *Saturday Evening Post*, Mar. 9, 1940, 29, 72, 76.

[53] "The Text of Governor Dewey's Address in Chicago Pledging Honesty in Government," *New York Times*, Oct. 26, 1944, 13.

[54] *See* C. Herman Pritchett, **Congress versus the Supreme Court, 1957-1960** (1961); Lucas A. Powe, Jr., **The Warren Court and American Politics** (2000); Clifford M. Lytle, **The Warren Court and Its Critics** (1968).

[55] *See* William G. Ross, "The Role of Judicial Issues in Presidential Elections," 42 *Santa Clara Law Review* 424-26 (2002).

[56] *See* e.g., Speech at the Alabama State Fair Grounds, June 27, 1964, Reel 1, Papers of George C. Wallace, State Archives, Montgomery, Alabama.

[57] Anthony Lewis, "Campaign: The Supreme Court Key Issue," *New York Times*, Oct. 11, 1964, 8E.

[58] *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

[59] For an excellent analysis of Nixon's use of the Court as a campaign issue, see Christopher Hickman, "Courting the Right: Richard Nixon's 1968 Campaign against the Warren Court," 36 *Journal of Supreme Court History* 287-303 (2011).

[60] *Engle v. Vitale*, 370 U.S. 421 (1962).

[61] Johnson, *supra* note 5, vol. 2, 683, 686.

[62] Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and Supreme Court: The Goldwater Campaign," 32 *Public Opinion Quarterly* 31, 33 (1968).

[63] Press Release, "Cellar Defends Supreme Court Against Goldwater Charges" (Sept. 13, 1964), Box 298, Emmanuel Cellar Papers, Manuscript Division, Library of Congress.

[64] Anthony Lewis, "Goldwater Stand on Court Decried," *New York Times*, Oct. 12, 1964, 24.

[65] Murphy and Tanenhaus, *supra* note 50.

[66] Memorandum from Pat Ryder to Denison Kitchel, et al., Sept, 23, 1964, Box W-8, Barry Goldwater Papers, Arizona Historical Foundation, Hayden Library, Arizona State University.

[67] Barry M. Goldwater, *The Speeches, Remarks, Press Conferences, and Related Papers of Senator Barry M. Goldwater, July 16-November 4, 1964* 500 (1965).

[68] *Ibid.*, 665.

[69] "Goldwater Takes Turn to Left," *New York Times*, Feb. 15, 1964, 11.

[70] 377 U.S. 201 (1966).

[71] *See* Stephen E. Ambrose, **Nixon: The Triumph of a Politician, 1962-1972** 154 (1989).

[72] Stephenson, *supra* note 1, 181.

[73] Dan T. Carter. The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics 367 (1995).

[74] Walter Rugaber, "Wallace Woos Mississippi; Scores Warren Career," New York Times, June 22, 1968, 17.

[75] Johnson, supra note 5, vol. 2, 702.

[76] "Excerpts from Debate among the Three Candidates before California Delegation," New York Times, Aug. 28, 1968, 34.

[77] Ibid.

[78] See Max Frankel, Humphrey Scores 'The Same Nixon,'" New York Times, Sept. 14, 1968, 1.

[79] Stephenson, supra note 1, 183.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

Beginning with the Supreme Court's first decade, anyone with access to its decisions has been privy to the exchange of views revealed in the published opinions. Before Chief Justice John Marshall standardized use of the "opinion of the Court," these exchanges took place through the medium of a varying number of opinions that were issued individually. Thus, in the all-important federalism and politically (and financially) sensitive case of *Chisholm v. Georgia*,[1] Chief Justice John Jay and Justices John Blair, William Cushing, and James Wilson wrote opinions expressing similar views, holding the state of Georgia amenable as a party defendant to a suit in federal court filed by a citizen of South Carolina, while Justice James Iredell expounded a contrarian position. Once the majority opinion replaced the seriatim practice after 1801, continuation of any public exchange of views had to await the advent of one or more individual or dissenting opinions taking issue with the majority position, which in the first decade of the nineteenth century was usually presented by Marshall. As one scholar of the Marshall era has explained, from 1805 until 1810, and with the exception of 1810, "Marshall wrote from 88 to 100 percent of the majority opinions in each of these years; and he wrote all opinions in constitutional cases with the exception of *Stuart v. Laird*."[2]

Credit for introduction of the practice of published dissent in the Supreme Court usually goes to Jefferson-appointee William Johnson who in a "struggle for free expression on the high bench,"[3] is reported to have authored some 34 dissenting opinions alongside 112 majority opinions he filed between his arrival in 1804 and his death in 1834.[4] The first of these dissents came in *Ex parte Bollman*,[5] where Johnson described the pressure not to dissent a "painful sensation."[6] Dissents of greatly varying frequencies have characterized the work of the Court since Marshall's day, with some periods, particularly in the late nineteenth and early twentieth centuries reflecting a strong norm of consensus,[7] in contrast to the more recent pattern where open division is more often the rule and unanimity the exception.

Thus, as common as it has become for legal and constitutional differences among the Justices to display themselves in separate

opinions, it still remains uncommon for divergent views on an important question to be displayed as an interchange of ideas within a single opinion. One such example is the dissenting opinion filed by Justice Hugo Black in *Griswold v. Connecticut*,[8] a decision that, in finding a right of privacy in the Constitution, has cast a long shadow across the landscape of American constitutional law for almost a half century.

While it was entirely unnecessary for Black to mention that since *Marbury v. Madison* "this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution,"[9] it was entirely instructive for the senior Associate Justice to draw upon the debates at the Philadelphia Convention of 1787 to emphasize his point that, in *Griswold*, the majority was engaged not so much in interpreting the Constitution as it was in making policy. If the former properly fell within the judicial role, the latter, Black believed, assuredly did not.

Instead, Black—a Justice who frequently drew decisional direction and inspiration from the historical record—pointed to the fact that the convention:

> did, on at least two occasions, reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed "that the President ... and a convenient number of the National Judiciary ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, ... and that the dissent of the said Council shall amount to a rejection ..." In support of a plan of this kind, James Wilson of Pennsylvania argued that: ... "It had been said that the Judges, as expositors of the Laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature."[10]

On the other side, Black noted, were individuals like Nathaniel Gorham of Massachusetts who "did not see the advantage of employing the Judges in this way. As Judges, they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision. He relied "on the Representatives of the people as the guardians of their Rights & interests. [The proposal] was making the Expositors of the Laws the Legislators, which ought never to be done."[11]

In his objection to the Court's discovery of a right to privacy in the Constitution, Black found encouragement in the fact that the "proposal for a council of revision was defeated."[12] Its interment lent credence to the counsel offered by South Carolina's Pierce Butler on a related measure that the delegates should "follow the example of Solon who gave the Athenians not the best Government he could devise; but the best they would receive."[13] For Black, the outcome in Philadelphia thus dictated a circumscribed role for the national judiciary. Alongside the Alabamian's pleadings, however, the Supreme Court's own record—both before and

FDR and Chief Justice Hughes **by James F. Simon is both heavily biographical of the two central figures that comprise the title, and informative, with extensive detail on the formulation of what infamously and quickly became known as the Court-packing plan. That episode is satirized in the cartoon above.**

after *Griswold*—reveals that constitutional interpretation unavoidably entails at least some policy making, all the while different Justices dispute just how much latitude exists and how that latitude should be discerned, and exercised.

However the balance is struck, the exchange echoed in Black's dissent highlights the recurring tension within the American polity between the popular sovereignty expressed by way of electoral politics and the judiciary's role by way of judicial review in making real the Constitution's promise of limited government. This was the tension Alexander Hamilton attempted to resolve in *Federalist* No. 78 when he explained to New Yorkers in 1788 that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." That role, however, did not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both." Hamilton's thinking resurfaced 15 years later in Chief Justice Marshall's opinion for the Court in *Marbury v. Madison*.[14] For a court to give

effect to a statute that contravened the Constitution, Marshall maintained, "would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure." The effect of such an arrangement, Marshall insisted, would be to "[reduce] to nothing, what we have deemed the greatest improvement on political institutions, a written constitution ...."[15]

Despite such efforts to reconcile judicial review with government by "the consent of the governed," the federal judiciary's interplay with democratic politics necessarily persists, sometimes uncomfortably or awkwardly, as current public opinion polls suggest.[16] This tension is generously reflected in recent publications about the Court.

One of the most salient examples of the tension to which Marshall alluded emerged in the mid-1930s from a confrontation involving the Court, President Franklin Roosevelt, and Congress. This tug-of-war between the judicial and legislative-executive wills not only cast grave doubts on the legitimacy of judicial review itself but ultimately precipitated a revolutionary shift in constitutional doctrine, as the Bench first relaxed strictures under the Constitution nonetheless permitted policies that previously had been deemed impermissible, and second, partly rewrote its job description. Reverberations from these tectonic shifts are felt even today.

Understanding of American constitutional development during the defining decade of the 1930s has been enriched by the publication of three books within as many years treating all or part of this watershed series of events. Jeff Shesol's **Supreme Power** focused on the several dimensions of the political controversy itself, largely from the viewpoint of the executive branch.[17] Noah Feldman's **Scorpions** looked at four Justices —Hugo Black, Felix Frankfurter, William O. Douglas, and Robert H. Jackson—all named to the Bench by Roosevelt between 1937 and 1941, and accordingly explored the impact of the decade's controversies on the constitutional perspectives developed by each member of that quartet.[18] Alongside these studies is now added **FDR and Chief Justice Hughes**[19] by James F. Simon, professor and dean emeritus at New York Law School. Simon's well-researched contribution reviews much of the same terrain covered by Shesol and Feldman, but Simon does so differently in at least two ways. First, his volume is heavily biographical of the two central figures that comprise the title. One thus has a mini-biography of both Hughes and Roosevelt within a single book. Second, in an especially illuminating narrative, Simon provides extensive detail on the formulation of what infamously and quickly became known as the Court-packing plan. As a result, the reader beneficially becomes an observer/participant from the vantage point of each of the principal antagonists.

Simon is no stranger to either the Court or the conflicts its decisions sometimes generate, as a listing of his books illustrates.[20] Moreover, as Simon has done with earlier scholarly contributions,[21] he exploits the theme of "great antagonists" to good advantage with his new book and thus opens a window not only into the politics of an era but also provides insight into the character, values, challenges, as well as accomplishments and shortcomings of the principal figures. And with a focus on Franklin Roosevelt and Charles Evans Hughes, one necessarily undertakes a study of two extraordinary individuals.

Indeed, both men reached their pinnacle positions from a deep background and preparation in public affairs. Certainly neither was a novice in politics. When he defeated President Hoover in 1932, Roosevelt had been assistant secretary of the navy in President Woodrow Wilson's administration, vice-presidential nominee on the Democratic ticket in 1920, and governor of New York. Before his

appointment as Chief Justice by Hoover in 1930, Hughes had been governor of New York, Associate Justice on the U.S. Supreme Court, Republican nominee for President in 1916, and Secretary of State in President Warren Harding's Cabinet.

As some readers of the *Journal* are aware, the conflict around which Simon's book is centered emerged soon after 1932 as the nation grappled with the social and economic severities of the Great Depression. Signature remedial measures put forth by Roosevelt's Democratic administration and approved handily by impressive Democrat majorities in Congress shortly foundered upon judicial shoals as a majority of the Justices, including Chief Justice Charles Evans Hughes, found some of the statutes constitutionally wanting. Indeed, in the years 1934–1936, the Supreme Court in twelve decisions declared unconstitutional all or part of eleven initiatives,[22] and these decisions were made by a Bench without a single Roosevelt appointee, as none of the "nine old men" (as some journalists called them) opted to retire during FDR's first term. As Justice Harlan Stone wrote to his sister at the end of the Court's term in June 1936, "we seem to have tied Uncle Sam up in a hard knot."[23]

Throughout, the Justices frequently divided in what became a familiar pattern. Usually supporting the constitutionality of the administration's program, which the President had branded the New Deal, were Justices Harlan Stone, Louis Brandeis, and Benjamin Cardozo. On the other side were Justices Pierce Butler, James McReynolds, Willis Van Devanter, and George Sutherland. Thus, the fate of the President's program depended upon the votes of Chief Justice Hughes and Justice Owen Roberts. Indeed, Hughes and Roberts were so essential for a pro-administration outcome that one scholar some years later referred in a game theory analysis to their combined voting pattern as "Hughberts."[24] The number of congressional statutory fatalities in such a short period of time seemed practically unprecedented, with many critics of the Court insisting that its rulings amounted to an abuse of judicial power, particularly in light of the hardships and dislocations that had afflicted all corners of the nation.

For Roosevelt, the immediate question was what to do about a hostile Bench, and by the fall of 1936 there seemed to be but four options. Least attractive was to stay the course. While in one sense time appeared to be on Roosevelt's side, the previous four years nonetheless had yielded not a single vacancy, in contrast to 1930–1932 during Hoover's presidency when there had been three. While it seemed improbable that the next four years would be as barren in vacancies as Roosevelt's first term had thus far been, there was the distinct possibility that the most conservative Justices would hang on until death. Neither was the President willing to count on an election-induced conversion by one or more Justices were his hopes for a resounding victory in November to be realized. Reliance on either the grim reaper or a judicial change of mind thus carried great risk: if FDR bet mistakenly, more of his legislative agenda might fall victim as a result.

Two additional options entailed substantive or procedural amendments to the Constitution.[25] A substantive amendment would empower Congress to regulate aspects of the national economy, such as labor relations or agricultural production, which the Court had placed off limits. While appealing because it would presumably be efficacious, an empowering amendment was far easier to imagine in principle than to reduce to writing. What, exactly, would it say? If it was insufficiently inclusive, it would fall short of meeting the administration's needs and might not receive support from necessary constituencies. If it was too inclusive, opponents could attack the amendment as a grant of nearly unlimited power to Congress. Moreover, by November "Roosevelt considered an additional reason to oppose the amendment route. The process was simply too cumbersome and time-

consuming ... and could not realistically be completed in less than two or three years, virtually exhausting his second presidential term."[26] Besides, any amendment would ultimately be subject to interpretation by the Supreme Court. While a procedural amendment might eliminate or restrict judicial review itself, even that measure would confront similar problems of timing, wording, and interpretation.

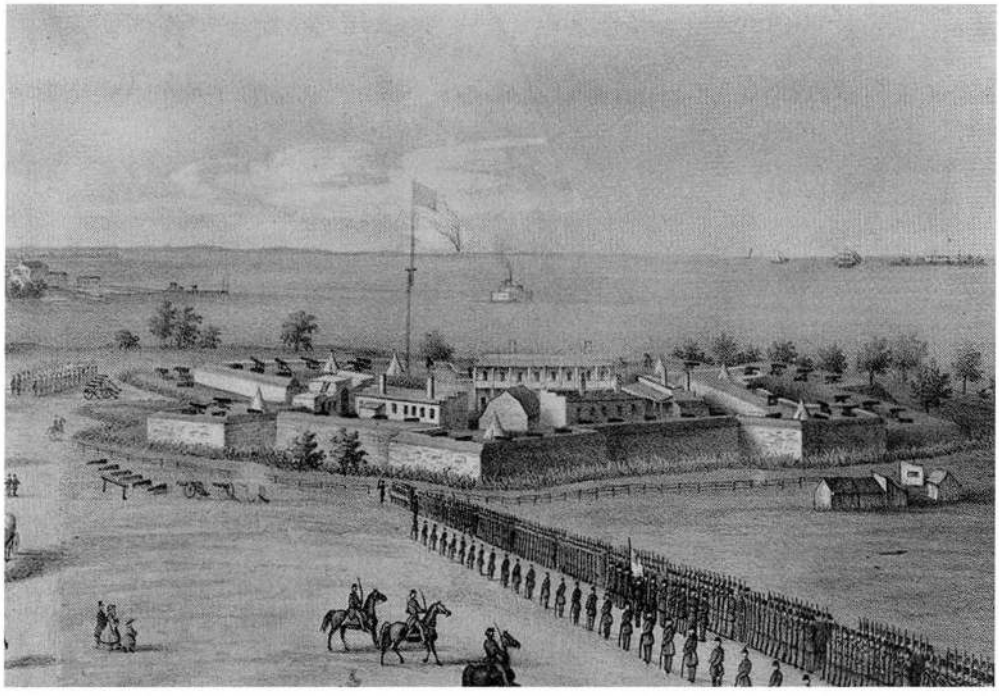
According to Simon, apparently only in the second half of November—after the scale of the Democratic victory at the ballot box had been fully digested—did the President settle on the staffing strategy that he would pursue early in 1937. Roosevelt, after all, had been reelected by colossal proportions. Not only had he received the electoral votes of all but two states, but the ranks of congressional Republicans had been so severely reduced that that they seem destined to join the ranks of an endangered species. Yet impressed by so sweeping a victory, the President made the mistake of equating public approval of what he had done with a popular mandate for what he was about to do.

With ample help from Attorney General Homer Cummings, the President was aware of the suggestion by Princeton professor Edward Corwin, a sharp critic of the Court, that federal judges should not hold office beyond their seventieth birthday. Cummings had also uncovered a recommendation made in 1913 by Wilson's Attorney General that federal judges retire at age seventy with full pay, with the President permitted to name another judge "who would preside over the affairs of the court and have precedence over the older one" in the event the older judge failed to step down.[27] That recommendation carried particular irony for Roosevelt in that Wilson's Attorney General was Justice McReynolds. Events then displayed two clues that a bold move was in the works. In December the President "commissioned his old friend *Collier's* editor George Creel to act as his surrogate in appealing 'over the head' of the Court to the American people." If the Court continued to invalidate the president's legislation, insisted the President, Congress "can enlarge the Supreme Court, increasing the number of justices so as to permit the appointment of men in tune with the spirit of the age."[28] In mid-January's State of the Union address, but with no Justices present in the House Chamber, Roosevelt warned that means "must be found to adapt our legal forms and our judicial interpretation to the actual present needs of the largest progressive democracy in the modern world."[29]

The President's plan was to have his proposal put forward as a judicial reform and efficiency measure just prior to oral argument on the constitutionality of the Wagner Labor Act, scheduled for February 9. With apparently no advance consultation with congressional leadership, Roosevelt unveiled his plan, asking for authority to appoint one additional Justice, up to a maximum Bench size of fifteen, for each member of the Court who reached age seventy and did not retire within six months. For the Court as constituted in February 1937, that would allow six appointments at once.

Congress failed to approve the plan, but the Court in early spring indicated a dramatic change of mind in a pair of decisions,[30] signaling new readings of the due process and commerce clauses that gave approval to expansive government power at the national as well as state levels of government. A revolution, American-style, was under way. Ironically, the about-face had not required so wholesale a retreat by the Justices.

While some accommodation with the President's legislative program was sooner or later almost certainly inevitable, there had been a middle option. On this road not taken, the Court could have upheld most new policy initiatives while occasionally finding some constitutionally excessive, thus partly retaining, not wholly abandoning, its previous policy oversight role.



***Ex parte Merryman*: *Two Commemorations*, edited by Joseph W. Bennett, was published in 2011 as the nation commenced observance of the sesquicentennial of the outbreak of the Civil War. The same year also marked the 150th anniversary of the *Merryman* case, which involved an attempt to serve a writ of habeas corpus at Fort McHenry (pictured above.)**

The Court-packing bill died several months later in the Senate, partly because of the Court's springtime shift—the switch-in-time—and partly because of clever intervention[31] in March by Hughes (by way of Justice Brandeis and Senator Burton Wheeler) into the legislative process that thoroughly undercut FDR's "efficiency" rationale for his proposal.

Nonetheless, although the Chief Justice outmaneuvered the President in the short term, Roosevelt soon got his long-awaited chance to remake the Bench. Justice Van Devanter announced his retirement on May 18, 1937, after Roosevelt had signed legislation on March 1 that sweetened judicial retirement benefits by providing full salary to those who retired at age seventy. Moreover, before the election of 1940, Sutherland, Cardozo, Brandeis, and Butler were gone too. In their seats were Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy, respectively. When FDR took the oath of office for an unprecedented third term in January 1941, only McReynolds, Stone, Hughes, and Roberts remained from the "old Court" of 1936–37, and by late spring both McReynolds and Hughes had retired. The President now had "his" Court.

Doctrinally as significant as the 1937 turnaround, the Court floated a trial balloon in 1938 that suggested a second dimension to what was already being understood as the early stages of a jurisprudential transformation. The Justices would redraw the boundaries of the domain they guarded. The problem was still the old fundamental one of trying to harmonize judicial review with democracy. As explained in the three paragraphs of a footnote, which Justice Stone attached to a low-profile regulatory decision,[32] *unelected* judges might validly set aside decisions made by *elected* officials in three situations. The footnote,[33] which Justice Lewis Powell much later called "the most

celebrated footnote in constitutional law,"[34] contained a corresponding number of ideas. The first suggested that when legislation, on its face, contravenes the specific negatives set out in the Bill of Rights, the Court's usual presumption of constitutionality—ordinarily applied to most challenged statutes—may be curtailed or even waived. The second paragraph carved out a special responsibility for the judiciary to defend those liberties essential to the effective functioning of the political process. The Court would thus become the ultimate guardian against abuses that would poison what James Madison in *Federalist*, No. 51, had called the "primary control" on government, "dependence on the people"—the ballot box. Stone was insisting that the Court must protect those liberties on which the effectiveness of political action depends, particularly since it was through the political and not the judicial process that undesirable legislation was customarily to be corrected. The third paragraph then outlined a special judicial role as protector of minorities and unpopular groups particularly helpless at the polls in the face of discriminatory or repressive policies, as happens when majoritarianism runs amuck. To a noticeable degree, what is now known simply as Footnote Four has been descriptive of much of the Court's work since the days of the Hughes Court.

As for Hughes himself, Simon's assessment is exceedingly generous especially given that the Bench over which Hughes presided (and in whose decisions he was frequently in the majority) skated perilously close to the edge of the institutional precipice. "By any objective standard," Simon writes:

> Hughes ranks as one of the most important Chief Justices in constitutional history .... He was well qualified to play that pivotal leadership role. Possessing a brilliant legal mind, he was by judicial temperament a dedicated centrist .... Had he been an ideologue, either on the right or left, his tenure as Chief Justice would almost certainly have ended badly, further polarizing a divided Court. Instead, his incremental approach to constitutional transformation enabled him to preserve both the image and reality of a strong Supreme Court, and in the process, resist the enormous political pressure exerted by President Roosevelt. Once the threat of FDR's Court-packing plan had run its course, Hughes led the Court with renewed confidence ushering in the modern constitutional era.[35]

As for Roosevelt, one notes the considerable emphasis Simon places on the final report of the Senate Judiciary Committee that contained what Simon labels a "devastating critique"[36] of the President's landmark proposal. The bill's ultimate purpose, according to this document, was hardly judicial reform but "to make this government one of men rather than one of law and its practical operation ... to make the Constitution what the executive or legislative branches of government choose to say it is—an interpretation to be changed with each change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[37] Three quarters of a century later, the reader wonders whether, had there in fact been no third term for Roosevelt, this condemnation would have largely colored the overall appraisal among scholars of the presidency of a Chief Executive who today usually shares prime and nearly exclusive space with Abraham Lincoln and George Washington in the pantheon of presidential greatness.

Simon's successful use of a "great antagonist" theme with President Roosevelt and Chief Justice Hughes—while useful in understanding a period of Supreme Court history—should not of course be taken too

literally. In most respects the clash Simon recounts was not actually between *that* President and *that* Chief Justice, as if they had met directly in some Renaissance-inspired bout of jousting on the south lawn of the White House. While there might well be an element of personal aversion or disdain present in any situation where the policy and emotional stakes are high, as with John Marshall and Thomas Jefferson, or John Marshall and Andrew Jackson, more often the antagonist theme is merely a convenient way of compartmentalizing thinking about a clash of ideas, objectives, and institutions, as one might do in analyzing judicial, executive, and congressional branch relations when Abraham Lincoln was President and Roger B. Taney was Chief Justice.[38]

With the sixteenth President and fifth Chief Justice, however, there was at least one occasion where the conflict may fruitfully be seen as plainly Taney versus Lincoln. This instance is amply explored in ***Ex parte Merryman*: Two Commemorations**,[39] edited by Joseph W. Bennett. Mr. Bennett is head librarian of the Library Company of the Baltimore Bar, the organization responsible for arranging the printing of this attractive and instructively illustrated volume. Publication is certainly timely as the nation in 2011 commenced observance of the sesquicentennial of the outbreak of the Civil War. The same year also marked the 150th anniversary of this intriguing incident with its contemporary legal implications.

Even those accustomed to the rapid reporting of events in today's 24/7 news cycle must still be overwhelmed by the tumultuous end-on-end series of events in the spring of 1861. The South Carolina legislature adopted an ordinance of secession in December 1860. Chief Justice Taney administered the presidential oath to Lincoln on March 4, 1861. By then six states from the lower South had joined South Carolina in its march out of the Union, and four other states from the upper South would soon follow them. When state troops in South Carolina fired on Fort Sumter on April 12, a war between the states was under way—and across distances then greatly diminished by widespread installation of the telegraph. The four mile per hour era that had characterized the world of the Constitution's framers had been replaced by a real-time world where, given a copper wire stretched between any two points, instantaneous awareness of unfolding events had truly become possible.

In this new world, Lincoln correctly perceived that retaining Maryland as part of the Union was strategically imperative. For Maryland to join Virginia in its exodus would have placed the city of Washington, and with it the government of the United States, in a defensively untenable position. Given the presence of much pro-slavery and anti-Lincoln sentiment in Baltimore and other parts of the state, however, Maryland's secession remained a live possibility. Therefore, to allow troop reinforcements to reach Washington from the north unimpeded, Lincoln authorized General Winfield Scott to suspend the writ of habeas corpus "on any military line" between Philadelphia and the capital.[40] (Lincoln later suspended the writ in other locations as well.) Without the availability of that writ, military officers would have unrestricted control over elements of the local population that might disrupt troop movements or otherwise interfere with military operations. In short, military officers could arrest or otherwise detain civilians and hold them indefinitely without trial. By contrast, the availability of the writ would restrict the hands of military commanders because it allowed a judge to direct that the detained person be brought to court for the purpose of determining the lawfulness of the detention. If the detention was deemed unlawful, then the prisoner would be released. If the detention was held lawful, the prisoner would be charged and perhaps returned to jail.

The pro-Union situation in Maryland became shaky when violence broke out in

Baltimore on April 19 as troops arriving from Pennsylvania and Massachusetts crossed the city to get to Camden Station for a railway line to Washington. (At the time there was no direct north-south rail link through Baltimore). Set upon by secessionist sympathizers, some troops fired on the crowd, and that fire was returned, resulting in the deaths of several soldiers and civilians. Baltimore's mayor and Maryland's governor were determined that there be no further troop movements through the city, and made their concern known to Lincoln on April 21. Troops from Pennsylvania that were then north of Baltimore were directed to return to Pennsylvania. It was about this time that a pro-secession paramilitary commander near Baltimore by the name of John Merryman, prominent cattle breeder and president of the state agricultural society, destroyed bridges near Parkton along the Northern Central Railway that linked Baltimore with Harrisburg, Pennsylvania and points north—all apparently done with the acquiescence, if not encouragement, of Baltimore's mayor (William Brown) and Maryland's governor (Thomas Hicks). Ironically, it may be that Merryman's actions, in so far as they contributed to a cessation of troop movements through Baltimore, avoided additional severe incidents in the city that might further have fanned secessionist feelings.

Because of this insurgency, General William H. Keim ordered Merryman's arrest and had him confined at Fort McHenry on May 25. On the same day, Merryman petitioned for a writ of habeas corpus on the ground that he had been unlawfully imprisoned. Taney, in whose circuit Maryland was located, traveled to Baltimore to receive the petition, perhaps to avoid the awkward situation that otherwise would have required the military authorities in Baltimore to leave their posts and perhaps also to lend gravitas to proceedings that otherwise would have been addressed by Maryland's district judge alone.

On May 26, Taney issued the writ directing General George Cadwalader, commander at Fort McHenry, to bring Merryman on the next day to the circuit court room at Baltimore's Masonic Hall. Instead of appearing in court with Merryman on May 27, however, Cadwalader sent his aide-de-camp with a statement that the general had been authorized by the President to suspend the writ in the case of individuals presenting a threat to public safety, and requested a delay in legal proceedings until he received further instructions from President Lincoln. When Taney issued an attachment for contempt against Cadwalader for failure to appear in court, the guard at Fort McHenry refused to admit the marshal bearing the writ of attachment, and Cadwalader made no reply to the court. Washington Bonifant, the federal marshal who had been dispatched to the fort, explained to Taney that he had sent in his card but had been unable to serve the writ. Taney explained that he would issue an opinion later but declared the detention unlawful on two grounds. First, the President could not unilaterally suspend the writ or authorize a military commander to do so. That prerogative lay solely with Congress. Second, if military forces arrested someone not subject to the usual rules of war, that person—someone like Merryman—was to be turned over to civil authorities.

The Chief Justice's opinion, which he completed three days later, consumed thirty-seven handwritten pages. It hardly masked his strong feelings. "[I]f the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no long living under a Government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose district he may happen to be found."[41] Taney instructed the clerk to transmit a copy, under seal, to Lincoln. Its concluding sentence read: "It will then remain for that high officer, in fulfillment of his

Todd C. Peppers and Artemus Ward's new book, *In Chambers*, features clerk reminiscences and behind-the-scenes glimpses of the Court. Margaret McHugh (above, left, with Maggie Bryan in 1962), who was Chief Justice Warren's principal secretary, plays a key role in an anecdote written by Jesse Choper, one of Warren's clerks.

constitutional obligation to take care that the laws be faithfully executed, to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[42]

Lincoln dealt with Taney's order by inaction, although, after Lincoln's death and even after the end of hostilities, the Supreme Court asserted the principles Taney had announced in Baltimore.[43] More immediately, Lincoln answered Taney indirectly in a lengthy message to a special session of Congress on July 4, 1861:

> This authority [suspension of the writ] has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States .... To state the question more directly, *are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?*[44] Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? ... The provision of the Constitution that "The privilege of the writ of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision—is a provision—that

> such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.[45]

But for Taney's opinion in Merryman's case, therefore, it seems plausible to suggest that Americans today would not have the benefit of the particular sentence (italicized above) which Lincoln phrased as a question that became one of his most widely quoted utterances. As for Merryman's fate, he was indicted for treason in federal court, then released to the U.S. Marshal and freed on $20,000 bail on July 13, 1861. His case, however, never came to trial, perhaps because of an anticipated difficulty in securing a conviction. By the time he died in 1881, he had been elected state treasurer and a member of Maryland's House of Delegates and, paradoxically, had helped to finance railroad construction.

As Johns Hopkins University political scientist and native West Virginian Carl Brent Swisher reminded readers some seventy-four years later:

> [Taney's opinion,] prepared in defense of the reign of law as against arbitrary military rule, has after the calmer appraisal of more remote periods been hailed as a masterpiece of its kind .... [I]t is futile to argue whether the President or the Chief Justice was right in the matter, for back of their legal differences were fundamental differences of opinion on matters of public policy. Lincoln preferred to interpret the Constitution so as to avoid the appearance of violating it, but he preferred violating it in one particular to permitting the union to be destroyed. Taney regarded the dissolution of the union as less disastrous than the reign of coercion which would be necessary to maintain it. Lincoln won, and the Union was saved.[46]

Two Commemorations reviews the Merryman case largely through a series of papers most of which were presented on two occasions: May 26, 1961, and June 1, 2011. The first marked the centennial observance and the second the sesquicentennial assessment. The first set includes introductory remarks by Roszel C. Thomsen, Chief Judge of the United States District Court in Maryland, a paper by attorney and Taney biographer M. H. Walker Lewis, and remarks by attorney William L. Marbury and U.S. District Judge W. Calvin Chestnut. This group precedes a paper on the case given on March 7, 2007 by U.S. District Judge Catherine C. Blake and the papers delivered on June 1, 2011. The second and most recent set includes a presentation by attorney George W. Liebmann on the relationship between Baltimore's mayor and President Lincoln, one by Dr. Edward Papenfuse, state archivist of Maryland, on the operation of the federal courts in Baltimore during the Civil War, and a paper by Jonathan White of Christopher Newport University entitled "Lincoln's Other Habeas Corpus Problem." Professor White has also authored **Abraham Lincoln and Treason in**

the Civil War: The Trials of John Merryman, published in 2011 by Louisiana State University Press.

The papers follow a reprint of Taney's opinion, which he signed simply, "R.B. Taney, Chief Justice of the Supreme Court of the United States."[47] In her paper, Judge Blake notes that Taney "directed his final opinion 'to be filed and recorded in the circuit court of the United States for the district of Maryland.'" She adds that Swisher describes it:

> "as an opinion of the Chief Justice acting in chambers." In any event, our court in the District of Maryland clearly has possession of the papers, and Taney's opinion is reported as a decision of the Circuit Court .... Why [attorney George] Williams chose to approach Justice [sic] Taney with the petition rather than District Judge William F. Giles, other than the likely political sympathies of the author of the Dred Scott decision, may be answered by that same historian's observation that Merryman's father and Roger Taney attended college together at Dickinson.[48]

However Taney's opinion might be classified, publication of these papers by the Library Company of the Baltimore Bar is a welcome event in that it re-focuses attention on a fascinating episode, one of interest not only to students of Maryland and Civil War history, but to students of the Supreme Court and civil liberties. But for the efforts of Liebmann and others, a case like *Ex parte Merryman* might easily drop from sight in the same way it seems not to have merited so much as a mention in the majority opinions of any of the national security detainee cases decided by the High Court since 2001.

Happily for the stability of American government, an episode like Merryman's and the sectional calamity which precipitated it are rare. Far more common, and indeed arguably systemically healthful, are the inter-branch friction and political turmoil Simon described that surrounded the Court during the 1930s.

It is to this literature on judicial political entanglement that one may now add **Nixon's Court**,[49] an important contribution by Kevin J. McMahon, who teaches political science at Trinity College in Hartford, Connecticut. The photograph on the book's dust jacket is dramatic—At the top of the imposing steps at the Supreme Court stand three men. In the center is President Richard Nixon, who took the oath of office on January 20, 1969. On his left is the newly sworn Chief Justice Warren Burger,[50] Nixon's first appointee to the High Bench. On Nixon's right is outgoing Chief Justice Earl Warren, who had been named to the center seat by President Dwight Eisenhower in 1953. In the late 1960s, probably few Americans lacked opinions about Nixon and Warren. Both Nixon and Warren were veterans of political battles in California and both had been fixtures in national politics since the late 1940s—Moreover, the photo effectively captured combat, which had recently been renewed. In the presidential election of 1968, three candidates—Democrat Hubert Humphrey, Republican Nixon, and third party George Wallace—competed to be President Lyndon Johnson's successor in a campaign where both Nixon and Wallace had made the Supreme Court a principal campaign issue. They and other critics claimed decisions of the Warren Court were at least partly to blame for the crime and social unrest of a decade some were already calling the turbulent sixties. The Court had become a vulnerable target because of legal developments that vote-hungry candidates could not ignore.

By the second decade of the Warren Court, there was general consensus within the Court and within both major political parties on the key point of the constitutional revolution of 1937: that governments at all

levels possessed wide-ranging authority, with minimal constitutional restrictions to enact economic and social welfare legislation.

Into this consensus, however, protruded two jurisprudential fault lines. Decisive shifts along each, moreover, identified the Court further with programmatic liberalism that insisted upon greater individual freedom and equality and hence moved the Justices deeper into politically salient issues. One fault line roughly paralleled Justice Stone's Footnote Four from 1938. If judges were supposed to allow legislators wide latitude on social and economic matters, did the same tolerance extend to laws that restricted liberty in other ways? Increasingly in cases involving socially sensitive issues such as free speech, religious liberty, and racial discrimination, the Court answered that question in ways that stirred popular opposition.

The second fault line revealed differences within the Court over the meaning of the due process clause of the Fourteenth Amendment. Since 1791, the Fifth Amendment had barred the national government[51] from depriving "any person ... of life, liberty, or property without due process of law ..." Since 1868, the Fourteenth Amendment had directed the same limitation against "any State." To what degree, if at all, did the Fourteenth Amendment make provisions of the Bill of Rights applicable to the states? The question was of profound importance. If the Bill of Rights applied only to the national government, citizens ordinarily would have no recourse under the federal Constitution against most alleged abuses of power by the states. (Then as now, when governments act in this country, more often than not it is action by a state government or one of its municipal subdivisions.) If the Bill of Rights applied to the states, individuals would have recourse under the federal Constitution, in addition to whatever protections their state constitution might provide. The rights or right in question would thus be "federalized" or "nationalized."

Not until 1897, however, did the Court acknowledge that the Fourteenth Amendment made any part of the Bill of Rights applicable to the states.[52] "Incorporation" of the First Amendment's speech, press, and assembly/petition clauses followed in 1925, 1931, and 1937, as did the free exercise and establishment clauses in 1940 and 1947, respectively.[53] Most of the provisions of the Bill of Rights, however, addressed criminal justice, and with three exceptions, none was made applicable to the states until the 1960s.[54]

Justices inclined along the first fault line toward a rigorous protection of individual liberties usually also favored rapid Fourteenth Amendment incorporation. As these Justices more and more frequently controlled the outcome of decisions during the Warren Court, the effect was two-fold: a broadening of "the substantive content of the rights guaranteed, giving virtually all personal rights a wider meaning than they had theretofore had in American law,"[55] and their application to every state, county, city, and crossroads in the land. Critics of these new rights-centered public policies—especially those that protected the rights of persons accused of crimes or ordered busing to achieve a desirable racial balance in public schools—predictably converged on the Supreme Court.

McMahon's goal is to offer not a replay of the presidential election of 1968, but a reappraisal of Nixon's attitudes toward the judiciary. The result of this carefully researched, heavily documented, and readable analysis is twofold: additional insight into Nixon's presidency and at least a partial explanation of why a Court-centered presidential campaign that yielded an administration blessed with chances to fill four seats on the High Court—Nixon also endured two failed nominations—came up short in fulfilling any goal of turning back the landmarks of the Warren Court. Moreover, the attempted counterrevolution[56] has had lingering and all too noticeable effects. "[M]ore than forty years after his election to the White House and

the appointment of thirteen of the last seventeen justices by Republican presidents, social conservatives remain decidedly displeased with the Court's product," particularly in the context of what is now called the "culture war."[57]

Within the broad field of political science, McMahon's work is an example of a "regime politics" study. With this approach "scholars have shown that Supreme Court decisions are not simply the product of nine independent thinkers walled off from the world, but rather byproducts of the dominant political coalition that put the justices in place. This is not to say that the justices are mere pawns in a larger political struggle, but it does suggest that their significance has been overemphasized in past analysis of doctrinal shifts."[58] Yet this is no heavily theoretical book. McMahon's analysis is sufficiently sophisticated to be sure, but the analysis is nicely balanced by revealing and non-technical peeps into the inner workings of the administration. For example, chapter seven (entitled "Fifty-three Seconds that Shaped the Court; Nixon's Acceptable Southerner and Accidental Ideologue (or How Liberals Made the Court More Conservative)")[59] shows how it was nearly Howard Baker and not William Rehnquist who was nominated in 1971.

"Nixon's approach to the Court," writes the author, has been misunderstood and misjudged "... with scholars and commentators assuming aspects of Nixon's judicial policy that simply were not there."[60] He assigns two reasons for this misperception. First, too much attention has been paid to Nixon's words or to the words of commentators who thought they knew what Nixon meant by his words, with insufficient attention paid to what his administration actually did with respect to the judiciary. Second, and similarly, too much emphasis has been placed on Nixon's truly conservative nominees for the Court. This group included not only Rehnquist but especially Judges Clement Haynsworth and Harrold Carswell, who were rejected by the Senate. By contrast, the more moderate nominees Warren Burger, Harry Blackmun, and Lewis Powell, who were all handily confirmed, received far less attention.

Furthermore, the author believes that there has been too little attention given to the political context of those nominations. Accordingly, McMahon looks at Nixon's two choices for Solicitor General because understanding an administration's judicial policy includes not just the individuals the President names to the Court, but an "analysis of the ... litigation strategy and the individuals at the center of that strategy."[61] Nixon's first Solicitor General was Erwin Griswold, former dean of Harvard Law School, who was Solicitor General in the Johnson administration at the time Nixon became President. Griswold thus became the first "S.G." since the office was created in 1870 to be carried over from one administration to its successor following a change in party control of the White House.[62] Indeed, Griswold served until the end of the Court's 1973 Term when he was succeeded by Robert H. Bork.

Taking a holistic view of Nixon's judicial policy yields what McMahon calls the "Nixon template,"[63] in that the administration "pursued a more limited and focused course of action than his rhetoric implied and his critics feared. It also suggests that politics far more than ideology drove all six of his choices for the Court."[64] That is, while professing to select conservatives—in campaign rhetoric Nixon preferred the term "strict constructionists"[65]—for the Court, the President had a looser sense of what "conservative" meant. Nixon, in other words, was hardly an ideological purist. While caring about a few issues on the Court's docket, he "never displayed a willingness to sacrifice failure at the ballot box in order to create a Supreme Court to match his most conservative rhetoric, believing instead that the unpopularity of the Justices' liberalism in some areas of the law might actually help advance his electoral

interests."[66] There were thus two principles that lay at the heart of Nixon's judicial policy. The first was that "electoral success was more important than advancing an ideologically consistent brand of judicial conservatism."[67] His goal at heart was to undo the Democratic coalition that had dominated American politics since Franklin Roosevelt's election in 1932. That objective in turn called forth the second guiding principle. The conservatism that Nixon tried to implement through his judicial policy was designed to address two pressing concerns on voters' minds: "law and order and school desegregation, not to unleash a complete conservative counterrevolution against the Warren Court and the ongoing rights revolution."[68] He would win over the white ethnic and heavily Roman Catholic voters in the cities of the North and Midwest with the former and southern Protestant whites with the latter. Both had long been the two key components of any successful Democratic strategy for gaining or retaining the White House. The Nixon template thus stood in contrast to the later strategy of President Ronald Reagan, which McMahon labels a "movement template."[69]

The very different templates and a resulting clash of judicial policies between these two Republican administrations have "had significant consequences for the construction of a conservative Supreme Court, consistently frustrating those most eager to see one."[70] Nonetheless, "on those issues in his scope, Nixon witnessed much of the doctrinal shift he had hoped for, even if some of the changes arrived after his Watergate-shortened presidency ended. Put another way, in time, the Nixon-shaped Burger Court largely adopted the general approach—if not the specific position—his administration advanced on law and order and school desegregation."[71] One might add that the electoral map in recent years reflects some of the effects of the Nixon template, as marked by the swell of Republican voters in the once solid Democratic South and a variety of "Reagan Democrats" in many cities outside Dixie. With respect to the current Supreme Court, the author concludes by speculating that "Nixon would likely be both jealous and proud. Jealous that the pool of politically symbolic conservative jurists his Republican successors had to choose from had grown so large. And proud that he had something to do with it."[72]

Chief Justice Warren, without whose Court leadership Nixon might never have become President, properly receives space in a valuable collection of essays on Supreme Court law clerks entitled **In Chambers** that is edited by Todd C. Peppers and Artemus Ward.[73] Peppers teaches public affairs at Roanoke College, and Ward teaches political science at Northern Illinois University. Those familiar with literature on the High Court will know that the editors have probably done more than anyone else in recent years to increase awareness and understanding of the role of Supreme Court law clerks in the judicial process. Working separately, Peppers and Ward completed two important research projects that were published almost exactly at the same time. In 2006, Peppers' **Courtiers of the Marble Palace** appeared just two weeks after **Sorcerers' Apprentices**, which Ward co-authored with David L. Weiden. As the author of this review essay wrote in appraisal of their individual works, "One would be hard pressed to choose between these two new contributions. For anyone interested in the Court, either book stands on its own as a prized and amply documented source of information and represents a worthy investment of a reader's time. Because each one contains at least some material lacking in the other, the books should be read together if possible".[74] Their recent collective effort nicely complements the earlier contributions.

In addition to a helpful foreword by Clare Cushman, an introduction by the editors, and an afterword by journalist Tony Mauro, **In Chambers** contains twenty-two essays, most of which appear in print in this book for the

first time. The essays in turn treat the clerkship operation in the chambers of 19 different Justices.[75] Peppers and Ward have structured **In Chambers** in three parts. Part one, "The Origins of the Clerkship Institution," appropriately begins with Justice Horace Gray's first (and self-funded) use of a clerk at the U.S. Supreme Court in the late nineteenth century, and concludes with Bennett Boskey's "The Family of Stone Law Clerks." Part two, "The Pre-modern Clerkship Institution," opens with two pieces on Justice Hugo Black by two of his clerks (Charles A. Reich and Daniel Meador) and concludes with a piece on Justice Charles Whittaker and his clerks by Craig Alan Smith. An Essay by Jesse H. Choper on Chief Justice Warren begins part three ("The Modern Clerkship Institution"), which concludes with a paper by editor Peppers on Justice Ruth Bader Ginsburg. The organization allowed the editors to include at least two pleasant surprises: an essay by Jennie Berry Chandra on Lucile Lomen, who was the first woman clerk, and an essay by Peppers on William T. Coleman, Jr., who was the first African-American to clerk at the Court. Lomen clerked for Justice Douglas in the 1944 Term, and Coleman clerked for Justice Frankfurter in the 1948 Term.

In addition to a cover-to-cover reading, which could easily be done in an evening, a reader has several options after opening the book. One might study the parts in sequence, thus gaining insight into changes in the clerkship institution over time. A second approach would be to select those essays dealing with one or more favorite Justices. Or, one might focus on chapters by a favorite author or those essays that span a particular period such as the 1930s or 1950s. For example, someone curious about Chief Justice Warren's chambers might find Choper's essay informative, particularly as an illustration of Warren's preference for easily understood prose, derived presumably from his many years of political experience.

Having self-assigned the Court's opinion in the Sunday closing cases that came down in 1961,[76] Warren asked Choper to prepare a draft. A short time after submitting a draft, Mrs. Margaret McHugh, who was Warren's principal secretary, sent Choper in to see Warren, who informed his clerk that he had two points to make about the draft. "I don't use the words 'albeit, or 'arguendo'." "Then he said, 'You know, Jesse, these opinions are going to be read from many church pulpits across the country. I think we ought to add something like this.' " Choper then recalls, "[h]e then handed me a piece of paper containing a handwritten paragraph. I looked it over. It was a brief, straightforward summation of the opinions, which ran over one hundred pages. He asked me if the paragraph troubled me in any way, which it did not. I included the Chief's language in the final draft, deleted any reference to 'albeit, or 'arguendo,' and sent the opinions back to him. When the Sunday Closing Law cases came down, they were widely reported .... Of the two major newspapers covering the opinions that I read, only one quoted from the opinions, and that was just a single paragraph—the Chief's."[77]

Peppers and Ward concede that the essays are "time bound"[78] in that the only essays that treat clerkships within the past ten years are Ward's on Chief Justice Rehnquist and one that Peppers wrote on Justice Ginsburg. "Simply put," the editors explain, "it is nearly impossible to coax either sitting justices or their clerks to talk about the clerkship institution; most of the present justices are disinterested in (or perhaps wary of) discussing their staffing practice, and the former law clerks themselves feel constrained by confidentiality concerns."[79] Given these restraints, it is therefore gratifying that Justice Ginsburg spoke with Peppers on the record for about an hour about her use of clerks and their selection. One gem from that conversation is as revealing of the Justice and the culture of her Chambers as it is of those whom she

selects. When Peppers asked if there "is a particular type of applicant personality toward which she gravitates," the Justice replied, "[N]umber one, they have to show respect for my secretaries. There was one law clerk," she continued, "who came to interview with me—top rating at Harvard—who treated my secretaries with disdain. As if they were just minions. So that is one very important thing—how you deal with my secretaries. They are not hired help. As I tell my clerks, 'if push came to shove, I could do your work—but I can't do without my secretaries.' I try to avoid the arrogant type."[80]

If it is difficult to imagine the Justices doing their work without secretaries, as Justice Ginsburg insisted, it is even more difficult—even in an age of search engines, data bases, digitized documents, laser printing, and word processing—to imagine the Supreme Court today functioning, as it did for most of its history, without law clerks. As depicted by **In Chambers**, the clerks are not only players in the judicial process but participants with multiple roles that seem heavily defined by the individual Justices whom they serve. They have a unique perspective on the work of the Court,[81] as close to the heart of the institution as they could be without being Justices themselves. As such they remain ever-present witnesses to the ongoing tension within the Court between government by the consent of the governed and limited government itself.

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

BENNETT, JOSEPH W. ***Ex parte Merryman*: Two Commemorations.** (Baltimore, MD: Library Company of the Baltimore Bar, 2012). Pp. 93. ISBN: 978-0-615-53581-4, paper.

MCMAHON, KEVIN J. **Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences.** (Chicago: University of Chicago Press, 2011). Pp. 343. ISBN: 978-0-226-56119-6, cloth.

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[1] 2 U. S., (4 Dallas) 419 (1793).

[2] Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," 1991 *Journal of Supreme Court History* 63, 70 (1991).

[3] Donald G. Morgan, "The Origin of Supreme Court Dissent," 10 *William and Mary Quarterly* (Third Series) 353, 353 (1953).

[4] Donald B. Morgan, **Justice William Johnson: The First Dissenter** (1954) 189.

[5] 8 U. S. (4 Cranch) 75 (1807).

[6] *Id.*, 107.

[7] Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, "The Norm of Consensus on the U. S. Supreme Court," 45 *American Journal of Political Science* 362 (2001).

[8] 381 U. S. 479 (1965).

[9] *Id.*, 513.

[10] *Id.*, n. 6, Black J., dissenting.

[11] *Id.*

[12] *Id.*

[13] Quoted in Carl Van Doren, **The Great Rehearsal** (1948), 65.

[14] 5 U. S. (1 Cranch) 137 (1803).

[15] *Id.*, 178.

[16] Adam Liptak and Allison Kopicki, "Approval Rating for Justices Hits Just 44% in New Poll," *New York Times*, June 7, 2012, p. 8. *See* also, Pew Research Center for the People & the Press, "Supreme Court Favorability Reaches New Low," May 1, 2012, http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low (last accessed on June 8, 2012).

[17] *See* Stephenson, "The Judicial Bookshelf," 35 *Journal of Supreme Court History* 267, 277 (2010).

[18] *See* Stephenson, "The Judicial Bookshelf," 35 *Journal of Supreme Court History* 149, 151 (2012).

[19] James F. Simon, **FDR and Chief Justice Hughes** (2012), hereafter cited as Simon.

[20] Simon's most recent book is his seventh. The list also includes a biography of Justice William O. Douglas.

[21] *See*, for example, Simon's **Lincoln and Chief Justice Taney** (2007).

[22] Economy Act of 1933 in *Lynch v. United States* (1934); Agricultural Adjustment Act of 1933 in *United States v. Butler* (1936); Joint Resolution of June 5, 1933, in *Perry v. United States* (1935); National Industrial Recovery Act of 1933 in *Schechter Poultry Corp. v. United States* (1935) and *Panama Refining Co. v. Ryan* (1935); Independent Offices Appropriation Act of 1933 in *Booth v. United States* (1934); 1933 Amendments to Home Owners' Loan Act in *Hopkins Savings Assn. v. Cleary* (1935); 1934 Amendments to Bankruptcy Act of 1898 in *Ashton v. Cameron County Dist.* (1936); Railroad Retirement Act of 1934 in *Railroad Retirement Board v. Alton R. Co.* (1935); Frazier-Lemke Act of 1934 in *Louisville Bank v. Radford* (1935); AAA Amendments of 1935 in *Rickert Rice Mills v. Fontenot* (1936); Bituminous Coal Conservation Act in *Carter v. Carter Coal Co.* (1936).

[23] Alpheus Thomas Mason, **Harlan Fiske Stone** (1956) 426.

[24] Glendon Schubert, "The Study of Judicial Decision-Making as an Aspect of Political Behavior," 52 *American Political Science Review* 1007, 1022 (1958).

[25] For a thorough analysis of the amendment possibility, *see* David E. Kyvig, "The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment," 104 *Political Science Quarterly* 463 (1989).

[26] Simon, 306-307.

[27] *Id.*, 309.

[28] *Id.*

[29] *Id.*, 311.

[30] *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937) (involving a Washington state minimum wage law); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937) (involving the Wagner Act).The first case was decided on March 29, and the second case was decided on April 12, 1937.

[31] *See* Simon, 321-24.

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

[33] *Id.*, 152, n. 4.

[34] Lewis F. Powell, Jr., "*Carolene Products* Revisited," 82 *Columbia Law Review* 1087, 1087 (1982).

[35] Simon, 392.

[36] *Id.*, 339.

[37] *Id.*

[38] See J. G. Randall, **Constitutional Problems Under Lincoln**, rev. ed. (1951).

[39] Joseph W. Bennett, ed., ***Ex Parte Merryman*: Two Commemorations** (2012), hereafter cited as Bennett.

[40] Executive Order, April 27, 1861, in James D. Richardson, A **Compilation of the Messages and Papers of the Presidents (1789-1897)**, vol. 6 (1908), 18.

[41] Bennett, 10.

[42] *Id.*

[43] *See Ex parte Milligan*, 71 U. S. (4 Wallace) 2 (1866).

[44] Emphasis added.

[45] Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861 in Richardson, A **Compilation of the Messages and Papers of the Presidents (1789-1897)**, vol. 6 (1908), 25. Lincoln's address is available online at this location: http://teachingamericanhistory.org/library/index.asp?document=1063 (last accessed on June 30, 2012).

[46] Carl Brent Swisher, **Roger B. Taney** (1935), 553, 555.

[47] The citation for *Ex parte Merryman* is 17 Fed. Cas 144 (C.C. D. Md.) (1861).

[48] Bennett, 5.

[49] Kevin J. McMahon, **Nixon's Court** (2011). Hereafter cited as McMahon.

[50] Burger's swearing in was on June 23, 1969. Warren had announced his intention to retire in 1968. President Johnson then named Justice Abe Fortas to take Warren's place. The Fortas nomination, blocked by a filibuster, was withdrawn in the fall of 1968. Johnson, who had declined to seek reelection, made no second nomination for Chief Justice, thus leaving the choice of Warren's successor to the next President.

[51] In *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833), the Supreme Court held without dissent that the provisions of the first ten amendments (the Bill of Rights) were applicable only to the national government.

[52] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), made the "just compensation" clause of the Fifth Amendment applicable to the states by way of the Fourteenth Amendment.

[53] *Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).

[54] This did not mean that, without incorporation, the Fourteenth Amendment gave the states an entirely free hand in administering their criminal justice systems. As early as *Moore v. Dempsey*, 261 U.S. 86 (1923), the Court insisted that state court convictions influenced by the pressure of lynch mobs violated due process; in *Rochin v. California*, 342 U.S. 165 (1952), the Court overturned a conviction based on local police procedure that "shocks the conscience."

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

[56] See Vincent Blasi, ed., **The Burger Court: The Counter-revolution That Wasn't** (1983).

[57] McMahon, 4.

[58] *Id.*, 9.
[59] *Id.*, 146.
[60] *Id.*, 6.
[61] *Id.*
[62] *Id.*, 85.
[63] *Id.*, 7.
[64] *Id.*, 6.
[65] *Id.*, 147.
[66] *Id.*, 6.
[67] *Id.*, 6-7.
[68] *Id.*, 7.
[69] *Id.*, 8.
[70] *Id.*
[71] *Id.*
[72] *Id.*, 256.
[73] Todd C. Peppers and Artemus Ward, **In Chambers** (2012). Hereafter cited as Peppers and Ward.
[74] Stephenson, "The Judicial Bookshelf," 32 *Journal of Supreme Court History* 190, 198, (2007).
[75] The book also contains two appendices, both from the William H. Rehnquist Papers. Appendix A reprints a 1994 "Survey of Threshold interest in Forming and Joining an Association of Supreme Court Law Clerks. Appendix B reprints a 1975 memorandum from Donald Cronson (law clerk to Justice Robert H. Jackson) to Chief Justice Rehnquist entitled "A Short Note on an Unimportant Memorandum." The "unimportant" memorandum is the memorandum Rehnquist, then also a clerk to Justice Jackson in the October 1952 Term, wrote to Jackson entitled "A Random Thought on the Segregation Cases." Rehnquist's memorandum to Jackson was an issue at his confirmation hearings for Associate Justice in 1971 and again at his hearings for Chief Justice in 1986.
[76] There were four cases in this group that were decided on May 29, 1961: *McGowan v. Maryland*, 366 U. S. 420 (1961), *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582 (1961), *Braunfeld v. Braun*, 366 U. S. 599 (1961), and *Gallager v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961).
[77] Peppers and Ward, 269.
[78] *Id.*, 3.
[79] *Id.*
[80] *Id.*, 393.
[81] One suspects that a Supreme Court law clerk who reads a newspaper account or watches a television news clip about an opinion she or he helped to draft, may sometimes be amused. The report may be far removed from the reality of why the Court wrote what it did, and how the opinion actually came about.

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Illustrations

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Cover: William Howard Taft campaigning for the Presidency in 1908.
Errata: Mrs. Charles Evans Hughes' first name was misidentified in Volume 37, no. 2. Her name was Antoinette.